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IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,634

WILLIAM F. CHILDERS and HOLLY CHILDERS, as joint Personal Representatives of the Estate of WILLIAM GILES CHILDERS,	:
Petitioners,	:
vs.	:
HOFFMANN-LaROCHE, INC.; LAWRENCE SCHACHNER, M.D.; SAPAC, Ltd.; F. HOFFMANN-LaROCHE & CO. Ltd.; ROCHE BIOMEDICAL LABORATORIES, INC.; BINDLEY WESTERN INDUSTRIES, INC.; THE KROGER COMPANY; SUPER-X DRUG STORES OF FLORIDA, INC.; SUPER X DRUGS CORPORATION;	:
Respondents,	:

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON JURISDICTION

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JURISDICTIONAL STATEMENT AND SUMMARY OF ARGUMENT

Petitioners herein, Plaintiffs/Appellants below, file this brief seeking review of Childers v. Hoffmann-LaRoche, Inc., Third District Court of Appeals Case No. 86-2305, Opinion filed October 6, 1987, in accordance with Florida Rule of Appellate Procedure 9.120(d), to demonstrate jurisdiction pursuant to Article V, Section 3 (b)(3), Florida Constitution, because that opinion expressly and directly conflicts with decisions of other district courts of appeal and this Supreme Court on the same question of law. Fla. R. App. P. 9.030(a)(2)(iv).

The Childers opinion consists of an affirmation based upon the authority of its companion case, Felix v. Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla. 3d DCA 1987), which is now pending review in this Supreme Court. Felix v. Hoffmann-LaRoche, Inc., et al., Supreme Court Case No. 71,633.

Under the scope of this Court's discretionary power of appellate review, as set forth in Jollie v. State, 405 So.2d 418 (Fla. 1981), this Supreme Court may exercise its jurisdiction under Article V, Section 3(b)(3).

The Childers opinion then, is prima facie an express conflict, assuming the Felix opinion is expressly and directly in conflict with other district court's or this Supreme Court's opinions on identical legal issues.

The Felix decision is within this Supreme Court's jurisdiction since it expressly and directly conflicts with the following decisions:

Tampa Drug Company v. Wait, 103 So.2d 603 (Fla. 1958)

Ricci v. Parke-Davis & Company, 491 So.2d 1182 (Fla. 4th DCA 1986); Rev. den. 501 So.2d 1283 (Fla. 1986)

Macmurdo v. UpJohn Co., 444 So.2d 449 (Fla. 4th DCA 1983)

Lake v. Konstantinu, 189 So.2d 171 (Fla. 2nd DCA 1966)

In summary, while the above decisions of this Supreme Court and other district courts all hold that the issue as to the sufficientcy of product warnings involving unavoidably dangerous products is **always** a jury issue and not appropriate for summary judgement, and further, in Ricci, that the testimony of a prescribing physician is not conclusive proof of a drug's having sufficient warnings where conflicting evidence suggests inadequacy, so that summary judgement for a defendant on such issues cannot be granted; the Third District in Childers and Felix ruled that a court can upon its own reading determine as a matter of law that particular warnings were adequate, and that despite conflicting evidence a prescribing physician's testimony that he read a warning and was aware of the product's dangers is conclusive as to the lack of a manufacturer's liability, and affirmed summary judgement on such issues.

STATEMENT OF THE CASE AND FACTS

Petitioners, William F. Childers and Holly Childers, as Personal Representatives of the Estate of William Giles Childers, were Plaintiffs in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida and Appellant in the Third District Court of Appeal. Respondents, Hoffmann-LaRoche, Inc., Roche Biomedical Laboratories, Inc., Bindley-Western Industries, Inc., The Kroger Company, Super-X Drug Stores of Florida, Inc., and Super-X Drugs Corporation, were Defendants in the Circuit Court and Appellees in the Third District Court of Appeal.

Decedent, William Giles Childers, died on October 12, 1983, having been born August 19, 1983 with multiple, severe birth defects, as a proximate result of a prescription drug prescribed to his mother for her skin condition in the first trimester of her pregnancy. The drug, Accutane, had been placed on the market in September 1982 by Hoffmann-LaRoche, Inc. Hoffmann-LaRoche disseminated printed advertisements, warnings and product information about the product aimed at physicians, including wording which it referred to as its "package insert."

A wrongful death action against Hoffmann-LaRoche was filed March 20 1985, in Dade County Circuit Court by the personal representatives of the decedent's estate.

The Circuit Court entered a partial order of consolidation of the Petitioners' wrongful death action with the substantially identical wrongful death action filed by the petitioner in the Felix v. Hoffmann-LaRoche, Inc. case which is presently pending review before this Honorable Court, Case No. 71,633. (Appendix Exhibit "D").

A Summary Judgment was entered in Circuit Court on all counts in favor of the product's manufacturer, distributors, retailers and the manufacturer's detailman (promotional salesman), on August 13, 1986. (Appendix Exhibit "A").

The Summary Judgment was appealed to the Third District Court of Appeal via timely Notice of Appeal filed September 12, 1986. (Appendix Exhibit "B").

The District Court granted appellants' motion to share a single record on appeal with the Felix v. Hoffmann-LaRoche, Inc., companion case in an order dated September 26, 1986. (Appendix Exhibits "G" and "H").

The Third District Court of Appeal issued a written opinion on October 6, 1987, affirming the Summary Judgment. Childers v. Hoffmann-LaRoche, Inc., (Appendix Exhibit "C"). The Childers decision consisted of a per curiam affirmation based upon the authority of its companion case, Felix v. Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla. 3d DCA 1987), Third District Case No. 86-1844, filed six days before. (Appendix Exhibit "D"). The Felix opinion was timely appealed to this Supreme Court and is pending review at present. (Appendix Exhibit "I").

A Motion for Re-Hearing or Clarification of the Third District's decision was timely filed pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure. The Third District entered an Order denying that motion on November 17, 1987. (Appendix Exhibit "E").

Petitioner herein timely filed a notice to invoke the discretionary jurisdiction of this court in accordance with Rule 9.120(b) of the Florida Rules of Appellate Procedure. (Appendix Exhibit "F").

This Court has jurisdiction to exercise its discretionary jurisdiction because the Third District's decision expressly and directly conflicts with a decision of other district courts of appeal and of this Supreme Court on the same question of law.

ISSUE FOR REVIEW

Whether the Third District Court's opinion in Felix that the adequacy or inadequacy of warnings concerning prescription pharmaceutical products can be determined by a Court as a matter of law in summary judgment proceedings, rather than allowing such

issue to be determined by a jury upon the full circumstances, is in express direct conflict with decisions of this Supreme Court and other district courts on the same legal issue; and whether the Third District's per curiam affirmation in Childers, on the authority of Felix, its companion case, allows this Supreme Court to review the Childers decision under its discretionary authority.

ARGUMENT ON JURISDICTION

Petitioners herein, Plaintiffs/Appellants below, file this brief pursuant to Florida Rule of Appellate Procedure 9.120 (d), to demonstrate jurisdiction pursuant to Article V, Section 3 (b)(3), Florida Constitution, and seek review of Childers v. Hoffmann-LaRoche, Inc., Third District Court of Appeals Case No. 86-2305, Opinion filed October 6, 1987, because that decision expressly and directly conflicts with decisions of other district courts of appeal and this Supreme Court on the same question of law. Fla. R. App. P. 9.030 (a)(2)(iv).

The Childers opinion consists of an affirmation based upon the authority of its companion case,[1] Felix v. Hoffmann-LaRoche, Inc., 53 So.2d 1319 (Fla. 3d DCA 1987), which is now pending review in this Supreme Court. Felix v. Hoffmann-LaRoche, Inc., et al., Supreme Court Case No. 71,633.

This Supreme Court has jurisdiction under Article V, Section 3(b)(3). This Court, confronted with a per curiam decision nearly identical, said;

> A district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction... Traditional practice in dealing with a common legal issue in multiple cases, both in district courts and here, has been to author an opinion for one case and

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1 Childers and Felix shared a consolidated appellate record (see appendix, Exhibit "H") and involved identical defendants, the identical product and identical warnings.

> summarily reference that opinion on all the others. Being time - and labor saving for the Court, that practice should not be discouraged. Jollie v. State, 405 So.2d 418 (Fla. 1981); at 420.[2]

The Childers opinion then, is prima facie an express conflict, assuming the Felix opinion is expressly and directly in conflict with other district court's or this Supreme Court's opinions on identical legal issues.

In Felix, the Third District affirmed a summary judgment for a prescription drug manufacturer and co-defendants, holding that:

> If the warning given to the medical community is sufficient, then the drug manufacturer is not liable for injuries sustained by the physician's patients as a result of the side effects of the drugs. **The warning given was adequate as a matter of law.** Felix, at 1320. (Emphasis added).

The Felix Court expressly followed and cited to the dissenting opinion in MacMurdo v. UpJohn Co., 444 So.2d 449 (Fla. 4th DCA 1983). Felix, supra., at 1320.

In Macmurdo v. UpJohn Co., supra., the Fourth District reversed summary judgment for a prescription drug manufacturer, holding that:

> It is clear that the trial Court read the warning subjectively and determined as a matter of law that same was sufficient and adequate. This was error under the law of this state. It is not for judges but it is for the jury to determine if a particular warning is adequate under the circumstances. Macmurdo , at 450, 451.

Felix concludes that, although, "whether a warning is adequate is usually a jury question," summary judgment is proper where a court is satisfied certain factors are present in the warning and the circumstances of the product's use. Felix at 1321.

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Of course, Felix's petition for review had not yet been filed when the 3rd DCA filed the Childers opinion, so there was at that time no basis to withhold issuance of a mandate in the opinion; and, unlike the 4th DCA, the 3rd DCA has not adopted the practice of citing to the Jollie decision in companion cases.

In direct conflict with this, the Fourth District concluded; "In all events, the adequacy of the warning is for the jury to decide and may not be disposed of by Summary Judgment." MacMurdo, at 451.

The Fourth District states that it is an, "unsound position," to maintain that adequacy of a particular warning is **only generally** a question of fact, i.e., it refutes the possibility that summary judgment on that issue could be proper. MacMurdo, at 451.

Florida's Supreme Court has ruled that whether warnings given by a manufacturer of an inherently dangerous product are adequate cannot be concluded as a matter of law; and that the sufficiency of warnings is a jury issue. Tampa Drug Company v. Wait, 103 So.2d 603 (Fla. 1958). Felix expressly and directly conflicts with Tampa Drug on the same question of law.

The Second District, in Lake v. Konstantinu, 189 So.2d 171 (Fla. 2nd DCA 1966), said that the issue of sufficiency of the warnings undertaken by a prescription drug manufacturer must certainly be submitted to a jury, and reversed summary judgment for a defendant entered in the trial court, citing to Tampa Drug, Supra. Felix is in express direct conflict with Lake on the same question of law.

In Ricci v. Parke-Davis & Company, 491 So.2d 1182 (Fla. 4th DCA 1986), the Fourth District held:

> The primary issue to be tried in this case was the sufficiency of the warnings and information furnished by Parke-Davis & Company to the doctors and health care providers prescribing and administering the pills. The adequacy and sufficiency of these warnings is clearly a jury issue in Florida. Ricci, at 491.

Reversing a summary judgment for a pharmacuetical manufacturer and co-defendants, the Ricci Court said that although there was argued to be, "overwhelming evidence that the doctors in this case all received and understood the warnings they were furnished, and that they considered the warnings and

information provided by it adequate... appellant is entitled to have these disputed fact issues determined by a jury and not as a matter of law." Ricci, at 491, 492.

In express, direct conflict with Ricci is Felix, where, in addition to the conflicting legal pronouncements already described, the Third District ruled that the prescribing physician's claims that he understood the warnings and was adequately informed of the product's dangers justify affirmation of summary judgment on the issue of proximate cause, despite the disputed facts indicating the patient was pregnant when the physician prescribed the drug and that he had not warned her of the risks involved.

Even where a district court of appeal's opinion purports to be in accord with Supreme Court or other districts' opinions, this Court will take jurisdiction under Article V, Section 3(b)(3), Florida Constitution, where the district court's opinion nevertheless demonstrates a direct conflict. See Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986); Wolmer v. Chrysler Corp., 474 So.2d 834 (Fla. 4th DCA 1985).

It is imperative that this Honorable Court accept jurisdiction to resolve these conflicts, because this inter-district conflict concerning an aggrieved party's right to jury trial will force venue shopping and foster uneven application of civil justice, and is particularly intolerable because of the statewide character of prescription drug marketing and distribution which calls for uniformity in this area of law.

CONCLUSION

It is clear from the contradictory legal rulings and holdings that the decision of the Third District Court of Appeal in Childers v. Hoffmann-LaRoche, Inc., supra, expressly and directly conflicts with the decisions of this Supreme Court and the Fourth and Second District Courts of Appeal discussed in this brief. Therefore, this Honorable Court has discretionary jurisdiction to consider this appeal.

This Honorable Court has repeatedly exercised its discretion to review decisions involving per curiam affirmations based upon decisions reached in companion cases pending review which expressly and directly conflict with other district courts or supreme court decisions, and this case should receive the same consideration.

It is of great importance that these conflicts be resolved by the exercise of this Court's discretionary review, because the Courts of this state and its litigants require uniformity and clarity in resolving the issue of whether there exists a right to jury trial on disputes involving pharmaceutical product warnings in Florida, or alternatively, whether instructions to physicians and the emphasis provided in warnings can be subjectively determined by a trial judge to be adequate, removing the issue from the hands of expert witnesses and jury resolution.

Respectfully submitted,

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By _____
JEFFREY P. KAISER, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to Mercer K. Clarke, Esq., Attorney for Hoffmann-LaRoche, 100 Chopin Plaza, 2400 Edward Ball Building, Miami, Florida 33131, this 28th day of December, 1987.

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