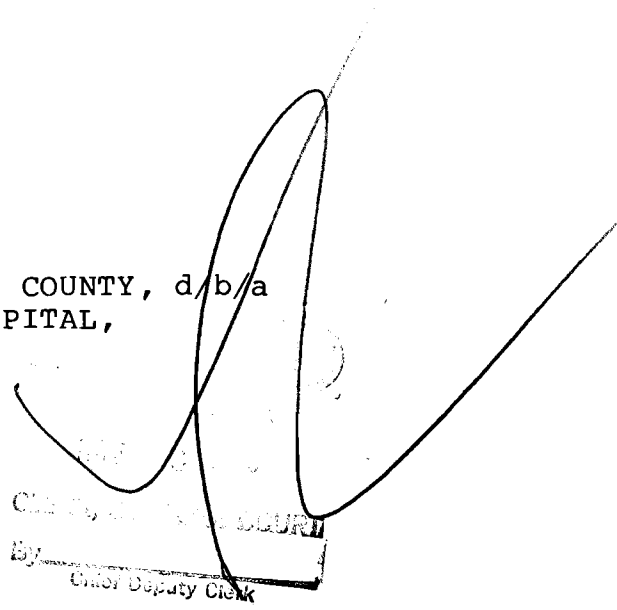
IN THE SUPREME COURT OF FLORIDA

CASE No. 67,673

PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a
JACKSON MEMORIAL HOSPITAL,

Petitioner,

vs.



GREGORIA VALCIN and GERARD VALCIN, her husband,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO JURISDICTION

(Conflict Certiorari)

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and
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I.

STATEMENT OF THE CASE AND FACTS

After the birth of their fifth child, Mr. and Mrs. Valcin (plaintiffs/appellants) opted for a sterilization procedure. Dr. Shroder, a member of the defendant's staff, performed a procedure on Mrs. Valcin. Some two years later she almost died as a result of a ruptured ectopic (tubal) pregnancy. This near fatality caused her to suffer permanent physical and emotional problems. Plaintiff's law suit against the defendant terminated when the defendant moved for, and obtained, summary final judgment (A. 17).

Plaintiff has emphasized and underscored the above because the defendant's "Brief on Jurisdiction" accords to the facts of this case none of the favorable intendments of testimony, inferences or benefits normally and mandatorily attendant with appeals from "adverse summary final judgment." See: HOLL v. TALCOTT, 191 So. 2d 40 (Fla. 1966). Indeed, defendant's brief ignores the (present) posture of the case (now as well as) at the time of the filing of the notice of appeal. Suffice it to say that a proper view of the facts does not include defendant's analysis and interpretation of what Dr. Hammond meant (or intended) when he stated. . . (those statements interspersed throughout pages 3, 4, 5 and 6 of the defendant's brief). Such analysis and credibility concerns are jury matters, not "conflict elements." A proper view of the facts, intendments of testimony and inferences has a direct bearing on both the correctness and accuracy of what the defendant believes consti-

tutes the "jurisdictional conflict" in this case. Such (proper) view soundly establishes the lack of merit to both the defendant's substantive and "conflict jurisdiction" concerns.

At page 1 of its brief the defendant states:

> "This is a petition for review in an action for medical malpractice, wherein the Third District Court of Appeal adopted a conclusive irrebuttable presumption of negligence applicable to all hospitals in the State of Florida. . ."

What the District Court "adopted"--viewed solely in the context of the facts of this case, on appeal from a summary final judgment--was to recognize (that):

* * *

> "There is little question that Valcin's ability to prove her negligence claim against the hospital has been substantially prejudiced by the absence of critical hospital records. Whether the ultimate sanction of entering a judgment as to liability against the hospital should be imposed depends, in our view, on what the proof ultimately shows as to the reason the records cannot be produced. Since the evidence concerning the reason the records cannot be produced is peculiarly within the knowledge of the hospital, we deem it fair to preliminarily impose upon the hospital the burden of proving, by the greater weight of the evidence, that the records are not missing due to an intentional or deliberate act or omission on the part of the hospital or its employees. If the fact-finder, under appropriate instructions, determines that the hospital has sustained its burden of showing that Dr. Shroder did not deliberately omit making an operative report or, if one was made, that the hospital did not deliberately remove or destroy the report, then the fact that the record is missing will merely raise a presumption that the surgical procedue was negligently performed, which presumption may be rebutted by the hospital by the greater weight of the evidence. However, if the fact-finder is not satisfied that the records are missing due to inadvertence or negligence, then a conclusive, irrebuttable presumption that the surgical procedure was negligently performed will arise, and judgment as to liability shall be entered in favor of Valcin."

* * *

Hence, it may be seen that the District Court's opinion has not "saddled" the defendant with any "factual finding" nor has the Court "held" that the defendant should not be allowed (A) to present evidence; (B) to address the pertinent issues; or (C) to try before a jury each and every issue of fact bearing on the matters raised by the pleadings. To the contrary:

* * *

> ". . .where a health care provider, statutorily and morally charged with the responsibility of making and maintaining records as a part of its obligation to promote the safe and adequate treatment of patients, negligently fails to do so, such health care provider shall have the burden of proving that the treatment which such missing records would reflect was performed non-negligently; and that where such health care provider intentionally fails to make or maintain such records, the treatment which such missing records would reflect shall be deemed negligent and the provider adjudged liable."

* * *

Application of those legal principles to the record before the District Court demonstrated to that Court:

A. Trial court granting of summary final judgment as to the plaintiff's warranty claim was justified as the claim was barred pursuant to § 725.01, Florida Statutes (1981) and as to that count, affirmance followed;

B. Trial court granting of summary final judgment as to plaintiff's cause of action for the defendant's failure to obtain informed consent was error:

> "Whether the indisputably false representations alleged to have been made to Mrs. Valcin by representatives of Jackson were in fact made and induced her to give her consent are quite clearly issues of fact which cannot be determined in a summary judgment hearing;

and

C. Trial court granting of summary final judgment as to plaintiff's claim of "negligent sterilization" was also error:

> ". . .Where evidence peculiarly within the knowledge of the adversary is, as here, not made available to the party which has the burden of proof, other rules must be fashioned. . .In Florida, where vital discovery has been lost after litigation has commenced, or has not been turned over upon request, a judgment on liability against the offending party has been held to be an appropriate remedy." MERCER v. RAINE, 443 So. 2d 944 (Fla. 1983). . ."

Each and every facet of the District Court opinion is in conformity with prior Florida law on the subject and this becomes crystal clear if one fairly treats the subject record with the deference required, with all intendments of testimony resolved in plaintiff's favor, and with due regard for the facts and circumstances of this particular case. See: HOLL v. TALCOTT, supra. Viewed in this light and for the reasons to be discussed, infra, it will be demonstrated there exists no conflict --direct, indirect, express or implied.

II.

QUESTION PRESENTED

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS RELIED UPON.

III.

SUMMARY OF ARGUMENT

The District Court found that the defendant's violation of a legislatively imposed obligation was actionable and, because it was, it reversed a summary final judgment entered in the defendant's favor. Because the District Court opinion recognized the need for, and specifically provided for, a "rational connection between the facts proved and the ultimate facts presumed", and because the District Court specifically reserved to the defendant the "right to rebut in a fair manner" (in any reasonable way the defendant sought to proceed), it cannot be said there exists "conflict" in the constitutional sense. Since none of the cases cited by the defendant are factually similar to the instant cause, it may be correctly concluded: No conflict exists!

IV.

ARGUMENT

A.

PROCEDURAL GUIDELINES

The plaintiff suggests to this Court no conflict exists. The plaintiff reaches this conclusion because conflict jurisdiction (as relevant herein) can exist only where the District Court applies a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in prior decisions allegedly in conflict or where the Court announces a rule of law not in harmony with prior announcements. KYLE v. KYLE, 139 So. 2d 85

(Fla. 1962) and NIELSON v. CITY OF SARASOTA, 117 So. 2d 731 (Fla. 1960). These principles have not changed, even under recent constitutional amendments and, if any change has occurred, the principles have been more strictly adhered to.

In the decision sought to be reviewed, the District Court did not "in an express manner" "give expression to" or "represent in words" any thought that its holding was in direct conflict with any other Florida decision. Under present practice, unless the District Court does recognize the existence of direct conflict and "gives expression to" that recognition, this Court has no jurisdiction to resolve any asserted or supposed conflict. JENKINS v. STATE, 385 So. 2d 1356 (Fla. 1980).

B.

THE DECISION SOUGHT TO BE REVIEWED IS NOT IN CONFLICT, DIRECT, INDIRECT, EXPRESS OR IMPLIED, WITH THE DECISIONS RELIED UPON.

This case involves a plaintiff's right (indeed, any litigant's right) to not suffer a fatal consequence where a party opponent negligently or intentionally does not produce "materials" (evidence of any pertinent type) which are/were exclusively within its possession, especially where same is either judicially or legislatively required to be both kept and, upon demand, produced!

After sorting through the established law, the District Court determined summary final judgment was improper--as a matter of fact--and remanded for jury evaluation of all matters. The subject cause, while both (that) simple and (that) complex, is just not in conflict with any of the authorities cited by

the defendant.

The thrust of the defendant's urgings is contained within a line of cases which recognize generally:

> "It is competent for the Legislature to create by law prima facie presumptions of evidence without denying the process of law, where such presumptions may be a natural or reasonable inference from the facts or circumstances from which the presumptions are raised by the statute, and the opposite party is not deprived of the right to rebut the presumptions in some fair manner duly provided or accorded by the rules of law or procedure." GOLDSTEIN v. MALONEY, 57 So. 342 (Fla. 1911).

In accord: BLACK v. STATE, 81 So. 411 (Fla. 1919); and, STRAUGHN v. K & K LAND MANAGEMENT, INC., 326 So. 2d 421 (Fla. 1976), wherein it was stated:

> "The test of the constitutionality of statutory presumptions is twofold. First, there must be a rational connection between the facts proved and the ultimate facts presumed (Citations omitted). Second, there must be a right to rebut in a fair manner (Citations omitted)." 326 So. 2d at p. 424.

In the instant cause the District Court did follow lawful guidelines in its determination that the summary final judgment was erroneous. Indeed, review of the subject opinion reflects that the evidence not produced (which evidence defendant was legislatively required to obtain, keep and produce--to the plaintiff) obviously provided the requisite "rational connection" between the fact proved--"medical negligence" and the ultimate fact presumed--"medical negligence." That there was provided by the District Court provision for the defendant to produce whatever evidence it desired on the issue of loss, failure to produce, medical negligence, etc., is patent from the face of the opinion. No conflict therefore exists as the

Court did not announce a rule of law not in harmony with prior announcements.

Factually, the District Court did not apply a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in the decisions allegedly in conflict. Aside from the obvious fact that the cases cited by the defendant deal with legislatively created presumptions and inferences (the subject cause does not):

1. GOLDSTEIN v. MALONEY, supra, involved a retail dealer in dry goods being indebted in excess of her assets. The case involved goods, wares and merchandise in bulk and simply has no factual relevancy to the instant cause;

2. BLACK v. STATE, supra, was a criminal case tried on the merits and is simply neither pertinent nor relevant herein;

3. STRAUGHN v. K & K LAND MANAGEMENT, INC., supra, arrived before this Court on appeal from a final judgment which declared a particular Florida Statute unconstitutional. This Court discussed the statute as it pertained to the facts of the case. The subject cause is in no wise analagous and CUNNINGHAM v. PARIKH, 472 So. 2d 746 (Fla.App.5th 1985) involved District Court ruling concerning the constitutionality of the medical consent law. In this case the District Court neither passed upon the constitutionality of that Act nor concerned itself with the burden of proof thereunder. In any event CUNNINGHAM, supra, held unconstitutional the statute's "conclusive pre-

sumption" and did so in favor of the plaintiffs. The constitutionality of that statute is neither pertinent nor relevant herein.

Lastly, mention can be made of defendant's reliance upon CORTINA v. CORTINA, 98 So. 2d 334 (Fla. 1957) on appeal from a proceeding brought by a husband against his wife for contempt of child visitation provisions of a divorce decree. Defendant cites that case for the proposition:

> "The Third District also decided issues which were never raised below, and granted relief on matters outside the pleadings and beyond the issues raised on appeal, in violation of this Court's decision in CORTINA v. CORTINA. . ."

In the instant cause plaintiff stated a cause of action for damages sustained as a result of defendant's failure to obtain informed consent. As a matter of law--not as a matter of fact or pleading--§ 768.46(4)(a) came into play. That statute allows an aggrieved plaintiff to rebut an apparently validly obtained consent:

> "if there was a fraudulent misrepresentation of a material fact in obtaining the signature."

Hence, District Court discussion of "fraud" was/is appropriate because without it the defendant would have no defense. As a matter of common sense, it should be further noted that the defendant did not produce for this Court the arguments raised in its "Appellee's Brief."

Since the remedy of imposing sanctions (i.e., liability, causation, removal of an issue from jury consideration) for a party litigant's wrongful interference with an opposing party's

right to seek redress in the courts is well precedented, plaintiff believes there exists no justification for this Court to exercise its jurisdiction. Defendant's reliance upon the Florida Evidence Code for "conflict" is inappropriate, See: KYLE v. KYLE, supra. Hence, where a District Court's opinion is not in conflict, direct, indirect, express or implied, with any Florida authority (much less the ones relied upon by the subject defendant), it is appropriate for this Court to decline to exercise its jurisdiction.

The plaintiff suggests to this Court no conflict exists and the petition for certiorari should be denied.

V.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondents in Opposition to Jurisdiction was served, by U.S. mail, this 4th day of November, 1985, on: George W. Chesrow, Esq., WALTON, LANTAFF, SCHROEDER & CARSON, Attorneys for Petitioner, 900 Alfred I. duPont Building Miami, Florida 33131; and WILLIAM A. BELL, ESQ., Attorney for Intervenor/ Petitioner, Florida Hospital Association, 208 South Monroe Street, Tallahassee, Florida 32301.

Respectfully submitted,

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