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IN THE SUPREME COURT OF FLORIDA

4th DCA Case No: 89-01467
17th Circuit Court Case No: 86-30259 CT

GEORGE WILLIAMS, D.D.S.,

Petitioner,

vs.

FRED CAMPAGNULO a/k/a
FRED CAMP a/k/a FRED CAMPO,

Respondents.

RESPONDENT'S BRIEF ON JURISDICTION

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JURISDICTION

Petitioner has filed this Petition for review taking the position that there is conflict between the District Courts of Appeal. It is Respondent's position that the conflict, if any, is inherent in the Third District Court of Appeal and does not involve the decision in the instant case. As such, jurisdiction is not vested pursuant to Article 5, Section 3(b)3, Florida Constitution.

STATEMENT OF THE CASE AND STATEMENT AND FACTS

Respondent would basically adopt the Statement of the Case and Facts as set forth by Petitioner with brief exceptions. Those exceptions are set forth below.

The Motion to Dismiss filed by Petitioner for failure to follow the Pre-suit Screening Notice Requirement was denied by Order entered March 30, 1987 and Petitioner filed an Answer thereafter on April 3, 1987. Petitioner did not allege non compliance with the Pre-Suit Screening Statute as an affirmative defense and, as such, the concept of waiver and estoppel has application in this case.

Petitioner asserts that Respondent did not request an abatement at the trial level. The reason is clear. The Motion to Dismiss premised on non compliance with the Pre-Suit Screening Requirement was denied on March 30, 1987, and there was no reason for an abatement or a request for abatement.

SUMMARY OF THE ARGUMENT

The real alleged inconsistency or conflict between our case and Public Health Trust of Dade County v. Knuck, 495 So2d 834 (Fla 3rd DCA 1986), Berry vs. Orr 537 So2 1014 (Fla. 3rd DCA 1989), and Ingersoll v. Hoffman, 561 So2d 324 (Fla. 3rd DCA 1990) concerns whether or not the failure to allege compliance with or the failure to comply with the Pre-Suit Screening Requirements of Florida Statute 768.67 deprives the trial court of subject matter jurisdiction. The Fourth DCA has ruled that the Trial Court does have subject matter jurisdiction in Lindberg v. Hospital Corporation of America 545 So2d 1384 (Fla. 4DCA 1989) and in our case. The Third DCA has ruled that the Trial Court does not have subject matter jurisdiction in Knuck, Orr and Ingersoll. The Third DCA has also ruled that the Trial Court does have subject matters jurisdiction in Angrand v. Fox 552 So2d 1113 (Fla. 3rd DCA 1989). As such, the conflict, if any, on this issue is one inherent in the Third District Court of Appeal as opposed to between the Third District Court of Appeal and the Fourth District Court of Appeal.

In any event, the issue has been certified to this Court by the Third District Court of Appeal in Ingersoll. The issue concerning whether the trial court does or does not have subject matter jurisdiction when compliance with Florida Statute 768.67 has either not occurred or has not been alleged can be resolved by this Court on the basis of the questions certified in the

Ingersoll case. It is therefore not a question of conflict with our case but rather that inherent Third District Court of Appeal conflict which this Court should and can decide through the questions certified in Ingersoll.

ARGUMENT

The concept of certiorari jurisdiction on the basis of conflict between the District Courts of Appeal is to harmonize the law of the State of Florida on a particular issue of law. There appears to be some conflict between the Third District Court of Appeal on the issue of subject matter jurisdiction but the battle line is between the Third District Court of Appeal in Angrand which is consistent with the Fourth District Court of Appeal in Lindberg versus the decision in the Knuck, Orr and Ingersoll cases.

The resolution of this issue of subject matter jurisdiction is already before this Court through the certification of that question in the Ingersoll case. A decision in the Ingersoll case will resolve that issue of disharmony which exists in the Third District Court of Appeal. It will also enlighten all of the District Courts concerning the correct determination of that issue. As the conflict exists within the Third District Court of Appeal and not between the District Courts, there is no basis for conflict jurisdiction in our particular case.

CONCLUSION

In conclusion, the conflict, if any, appears to be within the Third District Court of Appeal and not a conflict between the District Courts of Appeal and does not concern the decision announced in our case. There is no reason for acceptance of conflict certiorari jurisdiction in this case therefore as the conflict of law, if any, can be decided by a decision involving the questions certified by the Third District of Appeal in Ingersoll.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: J. ROBERT MIERTSCHIN, JR., Presidential Circle, 4000 Hollywood Boulevard, Suite 465 S, Hollywood, Florida and BETSY GALLAGHER, 25 West Flagler Street, Penthouse, Miami, Florida 33130 on this 15 day of November, 1990.

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