

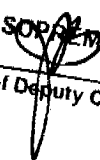
A35806-7/SHL/vsc/403535

IN THE SUPREME COURT OF FLORIDA
CASE NO. 93,353
DCA No. 96-2253

FILED

SID J. WHITE

JUL 23 1996

CLERK, SUPREME COURT
By 
Chief Deputy Clerk

SHIRLEY G. SAWCZAK,

Petitioner,

vs.

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,

Respondents.

**JURISDICTIONAL BRIEF OF
RESPONDENTS, J. STERNBERG and S. SCHULMAN, M.D. CORP.**

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STATEMENT OF THE CASE AND FACTS*

Sawczak appealed from a jury verdict and final judgment in which she was awarded more than four million dollars in her claim against the surgeon (Dr. Goldenberg) who removed her gallbladder, because a surgical clip was not removed at the conclusion of the operative procedure. The jury determined that the remaining health care providers (Dr. Alarcon (radiologist), J. Sternberg and S. Schulman, M.D. Corp. (employer of the radiologist) and Humana Bennett Hospital (where the surgery was performed) were not negligent.

Sawczak underwent laparoscopic surgery, where the surgeon visualizes the area through a TV screen located near the patient's head. The screen assists the surgeon in locating the relevant anatomical structures in the area of the surgical site prior to any cutting. Later, during the surgery, the surgeon may request intraoperative cholangiograms (films of the gallbladder which are enhanced by dye inserted through a catheter). Based upon the dye pattern, the surgeon may reconfirm the location of various structures. These films are optional because the surgeon may fully visualize the relevant structures through the TV screen.

*In the interest of economy, this respondent adopts the matters set forth in the jurisdictional brief of Dr. Alarcon.

While Dr. Goldenberg chose to obtain a cholangiogram, he did so ONLY to rule out gallstones and NOT for purposes of establishing "landmarks." Dr. Goldenberg wanted the dye contrast study only to verify that no gallstones were blocking the common bile duct and preventing the contrast material from flowing into the small intestines. All films taken during this procedure established that the dye travelled freely, that the area was properly clamped prior to surgery, and that no clips were improperly placed at the time these films were taken or interpreted. Dr. Goldenberg repeatedly testified that the radiologists could NOT have told him that the common bile duct was clamped because he did not take such action until AFTER the cholangiograms were completed.

The jury verdict was based on the substantial, competent evidence that Dr. Goldenberg properly clipped the cystic duct of the gallbladder then obtained the cholangiograms. AFTER the cholangiograms were given to the radiologist and interpreted, Dr. Goldenberg then misidentified one anatomical structure and clipped the common bile duct. The evidence established that there was no negligence or breach of the standard of care by either the radiologist, or vicariously, by the group which employed him.

Sawczak complained on appeal that improper remarks were made by various defense counsel during closing

argument. She did not object to the remarks of Sternberg and Schulman's counsel during the trial. While Sawczak's jurisdictional brief quotes lengthy passages from the trial transcript, it must be noted that the vast majority of these remarks were never the subject of any contemporaneous objection during the trial, and further, they were not included as part of the district court's opinion.

On appeal, the fourth district held that Sawczak's failure to object specifically and contemporaneously to closing remarks of opposing counsel waived any error that occurred. The appellate court quoted one comment where an objection was lodged, but noted that the trial court had sustained Sawczak's objection, *sua sponte* instructed the jury to disregard the comment, then considered Sawczak's timely motion for mistrial. The district court further noted that Sawczak withdrew this motion while it was being considered. The fourth district's opinion concluded with a determination that Sawczak failed to preserve the issue for appeal by failing to raise timely and specific objections.

Upon denial of Sawczak's motion for rehearing, this petition follows.

ISSUE ON APPEAL

WHETHER THIS HONORABLE COURT LACKS
JURISDICTION TO REVIEW THIS PETITION BECAUSE
THE INSTANT CASE IS NOT IN CONFLICT WITH ANY
DECISION.

ARGUMENT SUMMARY

While Sawczak asserts that the instant decision conflicts with decisions of the first, third and fifth districts, NO decisions from any of those courts are cited in her brief. The instant case is not in conflict with any decision of the Florida Supreme Court. Accordingly, conflict certiorari is not available because the instant decision is in harmony with the other case law of this state.

Sawczak's brief improperly recites and relies on matters not contained in the fourth district's opinion, and such argument cannot be used to create conflict jurisdiction.

ARGUMENT

THIS HONORABLE COURT LACKS JURISDICTION TO REVIEW THIS PETITION BECAUSE THE INSTANT CASE IS NOT IN CONFLICT WITH ANY DECISION.

Sawczak's petition sets forth no basis for invoking the jurisdiction of this Court based on an alleged conflict with decisions of other district courts for the simple reason that NO decisions of any other district courts have been cited in her brief.

The two decisions of this Court which are cited by Sawczak are factually distinguishable from the instant case and may be easily harmonized with the pending action. The two cited cases of *Seaboard Air Line R.R. Co. v. Strickland*, 88 So.2d 519 (Fla. 1956) and *Tyus v. Apalachicola Northern R.R. Co.*, 130 So.2d 580 (Fla. 1961), are in full accord with the case of *Murphy v. Int'l. Robotics Systems, Inc.*, No. 97-0388 (Fla. 4th DCA Feb. 11, 1998), which is cited in the instant appellate court's opinion.

Unlike the instant case, the *Seaboard* and *Tyus* cases involved claims of evidentiary errors as well as claims of improper comments during closing argument. Just as in the *Murphy, supra*, case, the appellate court may consider a claim of fundamental error in closing argument where it is coupled with an appeal of matters where the objections were properly preserved. The cited cases are distinguishable for an additional reason that is shown by even a cursory

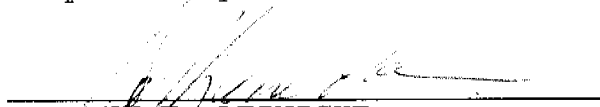
reading: timely objections were lodged to many, if not most, of the allegedly improper closing remarks.

Conflict certiorari is available only where there is a *direct* conflict between two decisions. Review is limited to those situations because of the concern for uniformity in decisions as precedent rather than the adjudication of the rights of particular litigants. *Mystan Marine, Inc. v. Harrington*, 339 So.2d 200 (Fla. 1976). Because the cases claimed to be in conflict are easily distinguishable both factually and legally, certiorari review on the grounds of conflict is not available. *Wilson v. Southern Bell Telephone & Telegraph Co.*, 327 So.2d 220 (Fla. 1976).

CONCLUSION

For the reasons set forth herein, no direct conflict exists between the instant decision and the two cases cited by Sawczak. No conflict can exist between the instant case and unreferenced decisions of other district courts of appeal. It is respectfully submitted that this Honorable Court lacks jurisdiction to review the instant decision and that Sawczak's petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed July 20, 1998, to: Robert J. Borrello, Esq., RUSSOMANNO FIORE & BORRELLO, P.A., Museum Tower, Suite 2101, 150 West Flagler Street, Miami, FL 33130, Attorney for Shirley Sawczak; Clark J. Cochran, Jr., Esquire, BILLING, COCHRAN, HEATH, LYLES & MAURO, P.A., 888 S.E. Third Avenue, Suite 301, Fort Lauderdale, FL 33316, Attorneys for Westside Regional Medical Center; Ronald FitzGerald, Esquire, FLEMING, O'BRYAN & FLEMING, Post Office Drawer 7028, Fort Lauderdale, FL 33338, Attorneys for Defendants Goldenberg; Crane A. Johnstone, Esq., GEORGE, HARTZ, LUNDEEN, FLAGG & FULMER, P.A., Third Floor, Justice Building East, 524 South Andrews Avenue, Fort Lauderdale, FL 33301, Attorney for Defendants Alarcon; Ila J. Klion, Esq., HICKS, ANDERSON & BLUM, P.A., New World Tower - Suite 2400, 100 North Biscayne Boulevard, Miami, FL 33132, Attorney for Alan Alarcon; John W. Mauro, Esquire, BILLING, COCHRAN, HEATH, LYLES & MAURO, P.A., 888 S.E. 3rd Avenue, Suite 301, Fort Lauderdale, FL 33316, Attorneys for Westside Regional Medical Center.

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