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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

JONATHAN T. FISHER,

Petitioner,

v.

CASE NO. 92,502
5DCA CASE NO. 96-2593

STATE OF FLORIDA,

Respondent.
______________________/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner's conviction and sentence were affirmed without opinion by the Fifth District Court of Appeal. Fisher v. State, 23 Fla. L. Weekly D303 (Fla. 5th DCA January 23, 1998). In so holding, the district court found this case to be controlled by Smith v. State, 683 So.2d 577 (Fla. 5th DCA 1996), State v. Scott, 692 So.2d 234 (Fla. 5th DCA), rev. granted, 698 So.2d 840 (Fla. 1997), and White v. State, 689 So.2d 371 (Fla. 2d DCA), rev. granted, 696 So.2d 343 (Fla. 1997).

SUMMARY OF THE ARGUMENT

In deciding this case, the district court relied on its earlier opinions in Smith v. State, 683 So.2d 577 (Fla. 5th DCA 1996), State v. Scott, 692 So.2d 234 (Fla. 5th DCA), rev. granted, 698 So.2d 840 (Fla. 1997), and the Second District's opinion in White v. State, 689 So.2d 371 (Fla. 2d DCA), rev. granted, 696 So.2d 343 (Fla. 1997). Review was granted in both Scott and White, which are presently before this Court, therefore, this Court would also have jurisdiction to review the instant case.

ARGUMENT

IT APPEARS THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THIS CASE SINCE REVIEW WAS GRANTED IN SCOTT AND WHITE.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. Where the district court's decision is a per curiam opinion which cites as controlling law a decision that is either pending review in or has been reversed by this Court, this Court has the discretion to accept jurisdiction. Jollie v. State, 405 So.2d 418, 420 (Fla. 1981).

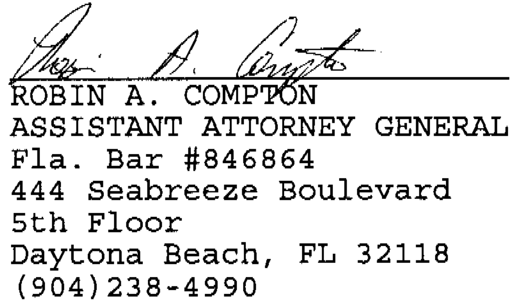
Here, the district court found this case to be controlled by its earlier opinions in Smith v. State, 683 So.2d 577 (Fla. 5th DCA 1996), State v. Scott, 692 So.2d 234 (Fla. 5th DCA), rev. granted, 698 So.2d 840 (Fla. 1997), and the Second District's opinion in White v. State, 689 So.2d 371 (Fla. 2d DCA), rev. granted, 696 So.2d 343 (Fla. 1997). A petition for review of Scott and White has been granted and the cases are presently pending before this Court. It appears that jurisdiction would be appropriate in this case as well.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court to accept jurisdiction of this case since review was granted in Scott and White.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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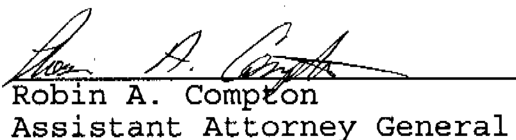
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been furnished by interoffice mail/delivery to Michelle A. Lucas, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL, 32114, this 3rd day of March, 1998.



Robin A. Compton
Assistant Attorney General

(DAUKSCH, J.) This is an appeal from a final judgment in an eminent domain case.

For two reasons we must reverse the judgment and remand the case for a new trial. The first reason is that the person the county called as a witness as to the value of the property was unable or unwilling to provide the court and jury with proper documentation and support for his opinion as to the value of the property being taken. Although he said that he "used market data, interviews with [persons] and other materials . . . to come up with these adjustments," on cross-examination he would not or could not produce any of the market data or names of persons to support his statements. His testimony was inherently incredible.

The second reason is that this same witness, a county employee, was permitted, over objection, to tell the jury that the notice of taking was not accurate; that the county was not really going to take all of the land it would be entitled to, under the ultimate judgment, so the appellant was not going to lose as much as had been originally proposed. Thus, he suggested that the jury award a lesser amount than what appellant would get under the entire taking. Although the appellant sought a mistrial for this behavior, the trial judge allowed the county to "amend" its notice of taking midtrial. Once that skunk was tossed into the jury box, the trial needed aborting.

REVERSED and REMANDED. (HARRIS and ANTOON, JJ., concur.)

* * *

SALEM VILLAGES MRDD, INC. v. E.C. KENYON CONSTRUCTION COMPANY, INC. 5th District. #97-635. January 23, 1998. Appeal from the Circuit Court for Orange County. Affirmed. *See Prosperi v. Code, Inc.*, 626 So. 2d 1360 (Fla. 1993); *Moritz v. Hoyt Enterprises*, 604 So. 2d 807 (Fla. 1992).

[illegible]WE v. STATE. 5th District. #97-3309. January 23, 1998. 3.800 Appeal [illegible] the Circuit Court for Orange County. AFFIRMED. *See State v. Mattress*, 686 So. 2d 740 (Fla. 5th DCA 1997).

HUMBERT v. STATE. 5th District. #97-3469. January 23, 1998. 3.850 Appeal from the Circuit Court for Marion County. AFFIRMED. *See State v. McCloud*, 577 So. 2d 939 (Fla. 1991); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

McGEE v. STATE. 5th District. #97-1960. January 23, 1998. Appeal from the Circuit Court for Osceola County. AFFIRMED. *See* Fla. R. App. P. 9.140(b)(2)(B); *Robinson v. State*, 373 So. 2d 898 (Fla. 1979).

FISHER v. STATE. 5th District. #96-2593. January 23, 1998. Appeal from the Circuit Court for Orange County. AFFIRMED. *See Smith v. State*, 683 So. 2d 577 (Fla. 5th DCA 1996); *State v. Scott*, 692 So. 2d 234 (Fla. 5th DCA), *rev. granted*, 698 So. 2d 840 (Fla. 1997); *White v. State*, 689 So. 2d 371 (Fla. 2d DCA), *rev. granted*, 696 So. 2d 343 (Fla. 1997).

* * *

Dissolution of marriage—Child custody—Visitation—Evidence—Hearsay—Establishment of visitation arrangements on basis of testimony of child's treating psychologist relating child's statements regarding mother's inappropriate conduct—Reversal required where trial court did not make necessary statutory findings relating to reliability of statements of child

ERIC A. COBERLY, Appellant, v. KAREN COBERLY, Appellee. 1st District. Case No. 97-493. Opinion filed January 21, 1998. An appeal and cross-appeal from the Circuit Court for Duval County. Frederick B. Tygart, Judge. Counsel: Ada A. Hammond and Glenn K. Allen of Johnston & Hammond, Jacksonville, for Appellant. Joy A. Lordahl, Jacksonville, for Appellee/Cross-Appellant. Michael M. Naughton, Jacksonville, for Maternal Grandparents.

(PER CURIAM.) In this appeal and cross-appeal, both Eric A. Coberly (the former husband) and Karen Coberly (the former wife) challenge the lower court's order which, among other things, grants primary residential custody to the former husband, supervised visitation to the former wife, and visitation to the maternal grandparents. The record is clear that the trial court established these visitation arrangements primarily to protect the parties' minor child in view of the court's finding that the former wife "more likely than not did act inappropriately in the presence of and with the minor child of the parties." This finding was based primarily upon testimony of the child's treating psychologist "that the minor child had expressed the fact that her mother [the former wife] . . . had engaged in certain conduct which is highly inappropriate [including] . . . inappropriate sexually related kissing, lifting up of dresses and looking a [sic] women's underwear, tying the child up, and improper touching of the child's genitalia." The former wife has consistently and vigorously denied engaging in any such inappropriate actions and objected to the introduction of this hearsay testimony of the child on the grounds that the requirements of section 90.803(23), Florida Statutes (1995), had not been met. Because the trial court failed to make the necessary findings under section 90.803(23) relating to the reliability of the statements of the child, we reverse. *See M.W. v. Department of Health and Rehabilitative Serv.*, 651 So. 2d 754 (Fla. 1st DCA 1995); *Weatherford v. State*, 561 So. 2d 629, 633 (Fla. 1st DCA 1990); *Salter v. State*, 500 So. 2d 184, 185 (Fla. 1st DCA 1986).

In view of our holding here, we find it unnecessary to address the other issues raised on appeal. On remand, the trial court, upon the appropriate motion, may again consider the findings and determinations required by section 90.803(23) and, in its discretion, may take additional testimony and hear additional argument concerning the visitation issues, including issues relating to grandparent visitation. *See Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996); *Sketo v. Brown*, 559 So. 2d 381 (Fla. 1st DCA 1990); *Von Eiff v. Von Eiff*, 22 Fla. L. Weekly D2176 (Fla. 3d DCA September 16, 1997); *Fitts v. Poe*, 22 Fla. L. Weekly D2265 (Fla. 5th DCA September 26, 1997).

REVERSED and REMANDED for proceedings consistent with this opinion. (BOOTH, JOANOS AND VAN NORTWICK, JJ., CONCUR.)

* * *

Criminal law—Manslaughter by culpable negligence—Proximate cause—Evidence that defendant consumed beer to the point of intoxication while driving vehicle, that defendant then insisted that minor passenger who had no driver's license drive vehicle, and that minor unlicensed driver fell asleep while driving vehicle, with result that vehicle crossed center lane and killed victim, sufficient to establish prima facie case of manslaughter by culpable negligence—The harm that occurred was foreseeable and within the scope of the danger created by defendant's negligent conduct—Error to dismiss information

STATE OF FLORIDA, Appellant, v. GREGORY ALAN MORRIS, Appellee. 1st District. Case No. 97-1108. Opinion filed January 21, 1998. An appeal from the Circuit Court for Santa Rosa County. Paul A. Rasmussen, Judge. Counsel: Robert A. Butterworth, Attorney General; L. Michael Billmeir, Assistant Attorney General, Tallahassee, for Appellant. Spiro T. Kypreos, Pensacola, for Appellee.

(LAWRENCE, J.) The State appeals the dismissal of an amended information charging Gregory Alan Morris (Morris) with manslaughter. The charge arose from an auto collision on January 12, 1996, in Santa Rosa County. We reverse.

Morris filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). Morris, in order to prevail on such a motion, must allege undisputed material facts, and show that the undisputed facts do not establish a prima facie case. *State v. Parrish*, 567 So. 2d 461 (Fla. 1st DCA 1990). We are required to review the trial court's ruling resolving inferences from all facts in the light most favorable to the State. *Boler v. State*, 678 So. 2d 319 (Fla. 1996); *Parrish*. We moreover must determine, not whether a jury *would* find a defendant guilty of the charged crime but, rather, whether the facts *could* be sufficient for a jury to convict a defendant. *State v. Knight*, 622 So. 2d 188, 190 (Fla. 1st DCA 1993) ("Whether or not a jury would ultimately find or would be justified in finding [the defendant] guilty is not now our concern.").

The facts of the instant case establish a prima facie case of manslaughter by culpable negligence. The trial court thus erred in ruling, as a matter of law, that the facts do not establish a prima facie case. The court reached this ruling by concluding that no

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