

IN THE SUPREME COURT  
OF THE STATE OF FLORIDA

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OLIVA RODRIGUEZ, as Personal  
Representative of the Estate of  
Eddie Rodriguez,

Petitioner,

v.

CITY OF CAPE CORAL, RENNY  
WIERSMA and THE AETNA CASUALTY  
& SURETY COMPANY,

Respondents.

CASE NO. 65,623

**FILED**

SID J. WHITE

AUG 13 1984

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

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RESPONDENTS' BRIEF ON JURISDICTION

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ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT OF THE STATE OF FLORIDA

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STATEMENT OF THE FACTS AND OF THE CASE

Respondents, City of Cape Coral, Renny Wiersma and The Aetna Casualty and Surety Company disagree with the Statement of the Facts and of the Case contained in the Petitioner's Brief on Jurisdiction. This brief will refer to the opinion contained in the appendix to the Petitioner's brief with the symbol "A."

The Petitioner represents that the District Court's sole authority for its decision was City of Cape Coral v. DuVall, 436 So.2d 136 (Fla. 2d DCA 1983), and Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983). Although the Court stated that it adopted Everton's rationale and holding in this case, it also based its decision upon Section 396.072(1), Florida Statutes (1977). (A 5, 7). It should also be noted that the version of the facts to which the statute was applied came from the pleadings and not from the evidence which was before the trial court when it entered the summary judgment. (A 2). In its decision, the Court specifically stated that Officer Wiersma observed and conversed with the decedent, and that he determined that the decedent was not incapacitated. (A 7).

ARGUMENT

WHETHER THE DISTRICT COURT'S DECISION DIRECTLY  
AND EXPRESSLY CONFLICTS WITH DECISIONS OF A  
SUPREME COURT OR OTHER DISTRICT COURTS OF APPEAL.

It appears that the tactic of the Petitioner in arguing the issue of jurisdiction is to incorporate by reference a brief filed in another case. The Respondents are placed at a disadvantage, since neither they nor their counsel are involved in the DuVall matter. In any event, it cannot be denied that the District Court relied upon both Everton and DuVall, which are currently pending before this Court on review, as a basis for its decision.

Although the Respondents are unaware of any identical situation, it appears that this case is similar to the situation presented in Jollie v. State of Florida, 405 So.2d 418 (Fla. 1981). In Jollie, this Court held that where a District Court of Appeal per curiam opinion cites as controlling authority a decision which is either pending review in or which has been reversed by this Court, the District Court decision is prima facie in express conflict, allowing the exercise of conflict jurisdiction. The Respondents cannot logically distinguish the holding in Jollie.

Although the Respondents cannot dispute the fact that sufficient conflicts exist to warrant this Court's exercise of discretion to review this case, that fact does not necessarily mean that this Court's decisions in Everton and DuVall

should control the result in this case. If Everton and DuVall are affirmed, this case should also be affirmed. However, if Everton and DuVall are reversed, the Respondents represent that an entirely separate basis for affirming the decision of the trial court exists. This issue was presented to the District Court as the Respondents' primary argument in support of the summary judgment. The District Court did not rule on this issue. If Everton and DuVall are reversed, this Court should examine the alternative issue or remand this cause to the District Court for a ruling on the issue.

If this Court entertains jurisdiction in this case, the Respondents will brief the issues which the Petitioner argues in the last full paragraph on page four and the following paragraph in her brief.

CONCLUSION

Respondents request that this Court withhold ruling on the issue of jurisdiction in this case. If Everton and DuVall are affirmed, the petition for review should be denied. If Everton and DuVall are reversed, the Respondents request that this Court either entertain jurisdiction to determine the alternative basis supporting summary judgment or remand this cause to the District Court for a decision on that issue.

Respectfully submitted,

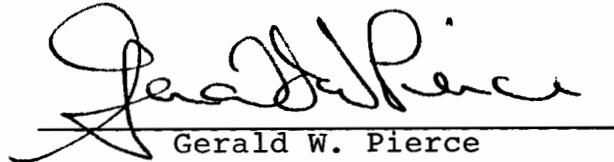
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By

  
\_\_\_\_\_  
Gerald W. Pierce

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondents' Brief on Jurisdiction has been furnished to SHELDON J. SCHLESINGER, ESQUIRE, 1212 S.E. Third Avenue, Fort Lauderdale, Florida, 33335, JOEL S. PERWIN, ESQUIRE, 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida, 33130, JOHN M. HARTMAN, ESQUIRE, Post Office Box 2696, Fort Myers, Florida, 33902, XAVIER J. FERNANDEZ, ESQUIRE, Post Office Box 729, Fort Myers, Florida, 33902, and to GEORGE O. KLUTTZ, ESQUIRE, Post Office Box 2446, Fort Myers, Florida, 33902, by regular United States Mail this 9th day of August, 1984.

  
Gerald W. Pierce