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IN THE SUPREME COURT OF THE
STATE OF FLORIDA

FIFTH DCA CASE NO. 98-02024
L.T. CASE NO. 97-2313 CA

FILED
DEBBIE CAUSSEAUX
AUG 31 1999
CLERK, SUPREME COURT
By

BECKY S. TORREY, Duly Appointed Personal Representative of the Estate of HELEN ROSE WOODARD, Deceased,

Plaintiff-Petitioner

vs.

LEESBURG REGIONAL MEDICAL CENTER, KENNETH KUPKE, M.D., and ROBERT HUX, M.D., Jointly and Severally,

Defendants-Respondents.

/

ANSWER BRIEF ON JURISDICTION OF RESPONDENTS, KENNETH KUPKE, M.D. AND ROBERT HUX, M.D.

On Notice of Appeal from the District Court of Appeal for the State of Florida, Fifth District

JEFFREY S. BADGLEY
Florida Bar No. 055417
RAFAEL E. MARTINEZ
Florida Bar No. 243248
RUTH C. OSBORNE
Florida Bar No. 0155977
McEWAN, MARTINEZ, LUFF, DUKES & RUFFIER, P.A.
Post Office Box 753
Orlando, Florida 32802-0753
Attorneys for Kenneth Kupke, M.D.

G. FRANKLIN BISHOP, III
Florida Bar No. 948489
~~JOHNSON & BUSSEY~~, P.A.
Post Office Box 531086
Orlando, Florida 32853
Attorneys for Robert Hux, M.D.

Bussey, White, McDonough and Freeman, P.A.,

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CERTIFICATE OF COMPLIANCE WITH TYPE SIZE-STYLE REQUIREMENTS

In compliance with the requirements of the Administrative Order of this Court, the undersigned certifies that the Respondents' Brief on Jurisdiction is produced in 12 point Courier New, a font that is not proportionately spaced.

JEFFREY S. BADGLEY
Florida Bar No. 0559417
RAFAEL E. MARTINEZ
Florida Bar No. 243248
RUTH C. OSBORNE
Florida Bar No. 0155977
McEWAN, MARTINEZ, LUFF DUKES & RUFFIER, P.A.
Post Office Box 753
Orlando, Florida 32802
Attorneys for Kenneth Kupke, M.D.

STATEMENT OF THE CASE AND FACTS

Plaintiff, Becky S. Torrey, as personal representative of the Estate of Helen Rose Woodard, deceased ("Petitioner") initiated this action on September 16, 1997 by the filing of her initial Complaint. The Complaint named as defendants, Leesburg Regional medical Center, Kenneth Kupke, M.D. and Robert Hux, M.D. ("Respondents") and was filed in the Circuit Court for the Fifth Judicial Circuit, in and for Lake County, Florida.

Petitioner's Complaint was signed by William J. McHenry, an attorney from Southfield, Michigan. (R.1) Because the Complaint was signed by a non-Florida lawyer, the trial court dismissed the action finding that the Complaint was a "nullity not subject to correction." Torrey v. Leesburg Regional Medical Center, 731 So. 2d 748, 749 (Fla. 5th DCA 1999). On April 1, 1999, the Fifth District Court of Appeal affirmed the trial court's decision dismissing Petitioner's Complaint. Petitioner's Motion for Rehearing was denied by the fifth district on April 1, 1999. Subsequently, Petitioner filed her initial brief with the Florida Supreme Court on or about July 16, 1999. This brief improperly argued the merits of the case and thus, Respondents filed timely Motions to Strike Petitioner's brief.

SUMMARY OF ARGUMENT

Art. V, § 3(b)(3), Fla. Const. empowers this Court to review the decision of a district court of appeal if that decision

expressly and *directly* conflicts with the decision of another district court of appeal. This express and direct conflict must be apparent from the four corners of the majority decision. In the instant case, there is no such express and direct conflict sufficient to invoke this Court's discretionary jurisdiction.

First, Petitioner's brief improperly extends beyond the four corners of the fifth district's opinion in an attempt to invoke this Court's jurisdiction. Second, Petitioner merely alleges an "apparent" conflict among the district courts of appeal rather than an express and direct conflict required by the Florida Constitution. Third, it is clear that no express and direct conflict exists between the four corners of the fifth district's decision and the decisions cited by Petitioner in her initial brief. Specifically, the cases cited by Petitioner can be limited to their facts and are easily distinguishable from the fifth district's decision.

Accordingly, due to the complete absence of an express and direct conflict, Respondents respectfully submit that this Court has no jurisdiction to consider this appeal.

ARGUMENT

On or about July 16, 1999, Petitioner filed her initial brief with this Court seeking discretionary review of a decision rendered by the Fifth District Court of Appeal on July 19, 1999. This brief is currently the subject of a pending Motion to Strike

due to Petitioner's failure to adhere to Fla. R. App. P. 9.120(d). Specifically, Petitioner's brief, entitled "Appellant's Initial Brief", substantially argues the merits of the matter under review rather than limiting its argument to invoking this Court's jurisdiction. It appears from Petitioner's brief that she is seeking discretionary review based upon alleged conflicts among the district courts of appeal.

Notwithstanding the fact that Petitioner essentially limits her brief to the merits of the appeal, it is abundantly clear that there is no express and direct conflict between the Fifth District Court of Appeal's decision and decisions of other district courts. The power of the Florida Supreme Court to review decisions of the various district courts of appeal is "limited and strictly prescribed." Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980) (citing Diamond Berk Ins. Agency, Inc. v. Goldstein, 100 So. 2d 420 and Sinnamon v. Fowlkes, 101 So. 2d 375). Moreover, the district courts of appeal are intended to be courts of final appellate review. Id. at 1358. Accordingly, this Court has discretionary jurisdiction to review a district court decision that *expressly* and *directly* conflicts with a decision of another district court or the Supreme Court on the same question of law. See Art. V, § 3(b)(3), Fla. Const. See also 385 So. 2d at 1359.

The 1980 revisions to Art. V, § 3(b)(3) were designed to

restrict this Court's jurisdiction and were premised on the idea that the Court should function as a "supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice . . . ." Id. at 1358. Thus, allowing district courts "to become intermediate courts of appeal" could be "detrimental to the general welfare and the speedy and efficient administration of justice." Id.

As previously discussed, Art. V. § 3(b)(3), Fla. Const. empowers this Court to review the decision of a district court of appeal if that decision *expressly* and *directly* conflicts with the decision of another district court of appeal. See Times Publishing Co. v. Russell, 615 So. 2d 158, 158 (Fla. 1993). This Court has defined "*expressly*" to mean "to represent in words" or "to give an expression to" 385 So. 2d 1356, 1359.

Moreover, this express and direct conflict "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). See also Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 223 (Fla. 1965). More specifically, this Court is not permitted to base conflict jurisdiction on a review of the record. See 485 So. 2d at 830 n.3. As this Court cautioned, "it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision

below, with citations to the record." Id.

Based upon these principles governing conflict jurisdiction, it is evident that there is no such express and direct conflict between the fifth district's decision and those of other district courts of appeal. First, contrary to the Constitution and the aforementioned precedent, Petitioner has improperly wandered outside the four corners of the fifth district's decision by citing to portions of the record not contained in the court's opinion. As such, the citations to the record on page one of Petitioner's brief that were not contained in the four corners of the fifth district's opinion should not be considered by this Court when deciding whether to accept or reject jurisdiction.

Second, Petitioner has not and cannot allege that the fifth district's decision *expressly* and *directly* conflicts with another district court decision. In her brief, Petitioner merely alleges that there is an "apparent" conflict among the district courts of appeal that have considered the central issue of this case. It is axiomatic that an "apparent" conflict is not sufficient to trigger this Court's discretionary jurisdiction. Moreover, it is unclear which cases Petitioner is relying on to allege this apparent conflict.

Assuming *arguendo* that Petitioner is attempting to allege a direct and express conflict between the fifth district's decision and the decision of the first district in Lincoln American Life

Ins. Co. v. Parris, 390 So. 2d 148 (Fla. 1st DCA 1980) and the third district's decision in Szteinbaum v. Kaes Inversiones y Valores, 476 So. 2d 247 (Fla. 3d DCA 1985), it is evident that no such conflict exists. In Lincoln, the first district held that a default entered against a corporation because its answer was signed by an attorney not licensed to practice in Florida was the result of excusable neglect. See 390 So. 2d at 149. In so holding, the court specifically stated that the lawyer's failure to comply with Fla. R. Jud. Admin. 2.060(b) was mitigated by "the shortness of time available to arrange for Florida counsel to serve a timely answer . . . ." Id. Similarly, in Szteinbaum, a corporate plaintiff filed a complaint signed by a non-attorney on behalf of the corporation. 476 So. 2d at 247. Based upon these facts, the third district held that the complaint's defect was curable since the representation of the plaintiff corporation was "brief, minimal and essentially innocuous." Id. at 250.

These cases are clearly distinguishable from the case at bar and therefore, there cannot be any express and direct conflict with the fifth district's decision. Both of these cases involve corporate parties which, unlike natural parties, cannot represent themselves and cannot appear in a court of law without an attorney. Id. at 248 (citing Nicholson Supply Co. v. First Federal Savings & Loan Assoc. of Hardee County, 184 So. 2d 438 (Fla. 2d DCA 1966)). However, in the instant case, Petitioner is

a natural person who could have signed the initial Complaint had her attorney not been able to arrange for Florida counsel.

Additionally, unlike in Lincoln, Petitioner's violation of Rule 2.060(b) cannot be mitigated by a shortness of time available to arrange for Florida Counsel. Petitioner's counsel initiated the instant action in February of 1997 with the service of a notice of intent to initiate litigation. Due to the numerous extensions provided by the presuit screening rules, Petitioner's counsel believed he had until October 13, 1997 to file the initial complaint. Even though he filed the complaint on September 16, 1997, he made no attempts to comply with Rule 2.060. Accordingly, Petitioner's failure to adhere to Rule 2.060(b) was by no means "brief, minimal and essentially innocuous."

Finally, from the third district's earlier decision in Gelkop v. Gelkop, 384 So. 2d 195 (Fla. 3d DCA 1980), it is clear that the Szteinbaum decision is limited to corporate parties. Specifically, in Gelkop, an Israeli attorney representing the respondent-husband in a dissolution of marriage proceeding filed a letter with the court contesting jurisdiction. Id. at 197-98. Since the letter was not signed by a member of the Florida Bar, the third district ruled that the letter was a nullity. Id. at 202. Thus, both the Lincoln and Szteinbaum decisions are limited to their facts and therefore, are clearly distinguishable from

the instant case. As such, there is no express and direct conflict between the fifth district's decision and the decisions of the other district courts of appeal. Accordingly, pursuant to Art. V., § 3(b)(3), Fla. Const., this Court lacks jurisdiction to hear this appeal.

CONCLUSION

In order to invoke the discretionary jurisdiction of this Court, it is necessary to establish that an express and direct conflict exists between the decision of the Fifth District Court of Appeal and the decisions of other district courts of appeal. Petitioner has failed to specifically identify any such conflict. Accordingly, Respondents respectfully submit that this Court has no jurisdiction to hear this appeal.

Respectfully submitted,

JEFFREY S. BADGLEY
Florida Bar No. 055417
RAFAEL E. MARTINEZ
Florida Bar No. 243248
RUTH C. OSBORNE
Florida Bar No. 0155977
McEWAN, MARTINEZ, LUFF,
DUKES & RUFFIER, P.A.
Post Office Box 753
Orlando, Florida 32802-0753
Attorneys for Kenneth Kupke, M.D.

G. FRANKLIN BISHOP, III
Florida Bar No. 948489
JOHNSON & BUSSEY, P.A.
Post Office Box 531086
Orlando, Florida 32853-1086
Attorneys for Robert Hux, M.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile transmission and by U.S. mail this 30th day of August, 1999, to ROGER E. CRAIG, ESQUIRE, Roger E. Craig & Associates, 1250 North Tamiami Trail, Suite 201, Naples, FL 34102, WILLIAM J. McHENRY, ESQUIRE, 19390 West Ten Mile Road, Southfield, MI 48075 and G. FRANKLIN BISHOP, III, ESQUIRE, Johnson & Bussey, P.A., P.O. Box 531086, Orlando, FL 32853-1086.

Ruth Osborne

JEFFREY S. BADGLEY
Florida Bar No. 0559417
RAFAEL E. MARTINEZ
Florida Bar No. 243248
RUTH C. OSBORNE
Florida Bar No. 0155977
MCEWAN, MARTINEZ, LUFF
DUKES & RUFFIER, P.A.
Post Office Box 753
Orlando, Florida 32802
Attorneys for Kenneth
Kupke, M.D.