IN THE SUPREME COURT OF FLORIDA
CASE NO. 73,596

THE UPJOHN COMPANY,

Petitioner,

v.

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

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

RICHARD A. KUPFER, ESQ.
FLA. BAR NO. 238600

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QUESTION PRESENTED

WHETHER THE WRITTEN OPINION OF THE FOURTH DISTRICT COURT OF APPEAL BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN FELIX v HOFFMANN-LaROCHE, INC., 513 So.2d 1319 (Fla. 3d DCA 1987)?

STATEMENT OF THE CASE AND FACTS

We agree with Upjohn's Statement of the Case and Facts, except that there was no "primary issue" presented by Upjohn to the Fourth DCA. Upjohn raised four issues including whether there was a jury question regarding the adequacy of the printed warning; whether there was sufficient evidence of proximate cause to go to the jury, whether there was sufficient evidence of foreseeability to go to the jury, and whether the jury's verdict was against the manifest weight of the evidence.

SUMMARY OF ARGUMENT

Upjohn attempts to manufacture a conflict by mischaracterizing the holding of the Fourth DCA below. The Fourth DCA did not state anywhere in its opinion that the sufficiency of drug warnings is always an issue for the jury, or that such a question could never, under any circumstances, be determined by the court as a matter of law. All the Fourth DCA said was that the evidence In this case created a substantial fact issue for the jury to determine the adequacy of the warnings:

and that does not conflict with the Felix v Hoffmann-LaRoche case or any other case.

ARGUMENT

The Fourth DCA noted that it had held in an earlier appeal in this same case that there was a jury question on the adequacy of the warnings (when it reversed a summary judgment in 1983), and that earlier decision might normally be controlling as the "law of the case." But the court went on to note that even if the **1983** appeal was not dispositive of this new appeal over substantially the same issue, it would still find from a review of the evidence presented at trial that the adequacy of the warning was properly submitted to the jury. The court wrote:

> We are convinced by a review of the record in this case that substantially more evidence on the issue of liability was presented at trial than existed at the time this court reviewed and reversed the summary judgment entered in favor of Upjohn. . . . Even if not bound by [the **1983** appeal], our review of the evidence presented at trial compels us to conclude that the case was properly submitted to the jury. . . . While there was considerable evidence presented that may have supported a verdict for Upjohn, there was also substantial evidence presented that the drug in question caused MacMurdo's bleeding problem, that the warnings were insufficient to alert her physicians of this risk, and that her hysterectomy was performed to treat the bleeding condition.
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> Slip op,, p. 5.

Dr. Levy, who prescribed the drug for plaintiff to be

used as a contraceptive, later misdiagnosed plaintiff's prolonged and excessive bleeding and performed a hysterectomy because he was given no warning from Upjohn that this drug can produce such side effects. If he had been warned of this then all he would have had to do was discontinue the plaintiff's use of this drug and the bleeding would have gradually subsided. The Fourth DCA noted in its opinion:

> [Dr.] Levy also testified that Upjohn's warnings about the side effects of the drug did not alert him to the possibility that MacMurdo's bleeding condition was related to the use of the drug.
> Slip op., p. 8.

That was also corroborated by other medical testimony at trial. There was evidence presented at trial that about 25% of the women injected twice with this drug display these symptoms, and that Upjohn was well aware of that but failed to relay that information to the prescribing physician.

The Fourth DCA did not state, nor imply, that an issue concerning the sufficiency of warnings must always go to the jury in every case. If the court had said that then we agree it would conflict with the Felix case, but that is not even remotely close to what the court said. In fact the court noted Upjohn's concession that "the adequacy of a particular warning is generally a question of fact for jury determinatio " Slip op., p. 3.

Actually, Upjohn seems to find conflict, no, from any language used by the Fourth DCA in this appeal, but from language coming from the Fourth DCA's opinion in the 1983

appeal. (See Upjohn's brief on jurisdiction, p. 5). Howeve this court has clearly held that the DCA opinion brought up for review must itself be in conflict, and not just a prior case that is cited by the DCA in its opinion. Dodi Publishing Co. v Editorial America, 385 So.2d 1369 (Fla. 1980).

In Felix v Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla. 3d DCA 1987), the doctor who prescribed the drug (accutane) to a pregnant woman testified that he understood the written warnings (not to prescribe it to such a patient) and he had prior knowledge of the drug's dangerous side effect. That is at odds with the testimony of the prescribing physician in the present case. The Felix court expressly "recognize[d that whether a warning is adequate is usually a jury question." Id. at 1321. However the Felix court also believed there may be some cases where reasonable persons could not possibly differ on that issue and those cases coul be determined as a matter of law. The Fourth DCA in the present case did not disagree with that and its opinion does no violence to that principle since, even if some cases could be determined as a matter of law, this obviously is not such a case.

If the Fourth DCA had either expressly agreed or dis-agreed with the Felix case, then the fact that this court has accepte jurisdiction to review Felix might warrant accepting jurisdiction in this case as well. However, the Fourth DCA did not agree, disagree, nor even mention the

~~Felix~~ case in its opinion, It did not have to reach the issue in Felix because in this case there was substantial evidence presented to support a jury determination that the warning was inadequate. Just because this court is reviewing the Felix case on its merits does not mean this court ha now set a dragnet to sweep up every products liability case where a warnings issue is allowed to go to the jury.

We agree that Upjohn has a right to a careful judicial assessment of the evidence presented, to determine whether it should go to the jury. But Upjohn has certainly received that in this case. It has presented this issue three times to three different appellate panels and every time it has been determined that the issue in this case should be submitted to a jury. Just because it disagrees with these appellate opinions does not mean it failed to receive a careful judicial assessment of its position.

There is no semblance of an express and direct conflict between this case and the Felix case which would generate confusion among precedents in this state. This court should deny jurisdiction to review the Fourth DCA's opinion.

CONCLUSION

This court should deny jurisdiction to review the opinion of the Fourth DCA, since it does not create express and direct conflict.

Respectfully submitted,

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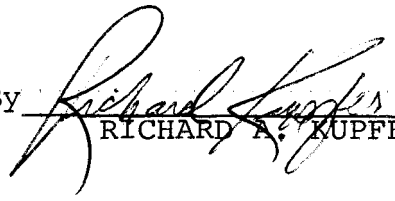
By 
RICHARD A. KUPFER

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 30th day of January 1989, to: **JOHN REED, ESQ., P. O. Box** 2809, Orlando, **FL** 32802.

By _____
RICHARD A. KUPFER