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

JACK DREW AND FAITH DREW
Husband and Wife,

Petitioner,

vs.

GORDON T. COUCH, M.D.

Respondent.
_____/

Petition for Review
from the District Court of
Appeal for the First District
of Florida. CASE NO. 88-03127

RESPONDENT'S REPLY BRIEF TO PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner's statement does not reflect the journey of this case through the courts and accordingly the following statement is made.

The case has been before the District Court twice and the Supreme Court once. In the last appearance before the Supreme Court, Drew v. Couch, 529 So.2d 693 (Fla. 1989) this Court declined review of the First District Court of Appeals decision reported at 519 So.2d 1023 (Fla. 1st DCA 1988). When the case went back before the trial court for additional judicial labor to tax cost and attorney's fees, the trial court refused to award attorneys' fees and costs to Dr. Couch, The trial court's ruling was appealed by Dr. Couch's attorney and the First District Court of Appeal in the opinion Couch v. Drew, ____ So.2d ____ 14 FLW 2808 (Fla. 1st DCA Dec. 7, 1989), reversed the trial court. After motion for rehearing was denied, petitioner Drew filed his Notice to Invoke Discretionary Review,

The facts are simple, The initial malpractice action filed by Jack and Faith Drew against Dr. Gordon Couch was filed while

Ch. 768.56(1) Florida Statutes was in effect for its very brief life of less than one year. After a jury verdict in favor of Dr. Couch was entered, Drews took an appeal to the First District which was unsuccessful. Drew then sought review of the First Districts decision and this Court declined review. After remand, the trial judge denied the motion to tax attorneys' fees and costs saying:

> Since Gordon T. Couch, M.D., did not incur liability nor pay attorneys' fees nor costs, the award of fees and costs would be inappropriate based on the authority of Lafferty v. Tenant, 528 So.2d 1307 (Fla. 2d DCA 1988).

The trial court also cited the case of City of Boca Raton v. Boca Villas Corp., 372 So.2d 485 (Fla. 4th DCA 1979), as authority for its ruling.

Dr. Couch filed an appeal from this decision and the First District Court of Appeals in Couch v. Drew, supra, overruled the decision of the trial court. Predictably the Notice of Invoke Discretionary Review by this Court followed.

SUMMARY OF ARGUMENT

The applicable rule of appellate procedure which provides for Discretionary Jurisdiction of the Supreme Court is Rule 3.030(a)(2)(A)(IV) which states discretionary review may be sought to review

> "Decisions of district courts of appeal that: (IV) expressly and directly conflict with a decision of another court of appeal or of the Supreme Court on the same question of law."

There is no such showing by the petitioner in this case. None of the decisions cited are in express and direct conflict and none of the cases deal with attorney's fees under Chapter 768.56.

Under this set of facts the Supreme Court should decline to assume jurisdiction of the case.

> mandatory penalty in the form of a reasonable attorney's fee," in order to "discourage baseless claims, stonewall defenses and sham appeals . . . by placing a price tag through attorney's fees awards on losing parties who engage in these activities." Wright v. Acierno, **437** So.2d **242, 244** (Fla. 5th DCA **1983)** (emphasis supplied). The court held further that, if that intent was to be implemented, the fee award "must be based only on the reasonable value of the services, not on whether or how much the prevailing party has actually paid." Wright at **244** (emphasis supplied).

and next when this language is used:

> It is therefore apparent that, as with Section 57.105, the Legislature intended the possibility of a fee award to operate as a deterrent to "baseless" medical malpractice claims. Under the rationale set forth in Wright, the implementation of this legislative goad requires that the fee award thereunder must therefore "be based only on the reasonable value of the services, not on whether or how much the prevailing party has actually paid." Therefore. the payment of the fee by Couch's insurance company would be irrelevant to the deterrent effect intended by the Legislature to result from the operation of Section **768.56.**

The first reference in the opinion to Wright was to show how the courts have interpreted the use of the word "shall". The opinion went on to point out Wright decision also held the fee award must be based on the reasonable value of the services, not on how much the prevailing party has actually paid. The second reference to Wright was merely incidental to the opinion pointing out the deterrent effect of 768.56 (1) would be negative if Drew would not be assessed with attorney's fees and cost because Dr. Couch's insurance company had paid them initially. This certainly does not indicate extensive reliance upon the Wright decision. Not that it matters because reliance upon a District Court opinion by another court is not a basis for discretionary jurisdiction,

Next Drew complains the First District decision cannot be reconciled with Turner v. D.N.E., Inc., 547 So.2d 1245 (Fla. 4th DCA 1988) or Aspen v. Bayless, 552 So.2d 298 (Fla. 2d DCA 1989) review pending, Supreme Court Case Number 75,107.

Turner had been decided when this case was on appeal to the First District for the second time and this case only deals with the issue of an award of costs. Although petitioner says Turner

is identical, that is not the case. The opinion says:

> However, costs are only recoverable by a prevailing party who has either paid the costs or incurred liability to do so. City of Boca Raton v. Boca Villa Corp., 372 So.2d 495 (Fla. 4th DCA 1979). In this case, the plaintiff argues that because the defendant stipulated it did not have to pay the expenses and was not obligated under its insurance policy to reimburse its insurer, the award was in error. We agree. See, also, Lafferty v. Tennant, 528 So.2d 1307 (Fla. 2d DCA 1988).

In the case before the court the only stipulation concerning this point was "the parties having stipulated that said costs and attorneys' fees were paid by Gordon T. Couch's insurance carrier and were not paid by Gordon T. Couch." In the complained of opinion of the First District, Drews' counsel has apparently totally overlooked the language contained in the last sentence of the next to last paragraph of the opinion.

There is no express direct conflict between the complained of opinion authored by Judge Joanos and the opinion in Turner, supra.

Finally, petitioner says the opinion of the First District cannot be reconciled with Aspen v Bayless, 552 So.2d 298 (Fla. 2d DAC 1989). First of all the mere fact one District Court's opinion cannot be reconciled with an opinion from another District Court does not satisfy the requirement of Rule 9.030 (a)(2)(A)(iv). There must be express and direct conflict.

Although there is some language in Aspen, supra, stating the appellant's motion was to tax costs and attorney's fees, the Court was only dealing with costs. In this case we have a claim in behalf of Dr. Couch for attorney's fees pursuant to Ch. 768.56(1) and costs pursuant to Sec. 57.041 Florida Statutes (1983). The nature of the reasoning for the awarding of attorney's fees to a successful litigant were far different when the Legislature enacted Section 768.56 Florida Statutes and those reasons are not discussed at all in the cases relied upon by petitioner. There is no express direct conflict between the complained of decision and Aspen, supra. That may be an inability to reconcile the First District opinion with Aspen, supra, but again, that is not the test.

CONCLUSION

The petitioner has failed to properly invoke the jurisdiction of this Court and this Court should decline to consider review of the First District Court's opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a **copy** of the foregoing has been furnished by U.S. Mail to Charles J. Kahn, Jr., P.O. Box 12308, Pensacola, Florida 32581 and Frank C. Bozeman, 25 W. Cedar Street, Pensacola, Florida 32501, this 4 day of March, 1990,

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