045

IN THE SUPREME COURT OF FLORIDA

CITY OF TAMPA,

Petitioner,

vs. Case No. 80,804

J.D. LONG and HELEN LONG,

Respondents.

ON PETITION TO REVIEW THE DECISION OF THE
FLORIDA SECOND DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON JURISDICTION

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The Case and Facts

In addition to the matters set forth in petitioner's brief, the Court should be aware of the following:

The jury found that J.D. Long had not suffered a permanent injury, but that Helen Long had. *R.565* Separate judgments were entered on the Longs' claims. *R.569, 570*

In its opinion, the District Court affirmed the judgment in favor of J.D. Long "without discussion."

> As to the final judgment entered in favor of Helen Long, we approve the jury instructions for the reasons explained in Philon v. Reid, 602 So.2d 648 (Fla. 2d DCA 1992). But see Rivers v. Mansfield [*sic*], 584 So.2d 1012 (Fla. 3d DCA 1991), jurisdiction accepted, 592 So.2d 1091 (Fla. 1992).

The instruction at issue in this case was that a permanent injury "may include" subjective complaints of pain. *R.479, 556* Mrs. Long's treating physician had testified that she was suffering from chronic pain as a result of the injuries she suffered in the accident, and that she would have the pain for the rest of her life. *R.15-16* Another doctor testified that he could relate Mrs. Long's subjective complaints of pain to objective findings, such as observable muscle spasms, and so forth. *R.119, 121, 122, 136*

The defendant's examining physician testified that he could find no objective evidence that Mrs. Long had suffered a permanent injury. When asked whether objective evidence would be necessary to a finding of permanent injury, the doctor said that each case had to be evaluated on its own merits. *R.402, 415, 421-22* As for Mrs. Long, the doctor recounted that during his

examination, her complaints of pain had been inconsistent; she would complain of pain during one test but not during another. *R.415*

Summary of Argument

The Court has no jurisdiction to review either of the respondents' judgments. Mr. Long's judgment was affirmed without discussion. Thus, in this regard the decision does not expressly conflict with any other.

In Mrs. Long's case, the jury was instructed that a permanent injury "may include" complaints of pain. This differed significantly from the instruction in Rivero v. Mansfield, *infra*, in which the court observed that the instruction advised the jury that pain *must* be considered a permanent injury. Moreover, in Mrs. Long's case medical witnesses did not disagree about whether pain could be considered a permanent injury. Rather, they differed as to whether Mrs. Long was actually in pain. The jury's resolution of that conflict in Mrs. Long's favor did not present a conflict with Rivero.

Argument

THE COURT HAS NO JURISDICTION TO REVIEW EITHER OF THE RESPONDENTS' JUDGMENTS.

Petitioner seeks review of the district court's decisions on the basis of alleged conflict with Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991). Decisional conflict sufficient to vest this Court with jurisdiction must be "express and direct". Article V, Section 3(b)(3), Florida Constitution.

In this case, J.D. Long's judgment was affirmed "without discussion." Thus, this Court has no jurisdiction to review the district court decision in regard to Mr. Long's judgment, because an affirmance without discussion cannot "expressly" conflict with any other decision. The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988); Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

Nor does the affirmance of Mrs. Long's judgment present any conflict with Rivero. In that case, the Third District declined to reverse where the trial judge had refused to instruct the jury that "The words 'permanent injury,' as used in the Florida No-Fault Law, include permanent subjective complaints of pain resulting from an initial organic injury." Rivero, 584 So.2d at 1013.

In an earlier case, Jones v. Smith, 547 So.2d 201 (Fla. 3d DCA 1989), the court had held it error for a judge to refuse to instruct the jury that "the words permanent injury include subjective complaints obtained resulting from an initial organic

injury." Jones, 547 So.2d at 201.

The Rivero court receded from Jones, positing that

> [a]n instruction that permanent injury includes permanent subjective complaints of pain incorrectly informs the jury that under the statute permanent pain is always permanent injury. In effect, such an instruction directs the jury to disregard the testimony of defense medical experts and is tantamount to the court directing a verdict for plaintiffs on the issue of permanent injury.

Rivero, 584 So.2d at 1014.

Even assuming the truth of that debatable proposition, what happened in Rivero and Jones did not happen here. Here, the trial judge did not instruct the jury that "permanent injury includes permanent subjective complaints of pain." Rather, he advised them that permanent injury "***may***" include subjective complaints of pain.

The difference is significant, for in no way did the judge's words suggest that subjective pain must always be permanent injury. In no way was the jury advised that it must disregard the testimony of the defendant's examining physician.

Rather, the jury was asked to do what the defendant's physician suggested: to consider Mrs. Long's case on its merits. In so doing, the jury weighed the testimony of the defendant's physician that Mrs. Long's complaints of pain were inconsistent against the testimony of Mrs. Long's physicians that she suffered from permanent pain that was consistent with their objective observations. In short, the jury accepted the latter view.

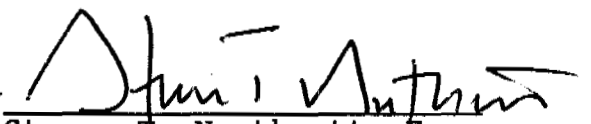
That being so, this case presents no conflict with Rivero. To accept jurisdiction would be a waste of judicial resources.

Conclusion

For the reasons described, the petition for review must be denied.

Respectfully submitted,

LEVINE, HIRSCH, SEGALL
& NORTHCUTT, P.A.

By 

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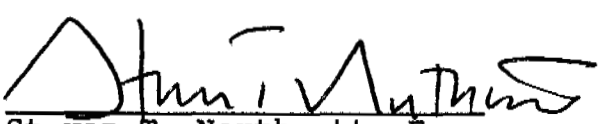
Certificate of Service

I certify that a copy of the foregoing has been furnished by U.S. Mail to Jack M. Larkin, Esq., 806 Jackson Street, Tampa, Florida 33602 on December 21, 1992.



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