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SUPREME COURT OF FLORIDA

CASE NO.: 73,596

FILED
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JAN 26 1989
CLERK, SUPREME COURT
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THE UPJOHN COMPANY,

Defendant, Petitioner,

vs.

ANNE MARIE MACMURDO, a/k/a
ANNE MARIE STAFFORD,

Plaintiff, Respondent.
______________________________/

PETITIONER'S BRIEF
(with separately bound Appendix)

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TABLE OF CONTENTS

PAGE

Table of Citations......................................ii

Statement of the Case and Facts...........................1

Jurisdictional Issue......................................3

Whether the Supreme Court of Florida has jurisdiction to review the decision of the Fourth District Court of Appeal rendered herein on 21 December 1988 under Section 3(b)(3) of Article V of the Florida Constitution on the ground that the decision expressly and directly conflicts with a decision of another Florida District Court of Appeal on the same question of law.

Summary of Argument.......................................4

Argument..5

Conclusion..8

TABLE OF CITATIONS

PAGE

Felix v. Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla. 3d DCA 1987); rev. granted, ___ So.2d ___ (1988)..4,5-7,8

MacMurdo v. Upjohn Company, 444 So.2d 449 (Fla. 4th DCA 1983)...5-7

Ricci v. Parke-Davis & Co., 491 So.2d 1182 (Fla. 4th DCA 1986), rev. denied, 501 So.2d 1283 (Fla. 1986)...5-7

The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988)......6

Florida Constitution, Article V, Section 3(b)(3).......3,6,8

Fla. R. App. P. 9.030(a)(2)(A)(iv)........................ 8

Statement of the Case and Facts

This case arises out of an action in the Circuit Court of the 17th Judicial Circuit for Broward County, Florida. The case was tried in December 1986 on an amended complaint which alleged that Petitioner, Defendant, The Upjohn Company, sold a prescription drug known as Depo-Provera without providing the medical community an adequate warning as to the side effects of the drug.

At the close of the plaintiff's case in chief and again at the close of all of the evidence, counsel for The Upjohn Company moved for a directed verdict. The motions were denied, and the case was submitted to the jury on two theories of liability. One was the alleged negligence of The Upjohn Company in marketing Depo-Provera. The other was the defendant's alleged failure to provide an adequate warning.

The jury found for The Upjohn Company on the first issue and for the plaintiff on the second. The jury, however, found the plaintiff 49% contributorily negligent and assessed her total damages at $370,000.00.

Post-trial, both parties moved for judgment notwithstanding the verdict. These motions were denied, and on 17 December 1986, a final judgment was entered for Anne Marie MacMurdo for $188,700.00. From this judgment The Upjohn Company filed an appeal to the Florida Fourth District Court of Appeal. The primary issue presented by The Upjohn Company to the District Court of Appeal was whether or not Upjohn's motions for directed verdict should have been granted on the ground that there was

legally insufficient evidence from which the jury could reasonably conclude that The Upjohn Company had failed to provide the medical community with an adequate warning. In a cross-appeal, the plaintiff presented the issue as to whether or not she was entitled to a directed verdict on the issue of contributory negligence.

The Fourth District Court of Appeal rendered a decision on 21 December 1988 in which it concluded that the trial court committed no error in presenting to the jury the issue of the sufficiency of the product labeling, but did commit error in permitting the jury to decide the issue of contributory negligence. A copy of that decision is found in Petitioner's separately bound appendix (App. 1).

Jurisdictional Issue:

Whether the Supreme Court of Florida has jurisdiction to review the decision of the Fourth District Court of Appeal, *supra*, under Section 3(b)(3) of Article V of the Florida Constitution on the ground that the decision expressly and directly conflicts with a decision of another Florida District Court of Appeal on the same question of law.

Summary of Argument

The Fourth District Court of Appeal, in its opinion rendered in this action on 21 December 1988, has concluded that in personal injury product liability litigation involving prescription drugs, the sufficiency of the manufacturer's labeling to inform the medical community is always an issue for decision by the jury. In so holding, the Fourth District Court of Appeal has placed itself in express and direct conflict with a decision rendered by the Third District Court of Appeal in Felix v. Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla. 3d DCA 1987). The Florida Supreme Court has already accepted jurisdiction to review the decision of the Third District Court of Appeal in Felix based on apparent conflict between the Felix decision and the authority relied on by the Fourth District Court of Appeal as the legal foundation for its decision herein sought to be reviewed.

Argument

1. The Supreme Court has jurisdiction to entertain this appeal because the decision of the Fourth District Court of Appeal rendered herein on 21 December 1988 expressly and directly conflicts with a decision of the Florida Third District Court of Appeal in Felix v. Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla. 3d DCA 1987).

The decision of the Fourth District Court of Appeal which Petitioner seeks to have reviewed cites and relies on a previous opinion of the Fourth District in an earlier appeal in this case. The earlier opinion, MacMurdo v. Upjohn Company, 444 So.2d 449, 451 (Fla, 4th DCA 1983), is included in Petitioner's appendix (App. 2) and for convenience will be referred to as MacMurdo I. The opinion which embodies the decision Petitioner seeks to have reviewed will be referred to as MacMurdo 11.

MacMurdo I was an appeal from a summary judgment in favor of The Upjohn Company. The Fourth District Court of Appeal, in reversing the summary judgment, held:

> But, in all events, the adequacy of the warning is for the jury to decide and may not be disposed of by summary judgment (emphasis added).

444 So.2d 449, 451

In MacMurdo 11, the Fourth District Court of Appeal expressly stated that it was bound by its holding in MacMurdo I to approve the decision of the trial court to submit the liability issue to the jury. MacMurdo II cites as additional authority Ricci v. Parke-Davis & Co., 491 So.2d 1182 (Fla. 4th DCA 1986), rev. denied, 501 So.2d 1283 (Fla. 1986). In Ricci, the Fourth District Court of Appeal, in reliance on MacMurdo I, reversed a summary judgment for a drug manufacturer and held without qualification that the adequacy of prescription drug labeling to

inform the medical community "... is clearly a jury issue in Florida."

The Fourth District Court of Appeal has thus developed a principle of law which holds that the adequacy of prescription drug labels to warn and inform the medical community is in all events an issue to be submitted to the jury. In this respect, the Fourth District Court of Appeal has placed itself in express and direct conflict with a decision of the Third District Court of Appeal in Felix v. Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla. 3d DCA 1987) (App. 3).

In Felix, the Third District Court of Appeal affirmed a summary judgment for the manufacturer of a prescription drug known as Accutane. In so doing, the Third District rejected the approach of MacMurdo I, Ricci and MacMurdo II, and held that in appropriate circumstances the adequacy of a warning can be an issue of law for the court to decide. The Third District Court of Appeal in Felix stated:

> While we recognize that whether a warning is adequate is usually a jury question, e.g., Ricci, 491 So.2d at 1182; Macmurdo, 444 So.2d at 451, summary judgment is proper where, as here, the warning is clear and unambiguous, the injuries arising as a result of the failure to heed the warning are identical to those the warning described, and the undisputed evidence demonstrates that at the time the prescribing physician prescribed the drug, he was completely aware of the dangers it posed.

513 So.2d 1319, 1321

Hence, by reason of the conflict between MacMurdo II and Felix, the Court has jurisdiction under Section 3(b)(3) of Article V of the Florida Constitution to review the decision of the Fourth District Court of Appeal in MacMurdo 11. See generally The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988).

2. The Supreme Court should exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal for the following reasons:

(a) The Supreme Court has already accepted jurisdiction to review the decision of the Third District Court of Appeal in Felix v. Hoffmann-LaRoche, Inc., supra, on the basis of an allegation that that decision is in conflict with MacMurdo I and Ricci, supra. A copy of the Supreme Court's order accepting jurisdiction in Felix is included in the Petitioner's appendix (App. 4).

(b) This case involves important questions related to the type of evidence which must be presented to lawfully support a verdict for a plaintiff in an action based on a claim that The Upjohn Company's U.S. Food and Drug Administration-approved labeling was insufficient warning to the medical community. In this respect the case presents issues of law of significant interest to the public, the bench, and bar.

(c) Whether or not the product labeling with respect to a prescription drug is sufficient to adequately inform a physician utilizing the drug is often the most critical issue in prescription drug litigation. Manufacturers have a right to a careful judicial assessment of the legal sufficiency of the evidence on that issue and to a removal of the issue from the jury's province if, under controlling principles of law, the evidence is judicially found to be insufficient to support an adverse verdict. The position taken by the Fourth District Court of Appeal in MacMurdo I, Ricci and MacMurdo II deprives Petitioner of this important right which is essential to a fair trial.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court has and should exercise discretionary jurisdiction to entertain this appeal pursuant to Section 3 of Article V of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv), by virtue of the manifest conflict between the decision of the Fourth District Court of Appeal rendered in this action on 21 December 1988 and the decision rendered by the Third District Court of Appeal in Felix v. Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla. 3d DCA 1987).

DATED this 24th day of January, 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief and a copy of the separately bound Appendix were furnished by U.S. Mail to DOMINIC L. BRANDY, ESQ., 115 S.E. 13th St., Ft. Lauderdale, FL 33316, Attorney for Plaintiff, Respondent; RICHARD A. KUPFER, ESQ., Cone, Wagner, Nugent, et al., P.O. Box 3466, West Palm Beach, FL 33402, Co-counsel for Plaintiff, Respondent; DAVID M. COVEY, ESQ., 59 Maiden Lane, 41st floor, New York, NY 10038, and G. WILLIAM BISSETT, ESQ., 501 N.E. First Ave., Miami, FL 33132, Attorneys for Defendant, Petitioner, this 24th day of January, 1989.

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