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IN THE SUPREME COURT OF FLORIDA.

CASE NO. 67,124

AMERICAN CYANAMID COMPANY,

Defendant/Petitioner,

vs.

LESTER K. ROY,

Plaintiff/Respondent.

PETITIONER'S BRIEF ON CROSS PETITION (IF ALLOWED)

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STATEMENT OF THE CASE AND FACTS

CYANAMID relies upon its previous Statement of the Case and Facts in its Brief on Jurisdiction.

SUMMARY OF ARGUMENT

No jurisdictional conflict is created by the cases noted in ROY's second point on certiorari, nor elsewhere in his argument. Each case specifically relied upon was decided under the doctrine of contributory negligence. With the advent of comparative fault or comparative responsibility as a result of this Court's judicial action, the harsh "all or nothing" rules that arose under contributory negligence have been stripped away from the law in Florida. Thus, there is no continuing jurisdictional conflict.

Additionally, the second case relied upon by ROY was a decision from the Fourth District. As such, the Constitution bars this Court from jurisdictionally considering intra-district conflicts.

POINT II

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS IN SUCH CASES AS FLORIDA SOUTHERN RAILWAY COMPANY V. HIRST, 30 Fla. 1, 11 So. 506 (1892) AND NATIONAL CAR RENTAL SYSTEM, INC. V. HOLLAND, 269 So.2d 407 (Fla. 4th DCA 1972), CERT. DEN., 273 So.2d 768 (Fla. 1973).

There is no conflict in this matter with respect to the Fourth District's decision with respect to comparative negligence. The two cases cited by ROY in his Point II on Certiorari (if accepted by this Court) demonstrate no jurisdictional conflict.

First of all, the case of National Car Rental System, Inc. v. Holland, 269 So.2d 407 (Fla. 4th DCA 1972), cert. den., 273 So.2d 768 (Fla. 1973), as a matter of constitutional law, can no longer even be the basis for jurisdictional conflict, since it also is a decision of the Fourth District. Had ROY felt that there was a conflict between the decision below and National Car Rental System, the avenue would have been through Rule 9.331 of the Florida Rules of Appellate Procedure, and not through a purported notice to this Court under Rule 9.120. Article V, Section 3(b)(4) of the Florida Constitution precludes jurisdiction on this point. (Addi-

tionally, as will be spelled out in more detail below, the decision in National Car Rental System generates no substantive conflict in any event because the decision was rendered when contributory, as opposed to comparative, negligence, was the controlling law in Florida.

With respect to the decision in Florida Southern Railway Company v. Hirst, 30 Fla. 1, 11 So. 506 (1892), there are a welter of reasons why no jurisdictional conflict arises with that decision. First of all, as the Supreme Court noted on Page 513 of the decision, any discussion with respect to aggravated conduct was clearly dicta, since this Court continued on to note at the bottom of that same page that the case was not submitted on any theory of aggravated fault, nor was it appropriate to have been submitted on such a theory.

More significantly, the accident in Hirst occurred before the Act of June 7, 1887, (c. 3744, Laws of Florida) which made comparative negligence, as opposed to contributory negligence, the rule in railroad cases from that time forward. Thus, the controlling rule in Hirst was contributory negligence, a rule which Florida courts struggled with for years and which was finally rejected for all civil cases in 1973.

During the years that contributory negligence was the law in Florida for most civil cases, a number of devices were created to avoid (or at least transfer) the perceived

unfairness of the contributory negligence rule, barring any recovery when the plaintiff was somewhat at fault. The concept discussed in Hirst (gross, willful, or wanton negligence) was one of those devices, as was the last clear chance doctrine and others.

With the advent of comparative fault (in 1887 for railroad cases and in 1973 for most other cases, see Hoffman v. Jones, 280 So.2d 431 (Fla. 1973)), the reason for these avoidance devices disappeared because juries were thereafter directed to consider the comparative fault of all parties. As this Court stated in Hoffman at Page 437 of its opinion:

> In an effort to ameliorate the harshness of contributory negligence, other doctrines have evolved in tort law, such as "gross, willful, and wanton" negligence, "last clear chance," and the application of absolute liability in certain instances.

When the Supreme Court in Hoffman threw out contributory negligence, it also threw out the above described "baggage" that had accumulated with it.

It should be noted that since Hoffman, Florida courts have in fact addressed and consistently rejected a number of other rules which require a 100%-0% split of responsibility. See Auburn Machine Works Co. v. Jones, 366 So.2d 1167 (Fla. 1979) (patent danger doctrine rejected); Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977) (assumption of the risk rejected as

complete defense; Zambito v. Southland Recreation Enterprises, Inc., 383 So.2d 989 (Fla. 2d DCA 1980) (invitee's negligence re: known danger no longer complete defense).

Similarly, one post-Hoffman court has considered an answer to the question raised on the cross appeal explicitly. The case of Tampa Electric Co. v. Stone & Webster Engineering Corp., 367 F.Supp. 27 (M.D.Fla. 1973). There, in a decision only three months after Hoffman, the federal court had to predict how the Florida courts would rule on this point and two others. It correctly answered the other two questions and predicted on this point that, consistent with Hoffman, the harshness of the Hirst rule would be thrown away.

For all of the foregoing reasons, no jurisdictional conflict has been shown to exist between the decision below and the two contributory negligence cases cited by ROY.

CONCLUSION

For the reasons set forth in the foregoing Brief, if Point II is considered by this Court, it is respectfully suggested that no conflict has been shown to exist.

Respectfully submitted,

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By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 29th day of July, 1985, to EARLE LEE BUTLER, of Butler & Pettit, P.A., 1995 East Oakland Park Boulevard, Suite 100, Fort Lauderdale, FL 33306; and to DON LACY, Post Office Box 6298, Tallahassee, FL 32314.

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