IN THE SUPREME COURT OF FLORIDA
CASE NO: 75,544

JACK DREW

Petitioner,

vs.

GORDON T. COUCH, M.D.

Respondent,
_____/

On Petition for Review
from the District Court
of Appeal for the First
District of Florida
Case No: 88-3127

PETITIONER'S JURISDICTIONAL BRIEF

CHARLES J. KAHN, JR.
Levin, Middlebrooks, Mabie
Thomas, Mayes & Mitchell, P.A.
226 South Palafox Street
P.O. Box 12308
Pensacola, Florida 32581
904/435-7000

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE AND OF THE FACTS

This matter arises out of a medical malpractice proceeding brought by Jack Drew and his wife, Faith M. Drew, against Dr. Gordon Couch. Mrs. Drew died during the pendency of the appeal.

After a jury verdict in favor of Dr. Couch, the Drews appealed to the First District Court of Appeal. The judgment in favor of Dr. Couch was affirmed. Drew v. Couch, 519 So.2d 1023, (Fla. 1st D.C.A. 1988), rev. denied, 529 So.2d 693 (Fla. 1989).

In denying the Drews' petition for review, this Court granted motions for attorneys fees filed by Dr. Couch, as well as the Florida Patients Compensation Fund, which was a party to that appeal, and allowed a single fee of $500.00, without an elaboration as to how such amounts should be divided between the two defendants.[1]

When the matter returned to the trial court, Dr. Couch filed a Motion to Determine Liability for Statutory Attorney's Fees pursuant to Section 768.56, Florida Statutes (1985). App. 1, R7-8. Dr. Couch also filed a Motion to Tax Costs simply alleging that he was the prevailing party and that he should recover costs. App. 2, R9-10.

After the hearing, the trial judge declined to order payment of costs or attorneys' fees to Dr. Couch. App. 3, Rll-12. In so ruling, the Circuit Judge found "Gordon T. Couch, M.D., did not incur liability nor pay attorneys fees nor (sic) costs." R 11.

---

[1] The Fund has taken no part in the appeal on the fees and costs question. The outcome of the issue as to Dr. Couch will not affect the Fund since the Fund hired and paid its own counsel.

Dr. Couch appealed the denial of fees and costs to the District Court of Appeal and won a reversal. Couch v. Drew, ___ So.2d ____ 14 FLW 2808 (Fla. 1st D.C.A. December 7, 1989). App. 4.

On January 31, 1990, the District Court of Appeal denied Drew's motion for rehearing. Petitioner has timely filed his Notice to Invoke Discretionary Review and this brief on jurisdiction.

SUMMARY OF ARGUMENT

The First District Court of Appeal followed as precedent a case arising on materially different facts. The court below also expressly declined to follow decisions of other districts which reach a different result on virtually identical facts. Thus the case under review creates conflict of decisions that should be resolved by this Court.

ARGUMENT

THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH OPINIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE IDENTICAL ISSUE OF LAW.

Drew's sole contention before the trial court was that since all of Dr. Couch's fees and costs had been paid by his insurance carrier, and since Dr. Couch incurred no liability for repayment of such, he was not entitled to recover attorneys' fees or costs. The trial court agreed.

The First District Court of Appeal reversed, creating express conflict of decisions in doing so.

First, the District Court relied extensively upon Wright v. Acierno, 437 So.2d 242 (Fla. 5th D.C.A. 1983), a case decided under Section 57.105, Florida Statutes, the "frivolous claims" statute, and having nothing to do with the present issue, which arises solely because Dr. Couch's insurance company was exclusively responsible for his attorneys' fees and costs. The First District discussed the "mandatory penalty" imposed by Section 57.105, and went on to conclude that the only issue was the reasonable value of attorneys' services, not whether or how much the prevailing party is actually paid.

Wright involved a claim against the defendants as city officials of the City of Winter Park, Florida. The court obviously focused upon the nature of the claim itself, rather than upon who paid attorneys' fees. Indeed the court noted that Section 57.105 evidenced a purposeful legislative intent to impose a mandatory

penalty against the losing party. With no justification whatsoever, the First District in the present case took this language construing Section 57.105 and transposeditto the medical malpractice attorneys fees statute, Section 768.56(1), Florida Statutes (1983), which simply provides that the Court shall award attorneys fees to "the prevailing party". Finally, the First District failed to acknowledge the fact that the attorneys' fees in Wright were paid out of public funds, for the benefit of public officials.

By accepting as controlling a decision of another District Court of Appeal that was based upon materially different facts, the First District Court of Appeal has created a conflict that should be resolved. Lubell v. Roman Spa, Inc., 362 So.2d 922 (Fla. 1978); Gibson v. Avis Rent-a-Car-System, Inc., 386 So.2d 520 (Fla. 1980).

Second, the First District Court reached a result that cannot be reconciled with the decisions in Turner v. **D.N.E.,** Inc., 547 So.2d 1245 (Fla. 4th D.C.A. 1988) or Aspen v. Bayless, 552 So.2d 298 (Fla. 2d D.C.A. 1989), review pending, Supreme Court Case Number 75,107.

Turner is virtually identical to the present case. In Turner, there was a stipulation that the prevailing party was not obligated to pay costs or reimburse his insurance company. Seizing upon the lack of obligation to reimburse, the District Court of Appeal tried to distinguish Turner from the present case. In so doing, however, the District Court of Appeal ignored the clear finding of the trial court that Dr. Couch "did not incur liability nor pay attorneys

fees nor (sic) costs". The judge's finding that Dr. Couch did not incur liability for fees and costs makes this case identical to Turner. Turner held "costs are only recoverable by a prevailing party who has either paid the costs or incurred liability to do so."

The decision in Aspen was raised before the First District on a motion for rehearing, which the First District summarily denied. The Aspen case is now pending before this Court on a certified question. The certified question asks substantially whether costs are recoverable only by parties who have paid costs or incurred liability to do so. Thus the language of the certified question expressly covers the facts of the present case in which Dr. Couch admittedly did not pay costs, nor incur liability to do so. This Court's determination of Aspen will most likely be dispositive of the present case. If this Court does not accept jurisdiction and then upholds the Aspen result, Drew will have no remedy.

CONCLUSION

The District Court of Appeal accepted a decision as precedent in a situation materially at variance with the case relied upon. The lower court's opinion directly and expressly conflicts with the decisions of two other District Courts of Appeals on the identical issue of law. This Court should exercise its jurisdiction here.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to James C. Truett, Esquire and Richard B. Collins, Esquire, 810 Thomasville Road, P.O. Box 550, Tallahassee, Florida and by hand deliver to Frank C. Bozeman, 25 W. Cedar Street, Pensacola, Florida 32501, this 20th day of February, 1990.

CHARLES J. KAHN, JR.
Bar No: 243051
Levin, Middlebrooks, Mabie,
Thomas, Mayes & Mitchell, P.A.
226 South Palafox Place
Post Office Box 12308
Pensacola, Florida 32581
Attorneys for Plaintiffs/Petitioners