IN THE SUPREME COURT

OF FLORIDA

CASE NO. 64,483

ED RICKE AND SONS, INC.,
a Florida corporation,

Petitioner,

vs.

DEMETRIUS OCTAVIUS GREEN, a minor, by and through his Guardian of the Property, EDWARD P. SWAN, Esquire,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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TABLE OF CASES CITED

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I.

STATEMENT OF THE CASE AND FACTS

This suit sought compensation for injuries incurred by a three-year-old child, Demetrius Green, when he fell into a deep puddle of boiling water which had been discharged from a faulty water heater. (A. 1). Green first sued and settled with Metropolitan Dade County and Florida Gas Company. He then brought this action against Ed Ricke and Sons, Inc., the general contractor which installed the water heater, and its insurer,

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United States Fidelity & Guaranty Company. (A. 1). Throughout this trial Ed Ricke brought out the fact that there had been a prior suit in which Dade County had been involved. In fact, it succeeded in making the absence of Dade County a feature of the trial in violation of the trial court's order in limine and F.S. 768.041(3). (A. 3). The Third District Court of Appeal below found that these errors required a new trial. (A. 3).

Ed Ricke also argued that these errors were waived when Green moved for a mistrial and then asked the court to reserve ruling until the jury finished its deliberations. (A. 3-4). The motion for mistrial referred to above, was made during closing argument and, with the court's permission, the grounds were stated after the jury had retired:

> Mr. Feldman: You Honor, comes now the Plaintiff and moves that this Honorable Court grant a mistrial and reserve ruling thereon until the jury completes their deliberations.
>
> The grounds of the mistrial being that Your Honor has admonished counsel that there be no reference to the lawsuit against Dade County....
>
> The Court: As far as I'm concerned, the empty chair Defendant is a proper argument....
>
> Motion denied. (A. 3).

On appeal, the Third District held that there was no waiver for:

> Appellant merely invoked the court to do what it was already empowered to do in the face of a motion for mistrial -- permit the jury to completely discharge its functions before declaring a mistrial. Cf. Dysart v. Hunt, 383 So.2d 259 (Fla. 3d DCA), rev.

> denied, 392 So.2d 1373 (Fla. 1980); Freeman v. Rubin, 318 So.2d 540 (Fla. 3d DCA 1975); Ditlow v. Kaplan, 181 So.2d 226 (Fla. 3d DCA 1965). We see no reason why it should make a difference on the question of waiver whether the trial court has reserved ruling at the suggestion of the party moving for a mistrial, rather than at its own instance.
>
> More to the point, there could not have been a waiver where, as was the case here, the motion to reserve ruling was unequivocally denied and the motion for mistrial was considered on its merits at the same time and also denied. (R. 4).

Ed Ricke filed a Motion for Rehearing and/or Motion to Certify Case to Florida Supreme Court and Motion for Rehearing En Banc. Both motions were denied. Ed Ricke then filed its notice to invoke the discretionery jurisdiction of this Court on the ground of express and direct conflict.

II.

POINT ON CERTIORARI

> WHETHER THE DECISION IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH EARL HOLLIS, INC. v. FRASER MORTGAGE CO., 403 So.2d 1038 (Fla. 4th DCA 1981).

III.

ARGUMENT

For the reasons set forth below, it is respectfully submitted that the petition for review should be denied.

THERE IS NO EXPRESS AND DIRECT CONFLICT WITH EARL HOLLIS, INC. v. FRASER MORTGAGE CO.

Petitioner contends that there is express and direct conflict because the Third District noted conflict with Earl Hollis, Inc. in its own opinion. However, this is not so. The court in footnote 2 only stated:

> 2. We respectfully disagree with the majority holding in Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038 (Fla. 4th DCA 1981) to the extent that it would require a different result, and agree with the dissenting opinion of Chief Judge Letts. (Emphasis supplied.)

A disagreement to the extent that ... does not create an express and direct conflict.

Additionally, the dissenting opinion in Earl Hollis, Inc. shows that no motion for mistrial was ever made in that case; there was only "an enquiry by plaintiff's counsel as to whether the judge would postpone a ruling on any motion for a mistrial." 403 So.2d 1038. The transcript of that trial, which is attached as Respondent's Appendix, confirms this.[1] In the cause sub judice, however, Green specifically moved for a mistrial. Thus, there is no express and direct conflict.

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[1] However, counsel in Earl Hollis, Inc. should not be faulted for failing to move for a mistrial. The waste of judicial economy that results from not letting a verdict be returned after a trial has, in effect, been completed is the very policy reason that prompts the Florida courts to allow a trial judge to reserve ruling n a motion for directed verdict. See, Dysart v. Hunt, 383 So.2d 259 (Fla. 3d DCA 1980); rev.den. 392 So.2d 1373 (Fla. 1980). However, the fact remains that no motion for mistrial was made in Earl Hollis, Inc. and one was made in the cause at bar.

The trial court, below, specifically denied Green's motion for mistrial on the merits saying: "As far as I'm concerned, the empty chair Defendant is a proper Argument. Motion denied." The Third District noted that this denial on the merits turned the question of waiver into a purely academic one. (A. 4, f. 1). Therefore, again, there is no express and direct conflict with Earl Hollis, Inc. which was decided entirely on the waiver argument.

Finally, there is no conflict with the other cases cited by Ed Ricke. In each of these cases, Murray-Ohio Manufacturing Co. v. Patterson, 385 So.2d 1035 (Fla. 5th DCA 1980); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Sears Roebuck & Co. v. Jackson, 433 So.2d 1319 (Fla. 3d DCA 1983); and H. I. Holding Co. v. Dade County, 129 So.2d 693 (Fla. 3d DCA 1961), no motion for mistrial was made at the time of the objectionable statement. Here, however, the motion for mistrial was made during closing argument (A. 3). Thus, there is no express and direct conflict with Earl Hollis, Inc. or any other Florida case and the petition for review should be denied.

IV.

CONCLUSION

For the reasons set forth above, it is again respectfully submitted that the petition for review should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December, 1983, a true copy of the foregoing Brief of Respondent on Jurisdiction was mailed to: WICKER, SMITH, BLOMQVIST, TUTAN, O'HARA, McCOY, GRAHAM & LANE and LAW OFFICES OF RICHARD A. SHERMAN, 204 E Justice Building, 524 South Andrews Avenue, Fort Lauderdale, FL 33301, Attorneys for Petitioner.

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