

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,400

PAMELA MARRERO, :

Petitioner, :

vs. :

MALCOLM G. GOLDSMITH, M.D., :

et al., :

Respondents. :

FILED

SID J. WHITE

JUN 11 1984

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

RESPONDENT BREWSTER'S BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

Although the Petitioner has made reference to portions of the initial pleadings filed in the trial court proceeding, which would normally not be part of the record before this court, they are, in the main, reasonably accurate. Any additional facts relied upon by the Respondent herein shall be set forth in the argument section of this brief.

POINT INVOLVED ON JURISDICTION

Whether, on the record proper, the decision sought to be reviewed expressly and directly conflicts with the decisions cited by the Petitioner in their Brief on Jurisdiction.

ARGUMENT

The intent of Article V, Section 3(b), Florida Constitution, as reflected in Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, is to vest in the District Courts of Appeal final appellate jurisdiction, as opposed to making them "mere way stations to the Supreme Court". Consequently, in reviewing petitions of this nature, a narrow scope of jurisdiction is applied. Short v. Grossman, 245 So.2d 217 (Fla.1971). Further, since Short, supra, the applicable rule has been amended to now only allow review when the decision in question, on its face, expressly and directly conflicts "with a decision of another District Court of Appeal, or of the Supreme Court on the same question of law."

To approach the simplest point first, a review of Benigno v. Cypress Community Hospital, 386 So.2d 1303 (Fla. 4th Dist. 1980), reveals absolutely no statements, comments, holdings, dicta or rules of law which in any way directly and expressly conflicts with the

instant decision. On the contrary, the Benigno opinion affirms the trial court's refusal to allow a res ipsa loquitur instruction, citing as direct support, Goodyear Tire and Rubber Company v. Hughes Supply, Inc., 358 So.2d 1339 (Fla.1978). Since the District Court in the instant decision cited Goodyear Tire, supra, as authority for the same proposition asserted in Benigno, it is inconceivable that any conflict between the two decisions could be asserted.

Turning now to South Florida Hospital Corp. v. McCrea, 118 So.2d 25 (Fla.1960), it becomes apparent that, additionally, there is no conflict between the instant decision and McCrea. To begin, the case of Metropolitan Dade County v. St. Claire, 445 So.2d 614 (Fla 3rd Dist.1984) was cited by the Court below in support of their holding. A review of St. Claire, supra, illustrates the issue. Specifically, McCrea, supra, states that if the cause of the injury is unknown, one can still utilize the doctrine of res ipsa loquitur despite the fact that there is direct proof of the negligent act or omission. However, as pointed out in St. Claire, supra, if the Plaintiff produces evidence of negligence and legal cause, then the doctrine of res ipsa loquitur is, again, not applicable. A review of the opinion below reveals "(T)he Plaintiff presented several expert witnesses to testify as to the cause of her injury. At least one expert testified that the injury was caused by the Defendants' incorrect positioning of the Plaintiff's arms during surgery or by the failure to change the arm position during the course of the operation." Thus, it is apparent that, on the record proper, this is an instance where the Plaintiff presented direct evidence of, not only negligence, but legal cause as well, and, accordingly, the decision in question is

in accordance with the aforesaid distinction and, in no way, directly and expressly conflicts with McCrea, supra.

Thus, the Petitioner has cited two opinions seeking to invoke this Court's jurisdiction through the rationale of direct and express conflict. The first such decision, Benigno, supra, is not in conflict with the instant decision, but, rather, is in accordance with it. The second decision, McCrea, supra, again, does not expressly and directly conflict with the instant decision. Metropolitan Dade County v. St. Claire, 445 So.2d 614 (Fla. 3rd Dist.1984).

CONCLUSION

Based upon the reasoning and authorities above, it is respectfully submitted that the within Petition for Review be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the aforesaid Respondent's Brief on Jurisdiction was mailed this 7th day of June, 1984, to:

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