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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT  
OF THE STATE OF FLORIDA

CAROLANN D. KOZEL,  
Petitioner,

v.

CASE NO. 80,380

D. STEVEN OSTENDORF, D.P.M.,  
Respondent.

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BRIEF OF RESPONDENT ON ISSUE OF JURISDICTION

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ON PETITION FROM THE DISTRICT COURT OF APPEAL, SECOND  
DISTRICT OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent, D. Steven Ostendorf, D.P.M., objects to the Statement of the Case and of the Facts in the Petitioner's brief. The second paragraph of that portion of Petitioner's brief improperly relies upon the dissenting opinion. See *Reaves v. State*, 485 So. 2d 829 (Fla. 1986). This brief will refer to the Petitioner's appendix with the symbol "A."

Petitioner appeals from an order entered by the Circuit Court dismissing her medical malpractice complaint. (A 1). The Circuit Court had previously entered an order of dismissal allowing Petitioner twenty days within which to amend her complaint. (A 2). That time was extended by agreement of the parties for an additional ten day period. (A 2). Petitioner, without leave of court or agreement of counsel, failed to file an amended complaint for more than five months after the agreed date. (A 2). The Circuit Court dismissed the amended complaint based upon the failure of the Petitioner to file within the allotted time. (A 2).

On review, the Second District Court of Appeal affirmed the dismissal. (A 2-3). It noted that the trial court has discretion to dismiss a complaint when the plaintiff fails to file a timely amendment. (A 2). It held that such an order of dismissal will not be reversed absent a finding of an abuse of discretion. (A 2). Based upon the extreme delay in amending the complaint, and based upon a lack of any showing that the delay was due solely to the fault of counsel, the

District Court was not persuaded that dismissal was an abuse of discretion. (A 2-3).

SUMMARY OF ARGUMENT

There is no express, direct conflict between the decision of the District Court in this case and the decision of the Fourth District Court of Appeal in *Clay v. Margate*, 546 So. 2d 434 (Fla. 4th DCA 1989), review denied, 553 So. 2d 1164 (Fla. 1989). The decisions are entirely consistent. Both appellate courts reviewed the dismissal of a complaint to determine whether the trial court had abused its discretion. In the *Clay* decision, the Court determined that the trial court had abused its discretion. In the instant case, it was determined that there was no abuse of discretion. The facts of the case are dissimilar, which fully explains the difference in result.

## ARGUMENT

The nature of the conflict upon which the Petitioner relies is not discussed in her brief. It appears that the Petitioner is arguing that the District Court applied a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case. See *City of Jacksonville v. Florida First National Bank of Jacksonville*, 339 So. 2d 632, 633 (Fla. 1976) (England, J., concurring); *Neilsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960).

In both *Clay v. City of Margate*, 546 So. 2d 434 (Fla. 4th DCA 1989), review denied, 553 So. 2d 1164 (Fla. 1989), and in the instant case, the District Courts were reviewing orders of dismissal in order to determine whether the trial courts had abused their discretion. The difference in result is explained by the difference in the circumstances reviewed by the District Courts. The majority opinion in the instant case reveals little of the circumstances which it reviewed in determining that no abuse of discretion was shown. In fact, the only circumstances revealed in the majority opinion are the fact that Petitioners delayed for more than five months in filing her amended complaint, and the fact that there was no showing that the delay was solely the fault of counsel. Additional factual materials are supplied in the dissenting opinion, but any conflict between the instant case and *Clay v. City of Margate*, must be established within the four corners

of the majority decision. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). A dissenting opinion cannot be used to establish jurisdiction. *Id.* Even if this Court were to consider the additional facts and circumstances related in the dissenting opinion, it is clear that there is no express, direct conflict between the two District Court opinions. The difference in result is based on the difference in circumstances.



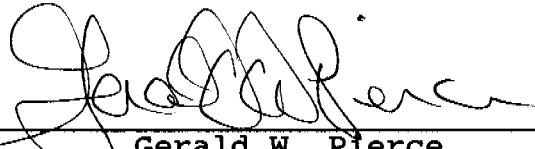
CONCLUSION

Respondent, D. Steven Ostendorf, D.P.M., requests that review be denied.

Respectfully submitted,

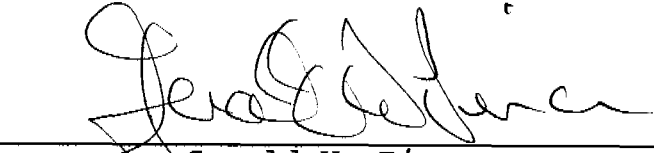
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By

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to KELLEY A. FINN, Suite 900, Courthouse Plaza, 28 West Flagler Street, Miami, Florida, 33130, by regular United States Mail this 22nd day of December, 1992.

  
\_\_\_\_\_  
Gerald W. Pierce