IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 65,400

THIRD DISTRICT COURT OF APPEAL CASE NUMBER:
82-1324 and 82-1435

PAMELA MARRERO,

Petitioner,

vs.

MALCOLM G. GOLDSMITH, M.D., WILLIAM BREWSTER, M.D., and CONSTANTINE KITSOS, M.D.,

Respondents.

BRIEF OF RESPONDENT
MALCOLM G. GOLDSMITH, M.D.

STEPHENS, LYNN, CHERNAY, KLEIN
& ZUCKERMAN, P.A.
One Biscayne Tower, Suite 2400
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BY: ROBERT M. KLEIN, ESQ.

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INTRODUCTION

Petitioner PAMELA MARRERO was the Plaintiff in the trial court and Appellant before the District Court of Appeal of Florida, Third District. Respondents MALCOLM G. GOLDSMITH, M.D., CONSTANTINE KITSOS, M.D., and WILLIAM BREWSTER, M.D., were the Defendants in the trial court action, along with NORTH SHORE HOSPITAL, and Appellees before the District Court of Appeal. (North Shore is no longer a party to this action.) In this brief, the parties will be referred to as Petitioner/Plaintiff and Respondents/Defendants, as well as by name.

The following symbols will be used for reference purposes:

"A" for references to the Appendix which is attached to the Petitioner's brief.

All emphasis has been supplied by counsel, unless indicated to the contrary.

STATEMENT OF THE CASE AND STATEMENT OF FACT

Respondent GOLDSMITH will accept Petitioner's Statement of the Case and Facts.

JURISDICTIONAL ISSUE

WHETHER THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION WHICH WAS RENDERED BY THIS COURT IN SOUTH FLORIDA HOSPITAL CORP. V. McCREA, 118 So.2d 25 (Fla. 1960), AND WITH THE FOURTH DISTRICT'S DECISION IN BENIGNO V. CYPRESS COMMUNITY HOSPITAL, INC., 386 So.2d 1303 (Fla. 4th DCA 1980).

ARGUMENT

THE THIRD DISTRICT'S DECISION IN THIS MATTER DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN SOUTH FLORIDA HOSPITAL CORP. V. McCREA, 118 So.2d 25 (Fla. 1960), OR THE FOURTH DISTRICT'S DECISION IN BENIGNO V. CYPRESS COMMUNITY HOSPITAL, INC., 386 So.2d 1303 (Fla. 4th DCA 1980).

The conflict certiorari jurisdiction of this Court is established in Article V, Section 3(b)(3) of the Constitution of the State of Florida. Section 3(b)(3) provides that the Supreme Court may review "any decision of a district court of appeal...that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, similarly provides for review by this Court of decisions which expressly and directly conflict with a decision of any other district court of appeal or this Court on the same point of law.

In JENKINS vs. STATE, 385 So.2d 1356 (Fla. 1980), this Court attempted to give definition to the constitutional constraints which had been placed upon discretionary conflict jurisdiction by the people of Florida, as a result of the constitutional amendment which went into effect in April of 1980. According to the decision in JENKINS, the language of amended Section 3(b)(3) leaves no doubt that a

district court decision must clearly demonstrate conflict on its face before this Court will exercise its discretionary jurisdiction. See also PENA vs. TAMPA FEDERAL SAVINGS AND LOAN ASSOCIATION, 385 So.2d 1370 (Fla. 1980); DODI PUBLISHING COMPANY vs. EDITORIAL AMERICA, S.A., 385 So.2d 1369 (Fla. 1980); and cf. SANCHEZ vs. WIMPEY, 409 So.2d 20 (Fla. 1982).

In his decision in JENKINS, supra, Justice Sundberg noted that it is a conflict of decisions, not a conflict of opinions or reasons which supplies jurisdiction for review by certiorari. JENKINS, supra at 1359. This has been a prevailing principle under both the present and predecessor jurisdictional amendments. See, e.g., GIBSON vs. MALONEY, 231 So.2d 823 (Fla. 1970). Thus, this Court has stated:

> [T]he principle situations justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflicts are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court. NIELSEN vs. CITY OF SARASOTA, 117 So.2d 731 (Fla. 1960). (Emphasis in original.)

Even within these stringent guidelines, conflict jurisdiction will only be asserted if this Court finds a "real, live and vital conflict...." NIELSEN, supra at 734-735.

In KYLE vs. KYLE, 139 So.2d 885 (Fla. 1962), this Court elaborated on the standards which it had related in the NIELSEN case. According to the opinion in KYLE, conflict jurisdiction requires a preliminary determination as to whether a district court's opinion on a particular point of law would be out of harmony with prior decisions on the same point if it were permitted to stand, thereby generating confusion and instability.

> We have said that conflict must be such that if the later decision and the earlier decision were rendered by the same Court, the former would have the effect of overruling the latter.... If the two cases are distinguishable in controlling factual elements, or if the points of law settled by the two cases are not the same, then no conflict can arise. KYLE, supra at 887. (Citations omitted.)

Given these guidelines, Respondent would respectfully submit that Petitioner has been unable to establish that the Third District's decision in this matter either expressly or directly conflicts with either of the two cases cited by Petitioner. In particular, there is no express and direct conflict between the Third District's decision in this matter, and the decisions by this Court in SOUTH FLORIDA HOSPTIAL, supra, and the Fourth District in BENIGNO, supra.

In the first place, the decision in MARRERO did not announce a rule of law which conflicts with a rule that was previously announced by this Court or another district court of appeal. The Third District's decision in MARRERO cited verbatim from this Court's decision in GOODYEAR TIRE & RUBBER COMPANY v. HUGHES SUPPLY, INC., 358 So.2d 1339 (Fla.

1978), a case which had specifically discussed the Court's prior holding in McCREA, supra. The Third District thereafter proceeded to properly apply the rule of law which this Court gleaned from the McCREA case in its opinion in MARRERO, i.e., the Third District clearly felt that there was "no room for an inference of negligence where direct evidence [was] adduced to reveal the circumstances surrounding the occurrence and to establish the precise cause of the Plaintiff's injury." GOODYEAR, supra at 1341.

It truly cannot be said that the Third District applied these rules of law to produce a different result in a case which had substantially the same controlling facts as the facts in McCREA. McCREA involved a patient who was allowed to fall from a recovery table while under anesthesia. By contrast, the MARRERO case involves a rather complex neurological injury, which is not within the realm of ordinary experience or common understanding, as would be the case with a fall from a table. Under the circumstances, the mere fact that the McCREA court approved application of a res ipsa standard cannot reasonably be construed as madating a similar result in the MARRERO case.

This Court's opinion in GOODYEAR draws similar distinctions. It is also worth to noting that the GOODYEAR case was cited by this Court when it refused to endorse application of a res ipsa standard in a case involving a post-operative neurological injury. CHENOWETH v. KEMP, 396 So.2d 1122 (Fla. 1981). The facts of that case are

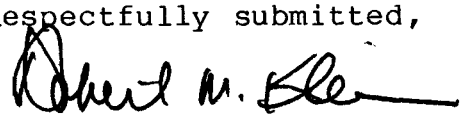
remarkably analogous to the facts in MARRERO. Given such similarities, Respondent would suggest that Petitioner cannot demonstrate that the Third District's decision in MARRERO has occasioned to any of the required conflict or confusion.

There is also no conflict with the Fourth District's decision in BENIGNO, supra. The cases certainly did not reach different results, since the court in BENIGNO also refused to overturn a trial court's decision not to give a res ipsa loquitur jury instruction. And while Petitioner suggests that the Third District's reliance upon BENIGNO was misplaced, Respondent would submit that the courts in the two appellate decisions applied virtually the same case law (GOODYEAR) to reach a virtually identical result. A finding of conflict would hardly be appropriate.

CONCLUSION

For all of the above-captioned reasons, Respondent MALCOLM G. GOLDSMITH, M.D. would respectfully suggest that the Third District's opinion in this matter does not expressly and directly conflict with the decisions by this Court and the Fourth District Court in SOUTH FLORIDA HOSPITAL CORP. v. McCREA, 118 So.2d 25 (Fla. 1960) and BENIGNO v. CYPRESS COMMUNITY HOSPITAL, INC., 386 So.2d 1303 (Fla. 4th DCA 1980). Accordingly, this Court should decline to entertain conflict certiorari jurisdiction.

Respectfully submitted,



ROBERT M. KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 25th day of May, 1984, to the attached list of addressees.

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Circuit Court Case No: 82-1435

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