IN THE SUPREME COURT
STATE OF FLORIDA

FILED
SID J. WHITE
JUL 24 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

CASE NO. 93,353

SHIRLEY G. SAWCZAK,

Appellant,

v.

ALAN L. GOLDENBERG, M.D.,
ALAN L.GOLDENBERG, M.D., P.A.
J. STERNBERG and S. SCHULMAN, M.D.
CORP., ALAN ALARCON, M.D., and
HUMANA INC., d/b/a WESTSIDE
REGIONAL MEDICAL CENTER f/k/a
HUMANA HOSPITAL BENNETT

Appellees.

APPEAL FROM THE FOURTH DISTRICT COURT
OF APPEAL OF FLORIDA
CASE NO. 96-02253

JURISDICTIONAL BRIEF OF APPELLEE, ALAN ALARCON, M.D.

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STATEMENT OF THE CASE AND FACTS

Petitioner's entire statement of the case and facts is improperly comprised of facts which are not contained within the four corners of the Fourth District Court of Appeal's opinion. This Court, under similar circumstances, has made it abundantly clear that:

> [t]he only facts relevant to our decision to accept or reject [discretionary review] are those facts contained within the four corners of the decisions allegedly in conflict ... Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here.[1]

Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986). See also Hardee v. State, 534 So. 2d 706, 708 (Fla. 1988) (for purposes of determining conflict jurisdiction, Supreme Court is limited to facts appearing on face of the opinion), citing White Constr. Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984).

Thus, respondent, Alan Alarcon, M.D. ("Dr. Alarcon"), will not compound Petitioner's improprieties by taking issue with the "pointless and misleading" assertion of facts contained in Petitioner's Jurisdictional Brief. Rather, Dr. Alarcon relies on the facts supplied by the Fourth District Court of Appeal in its opinion below. (App. 1).[2]

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[1]All emphasis has been supplied by counsel unless otherwise noted.

[2]"App." refers to the Appendix of Petitioner's Brief on Jurisdiction.

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ISSUE

WHETHER THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME QUESTION OF LAW.

SUMMARY OF ARGUMENT

The opinion in this case comports with the Fourth District's own well-settled precedent and is in accord with this Court's rule that contemporaneous objections must be made when an alleged prejudicial remark is made during closing argument. There is no conflict. Neither of the cases cited by Petitioner conflict with the district court's holding here.

In addition, the district court did not find that the comments challenged in this case were pervasive or constituted fundamental error. Thus, there is no express or direct conflict between this case and the decisions of another district court or this Court on the same question of law. This Court has no jurisdiction and review should be denied.

ARGUMENT

THE DISTRICT COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

This Court has jurisdiction over any decision of a district court of appeal "that expressly and directly conflicts 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. The Fourth District's decision in this case does not depart from an established question of law. Rather, the court's decision is in complete accord with its own established precedent and the holdings

of this Court.

Petitioner erroneously claims that

> the Fourth District eliminated the fundamental error exception to the requirement of an objection to improper argument. According to the Fourth District, no matter how egregious and pervasive the improper comment, no error will be held absent objection to the comment.

(Petitioner's Brief on Jurisdiction, pp. 9-10). The Fourth District made no such holding. To the contrary, the court simply stated:

> [w]hile we agree with Sawczak that many of defense counsel's arguments were improper and often egregious, her attorney's failure to object specifically and contemporaneously to them waived any error that occurred. See Murphy v. Int'l Robotics Systems, Inc., No. 97-0388 (Fla. 4th DCA Feb. 11, 1998); Nelson v. Reliance Ins. Co., 368 So. 2d 361 (Fla. 4th DCA 1978).

Clearly, the Fourth District's opinion does not establish (as Petitioner contends) that the court eliminated the "fundamental error exception" to the requirement that an objection be contemporaneously raised to an improper closing argument. Instead, the Fourth District's affirmance of the jury verdict and judgment entered therein was consistent with Castor v. State, 365 So. 2d 701 (Fla. 1978), where this Court said:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and unnecessary use of the appellate process results from a failure to cure early that which must be cured eventually.

Id at 703.

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In this case the Fourth District, in accordance with its own well-settled precedent, merely held that Petitioner's failure to specifically and contemporaneously object to defense counsel's argument waived any error that might have occurred. (App. 1). See e.g., Murphy v. Internat'l Robotics Systems, Inc., 23 Fla.L.Weekly D. 447 (Fla. 4th DCA February 11, 1998) ("in the thirty-three years since [the Fourth District] was created, it has never granted a new trial in a civil case grounded solely on improper argument where there was no objection during trial"). See also Nelson v. Reliance Ins. Co., 368 So. 2d 361 (Fla. 4th DCA 1978) (failure to object to improper argument is a judgment call by trial counsel and thus a tactical decision which waived error).

Moreover, the cases cited by Petitioner in support of jurisdiction, do not conflict with the district court's holding in this case. In Tyus v. Apalachicola Northern R.R. Co., 130 So. 2d 580 (Fla. 1961), this Court quashed the district court's reversal of a verdict based on an unobjected argument. This Court found that the trial court was "in a much better position than this court or the District Court to determine whether the alleged prejudicial remarks" constituted reversible error.[3] Id. at 588. Thus, rather than conflict with this decision, the Fourth District acted in accordance with Tyus when it affirmed the trial court's final judgment which was entered following a denial of petitioner's motion for new trial.

Furthermore, the decision here does not conflict with this

[3]Dr. Alarcon contends that the arguments in Tyus, discussed in the dissent, were far worse than the arguments in this case, and thus reversal of the jury verdict would be unwarranted.

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Court's holding in Seaboard Air Line R.R. Co. v. Strickland, 88 So. 2d 519 (Fla. 1956). In Strickland, responding to a multitude of improper remarks which ran throughout the entire course of the trial, this Court stated:

> [w]hile we are committed to the rule that in the ordinary case, unless timely objections to counsel's prejudicial remarks are made, this court will not reverse the judgment on appeal, however, this ruling does not mean that if prejudicial conduct of that character in its collective impact of numerous incidents, as in this case, is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, this court will not afford redress.

Id. at 523.

Unlike the comments in Strickland, which were interspersed throughout the whole trial, the remarks at issue in this case were confined to closing arguments. (App. 1). Thus, the reversal in Strickland is inapplicable to this case. See Lubell v. Roman Spa, Inc., 362 So. 2d 922 (Fla. 1978) (decision with materially different facts cannot serve as precedent).

In addition, the Fourth District in this case never found that the comments at issue here were pervasive or that they rose to the level of fundamental error.[4] Jankins v. State, 385 So. 2d 1356 (Fla. 1980), states that:

> This court may only review a decision of a district court of appeal that *expressly* and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary

[4]"Fundamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970).

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> definitions of the term "express" include: 'to represent in words'; 'to give expression to.' 'Expressly' is defined: 'in an express manner.'

Id. at 1359, quoting, Webster's Third New Int'l Dictionary. (1961 ed. unabr.). Thus, since the district court did not state that the closing arguments were pervasive or constituted fundamental error, there is no express and direct conflict with cases from the First, Third, and Fifth District or the decisions of this Court.[5]

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[5]Petitioner haphazardly contends that the opinion here expressly and directly conflicts with cases from the other districts, yet has failed to address the cases to which she refers. Instead, without discussion, Petitioner cites to "cases collected in Murphy, 23 F.L.W. at D449 n.1." In an abundance of caution, Dr. Alarcon notes that the cases discussed in footnote one of the Murphy decision do not expressly conflict with the decision in this case because in each and every one of those cases the courts specifically found that the improper comments either pervaded the trial or constituted fundamental error. See First District cases: Baptist Hosp., Inc. v. Rawson, 674 So. 2d 777 (Fla. 1st DCA 1996) (argument found to be "so pervasive as to effect the fairness of the proceeding"); Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254 (Fla. 1st DCA 1996) (attorney's prejudicial conduct, in its collective import, pervaded trial); Sacred Heart Hosp. of Pensacola v. Stone, 650 So. 2d 676 (Fla. 1st DCA 1995) (cumulative effect of prejudicial comments pervaded the trial and constituted fundamental error); Pippin v. Latosynski, 622 So. 2d 566 (Fla. 1st DCA 1993) (remarks constituted fundamental error). Third District Cases: Owens-Corning Fiberglass Corp. v. Crane, 683 So. 2d 552 (Fla. 3d DCA 1996) (closing argument found fundamentally erroneous); Martino v. Metropolitan Dade County, 655 So. 2d 151 (Fla. 3d DCA 1995) (cumulative effect of improper and prejudicial comments rose to level of fundamental error); George v. Mann, 622 So. 2d 151 (Fla. 3d DCA 1995) (closing argument compromised plaintiff's "right to a fair and legitimate trial."); Al-Site Corp. v. Della Croce, 647 So. 2d 296 (Fla. 3d DCA 1994) (character attacks, name calling, and grossly inappropriate language pervaded the trial); Bloch v. Addis, 493 So. 2d 539 (Fla. 3d DCA 1986) (closing argument found to be fundamental error); Borden, Inc. v. Young, 479 So. 2d 850 (Fla. 3d DCA 1985). Fifth District Cases: Superior Ind. Internat'l, Inc. v. Faulk, 695 So. 2d 376 (Fla. 5th DCA 1997) (prejudicial conduct pervaded trial); Walt Disney World v. Blalock, 640 So. 2d 1156 (Fla. 5th DCA 1994) (closing argument constituted fundamental error); Silva v. Nightingale, 619 So. 2d 4 (Fla. 5th DCA 1993) (prejudicial conduct in its collective import pervaded trial); Schubert v. Allstate Ins. Co., 603 So. 2d 554 (Fla. 5th DCA 1992) (cumulative effect of inflammatory opening and closing statements

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Accordingly, this Court does not have jurisdiction to entertain this case. See Department of Health & Rehab. Servcs v. National Adopt. Counseling Servc, Inc., 498 So. 2d 888, 889 (Fla. 1986) ("conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction.").

CONCLUSION

Based on the foregoing arguments and authorities, there is no express and direct conflict between this case and a decision of another district court of appeal or this Court on the same question of law. Absent express and direct conflict, this Court has no jurisdiction to entertain this case. Review in this matter accordingly should be denied.

Respectfully submitted,

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constituted fundamental error).

CERTIFICATE OF SERVICE

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