

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 75,125

THIRD DISTRICT
CASE NO. 89-124

FILED

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ARNALDO CURBELO, M.D. and
HIALEAH MEDICAL CENTER FOR
WOMEN, INC.,

Defendants/Petitioners,

vs .

HOWARD F. ULLMAN, ESQUIRE, as
Personal Representative of the
Estate of FRANCIA PEREZ,
Deceased,

Plaintiff/Respondent.

**PETITIONERS' BRIEF ON
JURISDICTION**

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TABLE OF AUTHORITIES

CASES:

Ansel vs. Kizer, 428 So.2d 671
(Fla. 2d DCA, 1982) 3, 4, 5

Employee Benefits Claims, Inc. vs. Diaz,
478 So. 2d 379 (Fla. 3rd DCA, 1985)41 5

Saunders vs. Saunders, 346 So.2d 1057
(Fla. 1st DCA 1977)3, 4t 5

OTHERS:

Article It Section 22, Fla. Const. 2, 4

Florida Rules of Civil Procedure 1.4301, 5

Florida Rules of Civil Procedure 1.5402, 3

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CASE NO. _____

THIRD DISTRICT
CASE NO. 89-1241

ARNALDO CURBELO, M.D. and
HIALEAH MEDICAL CENTER FOR
WOMEN, INC.,

Defendants/Petitioners,

vs .

HOWARD F. ULLMAN, ESQUIRE, as
Personal Representative of the
Estate of FRANCIA PEREZ,
Deceased

**PETITIONERS' BRIEF ON
JURISDICTION**

Plaintiff/Respondent.

INTRODUCTION

This is the Brief on Jurisdiction of the Petitioners,
ARNALDO CURBELO, M.D. (hereinafter CURBELO) and HIALEAH MEDICAL
CENTER FOR WOMEN, INC., (hereinafter HIALEAH MEDICAL CENTER), to
the Supreme Court of Florida invoking its discretionary
jurisdiction pursuant to Fla. R. App. P. 9.030(2).

Petitioner seeks review of the decision of the District
Court of Appeal, Third District, rendered on October 24, 1989.

STATEMENT OF THE CASE

The Plaintiff in the Trial Court, filed a Complaint for
medical malpractice which included a Demand for Trial by Jury,
pursuant to Florida Rule of Civil Procedure 1.430. After Default
by Defendants below, a non-jury trial was conducted on damages.
At no time was there an affirmative waiver of the trial by jury

by Defendants/Petitioners, CURBELO or HIALEAH MEDICAL CENTER. Defendants/Petitioners, CURBELO and HIALEAH MEDICAL CENTER, moved for Relief from Judgement pursuant to Florida Rule of Civil Procedure 1.540. Appendix - Page 5. In their Motion Defendants/Petitioners, said that the Judgement entered against them on December 1, 1988 was void or entered by mistake because the hearing was conducted non-jury when a jury trial had been demanded in the Complaint and Defendants/Petitioners did not waive their right to jury trial. The Trial Court granted their Motion for Relief from Judgement. Appendix - Page 7.

The Third District Court of Appeal rendered its opinion on September 5, 1989 reversing the Trial Court. Appendix -Page 3.

Defendants/ Petitioners, CURBELO and HIALEAH MEDICAL CENTER, timely filed a Motion for Rehearing and the Court entered a Corrected opinion on October 24, 1989. Appendix-Page 1.

This petition followed.

JURISDICTIONAL ISSUE

WHETHER THIS COURT SHOULD ENTERTAIN JURISDICTION WHEN THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL, IN THIS CASE, DIRECTLY CONFLICTS WITH OTHER DISTRICT COURTS, WITH THE PRIOR DECISION OF THE SAME COURT, AND WHEN IT CONSTRUES ARTICLE I, SECTION 22, FLA. CONST. (TRIAL BY JURY).

SUMMARY OF ARGUMENT

This Court should accept jurisdiction in this case because the opinion of the Third District directly conflicts with opinions of the First and Second District and, in fact, with its own prior opinion. Furthermore, it carves out an exception to

the right to trial by jury guaranteed by Article I, Section 22, Fla. Const.

More specifically, the First District in Saunders vs. Saunders, 346 So.2d. **1057** (Fla. 1DCA, **1977**), has stated that where a non-jury trial was conducted after jury was demanded and not waived, the judgement is subject to review under Fla. R. Civ. P. 1.540 because it was entered by mistake. Under similar circumstances the Second District held it was void and subject to attack under Rule 1.540. Ansel vs. Kizer, 428 So.2d **671** (Fla. 2d DCA, 1982).

ARGUMENT

The basis of the Third District's reversal of the Trial Court is **not** that it was appropriate to proceed non-jury where a trial by jury had been demanded by the Plaintiff as evidenced by its initial opinion rendered on September **5** 1989. Appendix - Page **3**.

Rather, the District Court reverses the Trial Court's ruling on the basis that Defendants/Petitioners, CURBELO and HIALEAH MEDICAL CENTER, should not be afforded relief pursuant to Fla. R. Civ. P. 1.540 and that Petitioners should have appealed. It is difficult to envision what Order of the Trial Court the Defendants/Petitioners, CURBELO and HIALEAH MEDICAL CENTER, could have appealed from since the jury trial issue was not discussed at the trial at all. The pro se Defendants simply attended a non-jury trial without any explanation.

In Ansel vs. Kizer, **Supra**, the Second District agreed that the entry of a Final Judgement without a jury trial after a

jury trial had been demanded and not withdrawn with the consent of all parties, resulted in a void judgement and that a Motion pursuant to Fla. R. Civ. P. 1.540 to vacate the Final Judgement should have been granted by the Trial Court. This holding is directly contrary to the holding of the Third District in the case sub iudice.

Futhermore, in Saunders vs. Saunders, Supra, the First District held that it was appropriate to grant relief pursuant to Rule 1.540 of the Fla. R. Civ. P. indicating that not conducting a jury trial was a "mistake" as envisioned by the subject Rule.

Both Ansel and Saunders, allowed relief under Rule 1.540 of the Fla. R. Civ. P. under essentially the identical circumstances which the Third District denies Petitioners relief under the subject Rule in this case.

In Employee Benefit Claims, Inc. vs. Diaz, 478 So.2d 379 Fla. 3rd DCA, 1985, the Court ordered a new trial on damages where a non-jury trial had been conducted after jury trial had been demanded. The vehicle used to raise this issue by the Defendant/Appellant in that case, was a Motion for Relief from Judgement.

The Employee Benefits decision supra, directly conflicts with the same Court's decision in this case. There is no attempt by the Third District to distinguish the Employee Benefits case and, in fact, there is no reason why appellants in Employee Benefits should be allowed to raise the issue by Motion for Relief from Judgement and the Defendants/Petitioners in this

case, CURBELO and HIALEAH MEDICAL CENTER should be denied the same relief under essentially identical situations.

Lastly and more importantly, Article I, Section 22, Fla. Const., states that: "The right of trial by jury shall be secure to all and remain inviolate." Rule 1.420(d) of the Fla. R. Civ. P. states that ".... A demand for trial by jury may not be withdrawn without the consent of the parties."

The Third District's holding in this case, essentially allows a judgement to stand where a trial was conducted in clear violation of the Florida Constitution and Fla. R. Civ. P. 1.420(d). In essence, the Third District's opinion waters down a citizen's right to trial by jury. It also ignores the waiver requirements of Rule 1.420.

CONCLUSION

In summary, the Petitioners submit that this Court should entertain jurisdiction because the Third District's opinion directly conflicts with the decision of the Second District in Ansel, supra; with the decision of the First District in Saunders, supra; and with its own decision in Employee Benefits, supra.

Additionally, the Third District's opinion interprets Article I, Section 22, of the Fla. Const. by chipping away at the citizen's right to trial by jury.

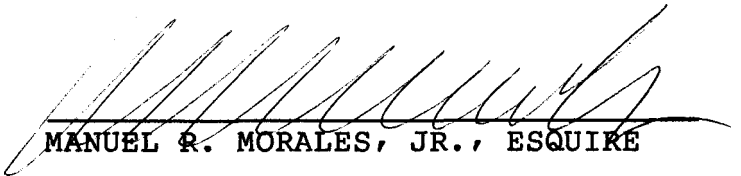
Based on the foregoing, Defendants/Petitioners, CURBELO and HIALEAH MEDICAL CENTER, respectfully request this Court to accept jurisdiction in this matter pursuant to Fla. R. App. P. 9.030(2).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of November, 1989 to: JAMES C. BLECKE, ESQUIRE, 705 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130.

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