IN THE SUPREME COURT OF FLORIDA

CASE NO. 94-03823

85,491

The Estate of MARGARET MAGGIACOMO, deceased, by and through the Personal Representative, DOUGLAS B. STALLEY,

Plaintiff/Petitioner,

vs.

BEVERLY ENTERPRISES-FLORIDA, INC., d/b/a BEVERLY GULF COAST-FLORIDA, INC., d/b/a WELLINGTON MANOR NURSING HOME

Defendant/Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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OTHER AUTHORITIES:

STATEMENT OF CASE AND FACTS

The facts are set forth in the decision of the Second District Court of Appeal:[1]

> Douglas Stalley, as the personal representative of the Estate of Margaret Maggiocomo, sued Beverly and sought damages for the deprivation of Mrs. Maggiocomo's nursing home resident's rights, pursuant to section 400.023, Florida Statutes (1993). The specific misconduct alleged is the theft of a diamond ring from Mrs. Maggiocomo's finger. The complaint asserts that a nurse's aid forcibly removed the ring, resulting in bruising to Mrs. Maggiocomo's finger. No arrest was made and Mrs, Maggiocomo subsequently died of unrelated causes.
>
> To amend a complaint to add a claim for punitive damages, the plaintiff must provide evidence of acts which prima facie show a malicious, wanton, or willful disregard of the rights of others. Key West Convalescent Center, Inc. v. Doherty, 619 So. 2d 367 (Fla. 3d DCA 1993). To sustain this burden, Stalley relied on Mrs. Maggiocomo's medical chart which reflected that the ring was missing and the finger was bruised and a police report which stated that an employee was a suspect.
>
> These facts are totally inadequate to sustain a claim for punitive damages against an employer based on vicarious liability. **See** Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981).
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> . .

(A. 2). The court granted the petition for certiorari and quashed the trial court's order permitting the plaintiff to plead a claim for punitive damages.

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[1] In this brief, the symbol "A" will designate the Appendix to the Petitioner's Brief on Jurisdiction.

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POINT INVOLVED ON CERTIORARI

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH THE DECISIONS FROM THE FIRST AND FIFTH DISTRICT COURTS OF APPEAL IN GLOBE NEWSPAPER CO. V. KING, 643 SO. 2D 676 (FLA. 1ST DCA 1994), pending on review, NO. 84-676; CHRYSLER CORP.. INC. V. PUMPHREY, 622 SO. 2D 1164 (FLA. 1ST DCA 1993); OR HARLEY HOTELS V. DOE, 614 SO. 2D 1133 (FLA. 5TH DCA), rev. denied, 626 SO. 2D 205 (FLA. 1993)?

SUMMARY OF THE ARGUMENT

Petitioner seeks to invoke this Court's jurisdiction on the basis of alleged conflict with decisions from the First and Fifth District Courts of Appeal. The decision of the Second District Court of Appeal is not in express and direct conflict with the cited decisions.

This case deals with an order permitting the plaintiff to amend his complaint to allege a claim for punitive damages, pursuant to section 768.72, Florida Statutes (1993). Although a hearing was held on the plaintiff's motion for leave to amend at which the plaintiff made a perfunctory proffer, the Second District Court of Appeal determined that the trial court departed from the essential requirements of law in permitting a pleading for punitive damages on the basis of such a proffer.

The decision of the Second District is not in conflict with the cited decisions from the First and Fifth District Courts of Appeal, to the extent that those decisions did not involve an evidentiary proffer which was, for all intents and purposes, a sham.

The purported "proffer" in this case amounted to no proffer at all. Accordingly, the Second District Court of Appeal appropriately determined that the order was reviewable by certiorari to redress the defendant's substantive right to be free from a baseless claim for punitive damages.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IS NOT IN DIRECT CONFLICT WITH THE DECISIONS FROM THE FIRST AND FIFTH DISTRICT COURTS OF APPEAL IN GLOBE NEWSPAPER CO. V. KING, 643 SO. 2D 676 (FLA. 1ST DCA 1994), pending on review, NO. 84-676; CHRYSLER CORP., INC. V. PUMPHREY, 622 SO. 2D 11644 (FLA. 1ST DCA 1993); OR HARLEY HOTELS V. DOE, 614 SO. 2D 1133 (FLA. 5TH DCA), rev. denied, 626 SO. 2D 205 (FLA. 1993)

Petitioner seeks to invoke this Court's "conflict law jurisdiction." This Court's discretionary review is restricted to decisions of the district court that

> expressly and directly conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law.

Art. V, § 3(b)(3), Fla. Const. See also Fla. R. App. P. 9.030 (a)(2)(A)(iv).

Prior to the 1980 amendment to Article V of the Florida Constitution, this Court construed the "conflict of law" provision to require one of two events at the district court level:

> (1) "Announcement" of a rule of law conflicting with a rule previously announced by this Court or district; or
>
> (2) The application of a rule of law to produce a substantially different result in a case which involves "substantially the same facts" as a prior case.

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Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975); Nielson v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960).

This Court has no jurisdiction to review the instant decision of the Second District because the decision neither announces a conflicting rule of law, nor applies the rule of law to produce a substantially different result in a case involving substantially similar facts. No conflict arises by virtue of "misapplication of law" because the Second District Court of Appeal did not "rely on a decision which involves a situation materially at variance with the one under review," **see** Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980), nor did it misinterpret or misapply any rule announced by this court. **See** Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039 (Fla. 1982).

Petitioner bases his claim of conflict on the fact that the First District Court of Appeal in Globe Newspaper Co. v. King, 643 So. 2d 676 (Fla. 1st DCA 1994), pending on review, No. 84-676, certified conflict between that decision and decisions from the Third and Fourth District Courts of Appeal in Henn v. Sandler, 589 So. 2d 1334 (Fla. 4th DCA 1991); Kraft General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA 1994), rev. denied, 642 So. 2d 1363 (1994); and Commercial Carrier Corp. v. Rockhead, 639 So. 2d 660 (Fla. 3d DCA 1994). The conflict between the instant decision and the cited decisions, however, is not so readily apparent.

Petitioner's argument is insufficient to invoke this Court's discretionary jurisdiction because, unlike the cases cited, the so-

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called "proffer" in this case amounted to nothing more than a perfunctory exercise. As recited in the district court's opinion, the only "evidence" proffered was a police report and Mrs. Maggiocomo's medical records. There was absolutely no evidence proffered regarding what the nursing home did wrong which would warrant an award of punitive damages.

The proffer in this case was so devoid of substance that this case is more properly viewed as a "no proffer" case, than a case where the district court of appeal is called upon to weigh the evidence in the certiorari proceeding. No district court has yet ruled on the question whether certiorari will lie to review a trial court's order permitting a punitive damages pleading where the plaintiff's proffer is, in essence, a sham.

Accordingly, there is no conflict between the instant decision of the Second District and the cited decisions.

CONCLUSION

The instant decision of the Second District Court of Appeal does not conflict with decisions relied upon by petitioner as a basis for the exercise of this Court's discretionary jurisdiction. The arguments raised in support of jurisdiction amount to a challenge to the correctness of the district court's decision, without demonstrating that conflict exists.

The Supreme Court of Florida was never intended to be the final court of final appellate jurisdiction to review district court decisions which do not expressly and directly conflict with other appellate court decisions.

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This Court should not exercise its discretionary jurisdiction.

Respectfully submitted,

BY: Gail Parenti
Gail Leverett Parenti

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21st day of April, 1995 to: EDWARD J. LYONS, ESQUIRE, Wilkes and McHugh, Tampa Commons, Suite 601, One North Dale Mabry Highway, Tampa, FL 33609; and BENNIE LAZARRA, ESQUIRE, 606 E. Madison Street, Suite 2001, Tampa, FL 33602.

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