IN THE SUPREME COURT OF FLORIDA

CASE NO.

JOHN W. KEMP,

Petitioner,

vs.

MURPHY MANUFACTURING COMPANY,

Respondent.



# BRIEF OF PETITIONER ON JURISDICTION

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## LIST OF CITATIONS AND AUTHORITIES

## I.

## INTRODUCTION

Petitioner--truckdriver injured when the rear door of a delivery truck unexpectedly slammed shut--was negligence, product liability personal injury plaintiff in the trial court, and appellant in the District Court of Appeal. In the District Court of Appeal, he sought review of an adverse summary final judgment rendered in favor of respondent--trial court defendant and District Court appellee--the manufacturer and/or assembler of the truck body.

The parties will alternately be referred to herein as they stand before this Court and as follows: petitioner as "KEMP;" and respondent as "MURPHY." The symbol "A" shall stand for petitioner's appendix filed contemporaneously herewith as required by the Florida Rules of Appellate Procedure.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

## II.

## JURISDICTIONAL STATEMENT

This proceeding has been instituted, and the jurisdiction of this Court is invoked, under the aegis of Article IV, § 3 of the Florida Constitution as amended April 1, 1980, and Rule 9.030(a), Florida Rules of Appellate Procedure, as construed by this Court in JENKINS v. STATE, 385 So. 2d 1356 (Fla. 1980), DODI PUBLISHING CO. v. EDITORIAL AMERICA, S.A., 385 So. 2d 1369 (Fla. 1980), and JOLLIE v. STATE, 405 So. 2d 418 (Fla. 1981). Petitioner contends that this Court--under

the rule of JOLLIE v. STATE, supra--should take jurisdiction of this cause because the decision sought to be reviewed here is a "PCA opinion which cites as controlling a case that is pending review in" this Court.

III.

STATEMENT OF CASE AND FACTS

The summary final judgment appealed was rendered on time bar grounds. The decision sought to be reviewed (A. 1), en toto, stated:

> "PER CURIAM.
>
> "Affirmed. Cates v. Graham, --- So. 2d --- (Fla. 3rd DCA 1983), Case No. 81-1193, opinion filed February 22, 1983, 8 FLW 621."

A copy of the CATES decision is included in petitioner's appendix at (A. 2-4). The majority opinion in CATES is reproduced hereat:

> * * *
>
> "The trial court granted a summary judgment for the defendant in a medical malpractice action finding that the plaintiff's cause of action was barred by the statute of limitations. The summary judgment reads as follows:
>
> "'THIS CAUSE came before the Court on the Motion for Summary Judgment of Defendants, ORLANDO R. GRAHAM, M.D.; PONDER & ASSOCIATES EMERGENCY PHYSICIANS, P.A., and NORTH SHORE HOSPITAL, INC. The Court finds from the pleadings, depositions and answers to interrogatories that the medical care and treatment occurred on June 21, June 24 and July 4, 1975. Plaintiffs claim that DR. GRAHAM negligently failed to remove a piece of glass from the foot of Plaintiff ROBERT B. CATES. Defendants denied Plaintiffs' allegations and, as an affirmative defense,

asserted that Plaintiffs' action was time barred by F.S. 95.11(4)(b) which provides that in medical malpractice actions, in no event shall the action be commenced later than four (4) years from the date of the incident or occurrence out of which the cause of action accrued. Plaintiffs argued that the Statute is unconstitutional because it abolishes the right to sue any health care provider whose professional negligence proximately causes a plaintiff an injury more than four (4) years from the date of the incident or occurrence. It was Plaintiffs' position that the glass was not discovered in the minor Plaintiff's foot until after four (4) years from the date of treatment by Defendant, ORLANDO R. GRAHAM, M.D., and, therefore, the Statute operated as a total bar to his ever filing a claim for his injuries. The Court finds Plaintiffs' argument invalid, as the minor Plaintiff's medical care and treatment occurred last on July 4, 975, and Plaintiffs knew that there had been glass left in the minor Plaintiff's foot by February 6, 1979. Accordingly, Plaintiffs had from February 6, 1979, when they knew of the alleged malpractice, until July 4, 1979, when the action became time barred, within which to file a medical malpractice action. Notwithstanding having had a period of approximately five (5) months within which to file an action, Plaintiffs waited until over eleven (11) months before filing a medical malpractice mediation claim on January 9, 1980. The Court finds that when applied to the facts in this case, F.S. 95.11(4)(b) is constitutional and that Defendants' Motion for Summary Judgment should be and is hereby granted.'

"WHEREFORE, the Court hereby grants and enters Summary Judgment in favor of Defendants and, accordingly, Plaintiffs shall go hence without day and Defendants shall recover their taxable costs, as proscribed by law.

"We affirm upon the Supreme Court reasoning contained in Bauld v. J.A. Jones Construction

Company, 357 So. 2d 401 (Fla. 1978). The question of the constitutionality of a statute is a question of law for the court. City of St. Petersburg v. Austin, 355 So. 2d 486 (Fla. 2d DCA 1978); 30 Fla. Jur., Statutes sec. 76.

"In performing that function the court may determine, under the facts of the case, whether or not the party was afforded a reasonable time in which to act before being barred under the applicable statute. See and compare Bauld v. J. A. Jones Construction Company, supra; Buck v. Triplett, 159 Fla. 772, 32 So. 2d 753 (1947); Manhood v. Bessemer Properties Incorporated, 154 Fla. 710, 18 So. 2d 775 (1944); Campbell v. Horne, 147 Fla. 523, 3 So. 2d 125 (1941).

"Therefore, for the reasons above stated the final judgment hereunder review be and the same is hereby affirmed."

* * *

CATES v. GRAHAM, supra, presently pends in this Court on petition for issuance of writ of certiorari. Supreme Court Case No. 63,449. The jurisdictional ground relied on in CATES is that in that decision, the District Court held that "when applied to the facts of this case [Cates], F.S. 95.11(4)(b), is constitutional. . . ."

In all significant legal respects, CATES and the case at Bar are indistinguishable.

IV.

POINT INVOLVED ON JURISDICTION

WHETHER THIS COURT SHOULD EXERCISE DISCRETIONARY JURISDICTION IN THE CASE AT BAR UNDER THE RULE OF JOLLIE v. STATE, 405 So. 2d 418 (Fla. 1981).

V.

ARGUMENT

THIS COURT SHOULD EXERCISE DISCRETIONARY JURISDICTION IN THE CASE AT BAR UNDER THE RULE OF JOLLIE v. STATE, supra.

In 1980, the Constitution of the State of Florida was amended for the intended purpose of restricting access to the Supreme Court of Florida. Prior to the 1980 amendment, a PCA decision which referenced another District Court decision that had been reversed or quashed by the Supreme Court of Florida was prima facie grounds for the exercise of this Court's conflict jurisdiction.

In JENKINS v. STATE, supra, 385 So. 2d 1356, and DODI PUBLISHING CO. v. EDITORIAL AMERICA, S.A., supra, 385 So. 2d 1369, both post-1980 amendment cases, this Court--consistent with the concept of limiting access to the Supreme Court--held that a per curiam affirmance without opinion, a per curiam affirmance with dissenting opinion, and a per curiam affirmance simply citing case authorities, would no longer be reviewed.

JOLLIE v. STATE, supra, 405 So. 2d 418, involved a per curiam decision which cited as controlling a case pending review in this Court. In JOLLIE, this Court stated and held:

* * *

> "We reaffirm that mere citation PCA decisions rendered in the traditional form will remain non-reviewable by this Court for the reasons stated in Dodi Publishing and Roblis del Mar. The circumstances of those cases are clearly distinguishable from a District Court PCA opinion which cites as controlling a case that is pending review in or has been reversed by this Court."

* * *

So stating, this Court took jurisdiction in JOLLIE. The holding in JOLLIE reflected an attempt by this Court to reconcile restricted appellate access with equity considerations which arise in cases such as the one at Bar. To deny review in the case at Bar, and accept jurisdiction in CATES, possibly reversing that decision, would create needless confusion and unjustly burden "innocent" litigants such as petitioner. This Court in JOLLIE wanted to make sure that all cases were decided on a fair and consistent basis.

VI.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, this Court should take jurisdiction of this cause and order briefing on the merits.

Respectfully submitted,

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I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner was mailed to the following counsel of record this 16th day of May, 1983.

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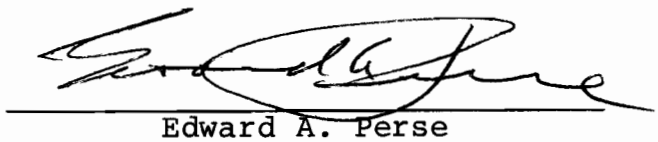

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