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SID J. WHITE
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,012

DCA CASE NO. 94-00833

L.T. G.C. -93-2309 POLK

JOHN D. RUSSO,

Petitioner,

vs.

SERA-TEC BIOLOGICALS, INC. and
GEORGE M. REIS, M.D.,

Respondents.

______________________________/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

There is no conflict between the instant case and any other decision of this State. Rather, this is an appeal from a "citation PCA" where the referenced decision,[1] is pending review in this Court. Contrary to Russo's assertion, the referenced *R.J.* case arose from a certified question and not from an issue of conflict between jurisdictions. The pending action and the *R.J.* case are factually similar, procedurally identical and involve the same issue of law. Both the trial court and district court in the instant case cited to the *R.J.* case as authoritative.

Russo's complaint alleges that he donated blood at Sera-Tec, a blood donor clinic, on August 21, 1989. A portion of this blood was sent to the Highland Division of Travenal Laboratory, Inc., Plasma Screening Laboratory for various screening, including a test for the HIV virus. Highland's screening test was positive for HIV on both August 29, 1989 and again on September 5, 1989, when a duplicate screening was performed. Russo alleges that these results were reported to Sera-Tec.

On October 26, 1989, Russo again returned to Sera-Tec to donate blood. Russo alleges that he was told he could not donate blood and must speak with Dr. Reis, a Sera-Tec employee. Russo claims that Dr. Reis told him that he had tested positive for HIV and gave him instructions for clinical follow up. Dr. Reis did not

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[1] *R.J. and P.J. v. Humana of Florida, Inc.*, 625 So.2d 116 (Fla. 5th DCA 1993), *rev. granted* 634 So.2d 626 (March 4, 1994), orally argued June 7, 1994.

retest Russo. Sera-Tec and Dr. Reis both asserted that Russo was not told that he tested positive for HIV; rather, Russo was told only that he could no longer donate plasma because he cohabitated with another person who had tested positive for HIV.

On October 1, 1992, Russo sought treatment in a Connecticut hospital for a cold and sore throat. Blood drawn in Connecticut showed that Russo was not HIV positive and did not have AIDS. This information was communicated to Russo on November 15, 1992. Following service of a notice of intent to initiate a malpractice action and timely rejection of the claim, the instant lawsuit was filed.

Dr. Reis and Sera-Tec both moved to dismiss the complaint on the ground that it was barred by the impact rule. The case of *R.J. and P.J. v. Humana of Florida, Inc.*, 625 So.2d 116 (Fla. 5th DCA 1993), *rev. granted*, 634 So.2d 626 (Fla. March 4, 1994), was cited. At the hearing on the motion to dismiss, Russo stipulated to the absence of impact and acknowledged that the *R.J.* case was controlling. The trial judge acknowledged his obligation to follow the decisional law of the District Court of Appeal and granted the motion to dismiss with prejudice. On appeal, the Second District initially issued a *per curiam* affirmance, without citation to any authority. Russo moved for clarification, requesting the District Court to state whether the *R.J.* decision was controlling authority so that the instant discretionary appeal could proceed. Clarification was granted and a "citation PCA" was substituted for the original *per curiam* affirmance without citation.

ISSUE

WHETHER REVIEW OF A "CITATION PCA" CASE IS LIMITED TO CONSOLIDATION WITH THE CONTROLLING CASE WHICH IS PENDING IN THIS COURT.

ARGUMENT SUMMARY

The instant case is a simple "citation PCA" which references a case that is pending review in this court upon a certified question. The referenced case was cited as controlling authority by both the trial court and district court, raises the identical point of law, and is both factually and procedurally the same. There is no basis for a full review of the instant decision in this court. Rather, the case should simply be "paired" with the *R.J.* decision so that its resolution will be consistent.

ARGUMENT

REVIEW OF A "CITATION PCA" CASE IS LIMITED TO CONSOLIDATION WITH THE CONTROLLING CASE WHICH IS PENDING IN THIS COURT.

Russo's argument and citation to case law is far afield from the issue before this court. No conflict is presented by this citation PCA case. There is no basis for a historical discussion of the impact rule or any reference to the cases of *Champion v. Gray*, 478 S.2d 903 (Fla. 1985); *Gilliam v. Stewart*, 291 So.2d 593 (Fla. 1974); or *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992).

The *R.J.* case was before this court on a certified question. The *R.J.* decision was cited by both the trial court and the district court as controlling. The cases are factually similar, involve precisely the same point of law, and followed the same procedural history. There is no necessity for merit briefs or oral arguments in the instant case because the issue has been fully briefed and orally argued in the *R.J.* case. The instant case should be simply "paired" or consolidated with *R.J.* so that the *R.J.* decision will automatically be followed. *Jollie v. State*, 405 So.2d 418 (Fla. 1981).

In an abundance of caution, this brief response on the merits of Russo's argument is offered. Because Russo has specifically admitted that he suffered no impact, the trial court correctly recognized that he cannot state a cause of action because of the impact doctrine. *Champion; Gilliam, supra.* The *Kush v. Lloyd* case, *supra*, is readily distinguishable. The public policy arguments that were

raised in *Kush* are inapplicable here. The *Kush* plaintiffs gave birth to a severely impaired child as a result of negligent advice and treatment of a physician. Had appropriate medical advice been given, the parents would not have conceived or given birth to the congenitally deformed child. In contrast, *R.J.* is healthy and alleges only that he was told about false positives on two separate HIV blood tests performed by a third party.

CONCLUSION

This court should accept jurisdiction only for the limited purpose of pairing or consolidating the instant case with the case of *R.J. and P.J. v. Humana of Florida, Inc.*, 625 So.2d 116 (Fla. 5th DCA 1993), *rev. granted* 634 So.2d 626 (March 4, 1994) which is currently pending in this court. Merit briefs and oral argument are unnecessary.

Respectfully Submitted,

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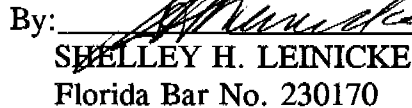
By: 
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 3rd day of February, 1995, to: Richard T. Kozek, Jr., Esquire, 9100 South Dadeland Boulevard, Suite 400, One Datran Center, Miami, FL 33156.

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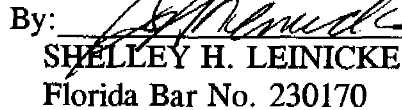

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