SUPREME COURT OF FLORIDA

CASE NO.: SC01-793
Lower Tribunal No.: 4D00-221

METISSIA RICKS,

PETITIONER,

vs.

RENE LOYOLA, M.D.

RESPONDENT.
_____/

RESPONDENT'S ANSWER BRIEF TO PETITIONER'S INITIAL BRIEF ON THE MERITS

Respectfully submitted,

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STATEMENT OF THE FACTS AND CASE[1]

On January 23, 1997, PETITIONER, METISSIA RICKS (hereinafter referred to as "PETITIONER"), was admitted to the Medical Center of Port St. Lucie for the placement of a Gore-Tex graft in order to serve as a portal for chronic dialysis (T. 72). The graft was placed that day by Dr. Wengler. It is undisputed that following the procedure, PETITIONER suffered a blood flow interruption in her left arm which resulted in nerve tissue death and disability in PETITIONER's arm. In the hours following the surgery, PETITIONER complained of pain in her arm. The Hospital chart reflects that at 9:00 a.m. on January 24, 1997, Nurse Day called Dr. Wengler and told him about the pain PETITIONER was experiencing and that PETITIONER could not move her wrist and fingers (T. 147). At 1:30 p.m. on that day, PETITIONER was seen by Dr. Wengler, who, at that time, did not diagnose a compartment syndrome and did not give the nursing staff any special instructions regarding monitoring PETITIONER. (T. 94-99). PETITIONER continued to be medicated for complaints of pain in her arm throughout the rest of January 24, 1997 (T. 646).

On the morning of January 25, 1997, RESPONDENT, DR. RENE LOYOLA, saw PETITIONER at approximately 8:00 a.m. during his morning rounds (T. 1002). DR. LOYOLA was alarmed by the fact that PETITIONER's arm was in a posture

[1]All references are to the record on appeal (R.), the trial transcript (T.) and the appendix (A.).

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known as "Volkmann's contracture," which he recognized to be a symptom of a permanent nerve injury caused by a prolonged ischemia, or interruption to the blood flow, and which could be the result of a compartment syndrome (T. 1010-11, 1016). However, DR. LOYOLA was unsure of the diagnosis because PETITIONER's hand was warm, and normally, with a compartment syndrome that has progressed to the point of a Volkmann's contracture, the patient's hand would be cold (T. 1011). DR. LOYOLA ordered a consultation with a neurologist, who concluded that PETITIONER's condition was a Volkman's contracture secondary to compartment syndrome (T. 1027, 1030). Immediately upon getting this diagnosis, DR. LOYOLA ordered that PETITIONER be returned to surgery to have the Gore-Tex graft removed (T. 1030-31). DR. LOYOLA testified that although the posture of the hand in a Volkman's contracture indicates the permanent nerve damage has already occurred, surgery to restore the blood flow must be performed or the muscle tissue will also eventually begin to become necrotic (T. 1024). DR. LOYOLA ordered for PETITIONER to be sent to surgery as soon as he received confirmation of the diagnosis of compartment syndrome from the neurologist at 3:00 p.m. PETITIONER continued to be treated to reduce her blood pressure for surgery through 4:00 p.m. (T. 1032). PETITIONER was returned to surgery by 5:50 p.m. on January 25, 1997, and DR. LOYOLA removed the graft and performed the fasciotomy to relieve the pressure in PETITIONER's forearm (T. 1033).

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Subsequently, PETITIONER sued Dr. Wengler, DR. LOYOLA, and Columbia Medical Center, alleging that Defendants breached their duties to provide reasonable and proper medical care by the following actions or inactions:

(a) by failing to accurately diagnose and understand the onset of the blood flow interruption in PETITIONER's arm;

(b) by failing to conduct such tests or examinations to assist them in accurately diagnosing and understanding the onset of the blood flow interruption in PETITIONER's arm;

(c) by failing to adequately monitor PETITIONER's post-surgical progress on a regular basis in order to promptly respond to the blood flow interruption in PETITIONER's arm;

(d) by failing to adequately document changes in PETITIONER's medical condition, from which other health care providers could accurately diagnose and treat PETITIONER's medical condition;

(e) by failing to competently treat PETITIONER's conditions; and

(f) by negligently diagnosing and treating PETITIONER for her medical conditions in heretofore undiscovered ways.

Through discovery, it became clear that PETITIONER's theory of the case was that Dr. Wengler breached the prevailing standard of care for vascular surgeons by not diagnosing the developing compartment syndrome when he saw PETITIONER on January 24, 1997, and that DR. LOYOLA breached the prevailing standard of care by getting a neurology consultation rather than taking PETITIONER to surgery immediately when he first saw her on the morning of January 25, 1997. DR. LOYOLA's primary defense was that given the circumstances, his decision to get a

neurology consultation was within the standard of care, and furthermore, that any delay occasioned by his actions did not change the PETITIONER's outcome, because by the time he saw PETITIONER, it was too late to prevent any of the nerve damage she suffered.

During deposition, PETITIONER's expert witness on causation, Dr. Donald DeSantis, was asked whether he was able to state, to a reasonable degree of medical probability, that PETITIONER's ultimate outcome was worse as a result of the alleged delay by DR. LOYOLA in getting her to surgery. (A. 1, p. 70). Dr. DeSantis testified that he was not able to offer that critical testimony. (A. 1, p. 71). DR. LOYOLA's expert, Dr. Sotereanos, testified that by the time DR. LOYOLA saw PETITIONER on the morning of January 25, 1997, it was too late to prevent the nerve damage she suffered. (T. 744).

Once expert discovery was completed, DR. LOYOLA moved for summary judgment on the basis that it was undisputed that any delay occasioned by him did not cause the PETITIONER's injury to be any worse than it would have been, even if he had taken her directly to surgery. In the Motion, DR. LOYOLA cited the authority that prevents a party from offering an Affidavit from a witness contradicting that witness' prior sworn testimony in order to avoid a summary judgment.

Not surprisingly, PETITIONER subsequently filed an Affidavit signed by her

expert, Dr. DeSantis[2], which stated that Dr. DeSantis changed his opinion, indicating the alleged delay caused by DR. LOYOLA did cause PETITIONER's injury to be worse than it otherwise would have been. A hearing was held on DR. LOYOLA's Motion for Summary Judgment on June 15, 1999. The issue before the court was whether Dr. DeSantis' explanation that his opinion changed based on review of a nurse's deposition was credible given the fact that Dr. DeSantis had testified at his deposition that there were four pieces of information needed to offer a causation opinion and the nurse's deposition did not provide any of that information.

The trial court never actually made a finding that the explanation for the changed opinion was credible, but the court did deny DR. LOYOLA's Motion for Summary Judgment. (R. 431-32). The case proceeded to trial.

During opening statement, it was PETITIOTNER's attorney who initially pointed out the fact that Dr. Wengler and the Hospital were not represented in the courtroom and suggested to the jury that DR. LOYOLA was going to attempt to blame Dr. Wengler and the Hospital, who were not in the courtroom to defend themselves. (T. 31). PETITIONER's counsel told the jury:

> Finally, at the end of this case, you will also have to decide

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2 At trial, Dr. DeSantis acknowledged that Plaintiff's counsel called him following his deposition and asked him to clarify his opinion and then prepared an Affidavit for him to sign (T. 472). Dr. DeSantis could not remember if Plaintiff's counsel actually showed him a copy of the motion for summary judgment which necessitated the clarified opinion (T. 469).

> whether or not somebody else, who is not in the courtroom to defend themselves, is at fault for the things that DR. LOYOLA did.

(T. 31).

Subsequently, during the defense opening statement, counsel stated:

> Now, as Mr. Vieth has pointed out, DR. LOYOLA is not the only health care provider that you will be hearing about. That is, I gather you've gleaned, from what I've said up to this point, there's going to be testimony that the nurses should have done things differently, that Dr. Wengler should have done things differently, before it ever reached the point . . . of being contracted with permanent nerve damage. It just never should have happened. It will not be something that you need to consider as to why they aren't in this Courtroom, although you might want to ask yourself that question. I assure you, though, that Miss Ricks and her attorney aren't going to tell you why they aren't here.
>
> After you have heard and listened to, tentatively(sic), all of the evidence, I think, I really believe, that you will reach the inescapable conclusion that DR. LOYOLA acted appropriately, and that what happened to Ms. Ricks had happened long before DR. LOYOLA got there, he was perfectly justified to be appalled and confused by what he saw, and you will render a fair and impartial verdict. Thank you.

(T. 48-49).

During closing argument, PETITIONER's attorney capitalized on the fact that Dr. Wengler had been deposed while he was a defendant in the case. He argued to the jury:

> I read Dr. Wengler's deposition to you. I'm the person that

> brought that testimony in. Did you hear Dr. Wengler come in, and fall on his own sword, and say I'm sick about this, I can't believe that I made such a mistake here, or that maybe Dr. Rittersbach made some mistake here? Did Dr. Wengler come in to support his own partner, to say it's all my fault? Don't blame poor DR. LOYOLA, I'm the one who screwed up? No. Didn't see him at all.

(T. 1242-1243). Also during closing, PETITIONER's attorney offered an explanation to the jury why DR. LOYOLA was the only defendant in the courtroom, arguing that PETITIONER's injuries were "nobody else's fault". (T. 1247).

Following closing arguments, the court instructed the jury on the law. The court anticipated numerous questions, such as whether testimony can be read back, and answered them in advance. (T. 1308 -1310). The court also stated:

> Another question that is asked in these kinds of cases, and I'll answer it now so that you hopefully don't ask it now, is that, even though you may end up deciding whether there was any negligence on the part of Dr. Wengler and/or Columbia Medical Center which was a contributing legal cause to the injuries of Ms. Ricks in this case, in making that determination, I will not answer any question as to why neither of them have defended themselves during this trial. Your decision in this case concerning the contributing liability, if any, must be based upon the evidence presented and the instructions on the law from me, and not based upon any speculation or questions as to why they were not present in this case. So I'm not going to answer any questions concerning that. You are to make you decision based solely upon what has been presented to you and what I've instructed you on the law to consider.

(T. 1310).

The jury was provided a verdict form. The first question on the verdict form was whether DR. LOYOLA was negligent. The verdict form instructed the jury to sign and date the verdict form if it answered that question "No". Ultimately, the jury returned a verdict, finding there was no negligence on the part of DR. LOYOLA. (R. 1231). Thus, the jury never reached the question of whether Dr. Wengler or the Hospital were negligent. PETITIONER filed a Motion for New Trial, arguing that a new trial was warranted based on the Motion for Mistrial made during opening statement, upon which the court had reserved ruling, because the error had not been "cured" by a Plaintiff's verdict. (R. 1232-42). A hearing was held on the Motion for New Trial, and ultimately, the court granted a new trial, based on the isolated comment during opening statement.

RESPONDENT appealed to the Fourth District Court of Appeal. RESPONDENT argued that 1) the trial court had abused its discretion by reserving ruling on a motion for mistrial made early on the first day of a complex medical malpractice case; 2) the comment complained of did not violate Florida Statue, Section 768.041(3); and 3) even if the comment was improper, it was harmless error which did not create manifest injustice.

The Fourth District Court of Appeal reversed the order granting a new trial. In its opinion, the Fourth District recognized that a trial court has discretion to reserve ruling on motions for mistrial pursuant to this Court's decision in Ed Ricke & Sons,

Inc. v. Green, 468 So. 2d 908 (Fla. 1985). (A. 1). The Fourth District recognized that this Court also held that the discretion to reserve ruling must be exercised in accordance with precepts of judicial economy. However, the Fourth District concluded that there was nothing in the record indicating that the interests of judicial economy were served by a reservation of ruling and therefore, the trial court had abused its discretion by reserving ruling during the earliest moments of trial. (A. 1). The Fourth District also found that the comment did not violate Section 768.041(3) because there was no reference to a prior lawsuit, prior defendants, or a settlement. (A. 1). Finally, the Fourth District held that even if the comment was error, it would find it to be harmless because it was isolated and never mentioned again by the defense. (A. 1). Accordingly, the Fourth District reversed the trial court and remanded the case for entry of judgment in accordance with the jury's verdict.

PETITIONER moved for rehearing arguing that the opinion was in conflict with another decision of the Fourth District Court of Appeal and that the court did not properly apply this Court's holding in Ed Ricke. The motion for rehearing was denied. PETITIONER now argues that jurisdiction to review the Fourth District Court of Appeal's decision in this case is vested in this Court as a result of express and direct conflict with this Court's opinion in Ed Ricke & Sons, Inc. v. Green, 468 So. 2d 908 (Fla. 1985).

SUMMARY OF THE ARGUMENT

The Fourth District's decision in this case is not in conflict with this Court's holding in Ed Ricke because the Fourth District applied the exact same legal standard announced by this Court in Ed Ricke. Also, it cannot be said that the Fourth District applied the rule of law to produce a different result in a different case which involves substantially the same facts because in Ed Ricke, the reservation of ruling occurred during closing argument, this Court indicated the timing was important, and the reservation of ruling in this case occurred during opening statement. Furthermore, the Fourth District correctly held that the comment at issue did not violate Florida Statute 768.041 and even if the comment was otherwise improper, it was harmless error in light of the whole case. Finally, if this Court accepts jurisdiction and quashes the decision, it will be necessary for the case to be remanded to the Fourth District for consideration of an issue briefed before that court but not reached in its opinion.

ARGUMENT

I. THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

A. This Court's Opinion in Ed Ricke:

The trial court in Ed Ricke was confronted with a motion for mistrial during closing argument coupled with a request that the trial court reserve ruling on the motion until after the jury verdict. The trial court did not address the request to reserve ruling, but rather simply denied the motion. Green v. Ed Ricke and Sons Inc.,

438 So. 2d 25 (Fla. 3d DCA 1983). The defense verdict was appealed to the Third District Court of Appeal. On appeal, the defense argued that by coupling the motion for mistrial with a request to reserve ruling, PETITIONER had waived the error. The Third District Court of Appeal held that the request for reservation of ruling during closing argument did not waive the alleged error and explicitly stated that it disagreed with the contrary holding of the Fourth District Court of Appeal in Earl Hollis, Inc. v. Fraser Mortgage Co. , 403 So. 2d 1038 (Fla. 4th DCA 1981). This Court agreed to review the case based on the inter-district conflict on the waiver issue. This Court framed the issue before it as follows:

> The issue to be decided is whether a party waives his right to a mistrial by coupling his motion with a request that the court reserve ruling on the motion until after the jury deliberates.

Ed Ricke & Sons, Inc. v. Green, at 909. This Court's holding on the issue was stated as follows:

> We now explicitly hold that the trial court has the power to wait until the jury returns its verdict before ruling on a motion for a mistrial. A motion for a mistrial coupled with a request that the court reserve ruling until after the jury deliberates is simply a motion for a mistrial, and, if properly made, deserves full consideration at both the trial court and appellate level.
>
> The trial court judge may, in his or her sound discretion, determine whether to rule on a motion for mistrial immediately or reserve ruling until after the jury deliberates. **However, this discretion must be exercised in accordance with precepts of judicial economy**. When, as here, the prejudicial comments occur during the closing argument, it is quite reasonable for a trial judge to reserve ruling until after the jury deliberates in the hope that the jurors can rise above the alleged prejudice and cure the error. If the verdict cures the error, the court

> will save the expenditure of additional time, money and delay associated with a new trial.
> ...
> The judge may, at his discretion, order a new trial immediately following the motion for mistrial or reserve ruling on the motion until after the jury deliberates. However, **such a power is limited and must be based upon notions of judicial economy.**

Id. at 910-11.

B. The Fourth District's Opinion in This Case:

The Fourth District Court of Appeal in this case explicitly followed Ed Ricke stating:

> A trial court has discretion to reserve ruling on motions for mistrial. "However, this discretion must be exercised in accordance with precepts of judicial economy..."

(A. 1).

The Fourth District Court of Appeal then applied this Court's holding, and held that based on all the circumstances of this case, including the fact that the motion for mistrial was made early in the day on the first day of trial before any witnesses testified, the interests of judicial economy were not served by the reservation of ruling. In her brief, PETITIONER has not pointed to anything in the record which suggests that interests of judicial economy were served by the reservation of ruling. In fact, there is nothing in the record to support such an argument. Accordingly, the Fourth District Court of Appeal explicitly followed this Court's ruling in Ed Ricke.

PETITIONER argues that this case essentially announces a per-se rule that Ed

Ricke is inapplicable to improprieties in opening statement. This is incorrect. The opinion of the Fourth District Court of Appeal clearly states that their ruling was based on the circumstances of the case. (A. 1). The court did not announce a per-se rule. (A. 1).

C. No Express and Direct Conflict:

The decision of the Fourth District Court of Appeal does not directly and expressly conflict with this Court's decision in Ed Ricke. Because there is no other basis for jurisdiction, review has been improvidently granted and the writ should be discharged. This Court has consistently dismissed cases when it becomes apparent on review of the merits that the express and direct conflict asserted in the jurisdictional brief does not actually exist. City National Bank of Florida v. Miami Dade County, 715 So.2d 350 (Fla. 3d DCA 1998); Corporate Securities Group, Inc. v. Lind, 789 So. 2d 340 (Fla. 2001); Curry v. State, 682 So. 2d 1091 (Fla. 1996); Reaves v. State, 485 So. 2d 829 (Fla. 1986); Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986); Mancini v. State, 312 So. 2d 732 (Fla. 1975).

None of the cases relied on by PETITIONER support the argument that the decision in Ricks expressly and directly conflicts with this Court's holding in Ed Ricke. Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000); Arab Termite & Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039 (Fla. 1982); Rosen v. Florida Ins.

Guaranty Association, 26 Fla. L. Weekly S611 (Fla. 2001). Each of these cases involved a conflict created when a district court of appeal applied the wrong legal standard to a given scenario. In this case, it is undisputable that the Fourth District applied the exact legal standard this Court announced in Ed Ricke.

In Vest, the first case relied on by PETITIONER to establish express and direct conflict, this Court held that the Third District's decision conflicted with this Court's opinion because the Third District applied the wrong legal standard on the issue of when a bad faith claim arose. Id. The Third District held that, as a matter of law, the insured was not entitled to recover UM benefits until she had settled with the tortfeasors, and therefore, summary judgment in favor of the insurer was appropriate where the insurer paid its policy limits within 60 days of the settlement of the insured's claim against the tortfeasors. Vest v. Travelers Insurance Co., 710 So.2d 982 (Fla. 1st DCA 1998). This Court found that holding to be in conflict with its prior decisions and clarified that those decisions merely held that a bad faith claim is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract. This Court stated:

> Therefore, in this case, the trial court erred in ruling **as a matter of law** that there was no claim for bad faith for acts which occurred prior to the approval of the settlement on January 12, 1996. An action prior to that settlement was premature and was subject to dismissal without prejudice. However, upon that settlement, the claim for bad-faith damages accrued from the date of violation of section 624.155(1)(b)1 ripened because at that time the final element of the cause of action occurred.

753 So.2d at 1275.

Thus, the conflict in Vest was created when the First District relied on a prior Supreme Court opinion as establishing a legal standard which the Supreme Court had not in fact established. Id. Here, there is no such conflict because the Fourth District applied verbatim the legal standard as to the scope of a trial court's discretion to reserve ruling on motions for mistrial which was stated by this Court in Ed Ricke.

PETITIONER really asks this Court to apply the same standard and reach a different conclusion than that reached by the Fourth District. This type of re-analysis of the case is not permitted by Article V, section 3(b)(3), and is at odds with this Court's holding in Jenkins v. State, 385 So. 2d 1356 (Fla. 1980), wherein the Court addressed the 1980 amendment to Article V conflict jurisdiction stating:

> The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. 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 definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner."
>
> ...
>
> As stated by Justice Adkins in Gibson v. Maloney, 231 So. 2d 823, 824 (Fla. 1970), "[i]t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari."

Id. at 1359.

The Fourth District's decision in this case was that based on all of the factual

circumstances, the trial court exceeded its discretion by reserving ruling on a motion for mistrial made during opening statement when the reservation of ruling in no way comported with notions of judicial economy. That decision does not expressly conflict with this Court's ruling in Ed Ricke.

The second case relied on by PETITIONER to establish conflict jurisdiction is Arab Termite & Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039 (Fla. 1982). In Arab, this Court held that a decision of the Third District Court of Appeal was in conflict with this Court's decision in Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978) on a question of law regarding whether a trial court has authority to consider the degree of a defendant's misconduct in relation to the amount of punitive damages found by the jury. Id. The Third District had held, as a matter of law, that the trial court did not have authority to consider the degree of the defendant's misconduct in relation to the amount of punitive damages found by the jury, stating:

> Post-Wackenhut, there is only one permissible ground for a determination by a trial judge that a punitive damages award is excessive; that is, that the amount of the award bears no relation to the amount the defendant is able to pay and results in economic castigations.

Jenkins v. Arab Termite & Pest Control of Florida, Inc., 388 So.2d 44 (Fla. 2d DCA 1980). This Court accepted review based on conflict with its prior opinion in Wackenhut and held that the decision in Wackenhut did not preclude a trial court from considering whether the manifest weight of the evidence shows that the amount of

punitive damages assessed is out of all reasonable proportion to the malice outrage, or wantonness of the tortious conduct. Id. This Court quashed the decision of the district court because the district court had applied the wrong legal test. Id. This Court did not then apply the correct test to resolve the case. Rather, this Court remanded the case to the district court to provide the appropriate appellate review based on the correct legal standard. Id. Here, as discussed above, it is indisputable that the Fourth District Court of Appeal applied, verbatim, the legal standard announced by this Court regarding the scope of a trial court's discretion to reserve ruling on a motion for mistrial. Thus, PETITIONER does not, and could not, ask this Court to remand the case to the Fourth District for review based on a different legal standard. Rather, PETITIONER seeks to have this Court go behind the opinion of the Fourth District and apply the same legal standard to reach a different conclusion based on the facts of the case.

The next case relied on by PETITIONER to support conflict jurisdiction is Rosen v. Florida Ins. Guaranty Association, 26 Fla. L. Weekly S611 (Fla. 2001). In Rosen, this Court found that a decision of the First District Court of Appeal conflicted with a decision of this Court in Cope[3] on the issue of whether a bad-faith claim was precluded by a settlement agreement between an insured and a claimant which contained an express reservation of a bad-faith claim against the insurer. The Third

[3]Fidelity & Casualty Co. v. Cope, 462 So.2d 459 (Fla. 1985).

District cited the decision of this Court in Cope to support the decision that the settlement agreement precluded the claim. Rosen v. Florida Insurance Guaranty Association, 734 So.2d 491 (Fla. 1st DCA 1999). This Court accepted conflict jurisdiction and stated:

> Our holding in Cope was a narrow one–" if an excess judgment has been satisfied, absent an assignment of that cause of action prior to the satisfaction, a third party cannot maintain action for breach of duty between an insurer and its insured.

Id. at 612. This Court then held that because the settlement agreement between the claimant and the insured constituted a covenant not to execute as opposed to a release of the insured, the agreement did not preclude the claim against the insurer pursuant to this Court's prior holding. Id.

Thus, as in the other cases relied on by PETITIONER, the conflict jurisdiction of this Court existed because the district court of appeal erroneously applied the wrong legal standard. As discussed above, the Fourth District in this case clearly applied the exact legal standard regarding the scope of a trial court's discretion to reserve ruling on a motion for mistrial made during opening statement announced by the Ed Ricke Court. Thus, there is no express and direct conflict between the decision of the Fourth District Court and this Court's decision in Ed Ricke. Finally, PETITIONER's reliance on Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960), is misplaced. Nielsen predates the 1980 constitutional amendment which narrowed

this Court's conflict jurisdiction as discussed in Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). Furthermore, Nielsen does not support PETITIONER's assertion of jurisdiction in this case. In Nielsen, the court stated:

> While conceivably there may be other circumstances, the principal situations justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflicts are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case **which involves substantially the same controlling facts as a prior case disposed of by this Court**.

Id. at 734. The controlling facts regarding the reservation of ruling in this case and in the Ed Ricke case are not even remotely the same, much less substantially the same. In Ed Ricke, the comment explicitly violated the statute as well as a pre-trial order and was made during closing argument just before the jury was to retire to deliberate. Here, the comment did not explicitly violate the statute or a pre-trial order and was made during opening statement immediately after the jury was seated in a lengthy, complicated, medical malpractice case. In Ed Ricke, this Court held that the discretion to reserve ruling on the motion for mistrial must be based on notions of judicial economy and stated "[w]hen, as here, the prejudicial comments occur during closing argument, it is quite reasonable for a trial judge to reserve ruling until after the jury deliberates." Id. at 910. The Ed Ricke Court went on to state that the reservation of ruling, properly applied, will "conserve judicial resources." Thus, the fact that the reservation of ruling in this case occurred at the very beginning of trial as opposed to

the very end, and would have the effect of requiring two trials as opposed to preventing a second trial, is an incredibly significant factual distinction which precludes this Court from exercising conflict jurisdiction to review this case. See Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983)(holding that when a cause is before this Supreme Court because of apparent conflict between two decisions, the court will discharge jurisdiction when it is determined that the cases are factually distinguishable).

In her brief, PETITIONER queries "May Ed Ricke motions for mistrial now be taken under advisement after the first witness testifies, in the middle of a heated trial, or only at the end, during closing arguments." Based on the current jurisdictional structure of the courts in Florida, those are questions to be answered by the trial courts when confronted with those scenarios and to be reviewed by the district court's of appeal. If the district courts reach different conclusions on the extent of the trial court's discretion in similar factual scenarios, this Court will have conflict jurisdiction to answer the question. Currently, there is no jurisdiction to offer an advisory opinion on those issues.

Accordingly, RESPONDENT respectfully requests that the court dismiss review of this cause.

II. THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE OPENING STATEMENT DID NOT VIOLATE FLORIDA STATUTE SECTION 768, AND EVEN IF THE COMMENT WAS

OTHERWISE IMPROPER, IT WAS HARMLESS ERROR.

PETITIONER argued to the trial court that defense counsel violated Florida Statute, Section 768.041(3), during opening statement. The statute provides:

> (2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on her or his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.
>
> (3) The fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury.

§ 768.041(3), Fla. Stat. (1999).

In this case, the fact that Dr. Wengler and the Hospital were not in the courtroom was first raised by PETITIONER in the opening statement. PETITIONER suggested that DR. LOYOLA was attempting to blame those who were "not in the courtroom to defend themselves." If PETITIONER wished to argue to the jury that Dr. Wengler and the Hospital were not in the courtroom because they were not negligent, it was incumbent upon PETITIONER to support that argument with an evidentiary basis. PETITIONER had no evidence to establish that Dr. Wengler was not negligent. At the time of opening statement, DR. LOYOLA did not expect that the court was going to permit PETITIONER to introduce the deposition of the nursing

expert retained by the Hospital to defend the nurses because the Hospital was no longer a party to the case and PETITIONER had not disclosed that witness. Ultimately, PETITIONER argued that her disclosure included a catchall disclosure of witnesses disclosed by other parties. The court permitted PETITIONER to introduce the expert deposition even though the party that disclosed the expert was no longer a party. The comment made by defense counsel was intended to point out that PETITIONER did not have an evidentiary basis to support an argument that PETITIONER's injury was not caused by the negligence of Dr. Wengler[4] and the Hospital.

PETITIONER relies primarily on Ed Ricke & Sons, Inc. v. Green, 468 So. 2d 908 (Fla. 1985) to support her argument that the comment here violated Section 768.041(3). PETITIONER's reliance on Ed Ricke is misplaced for several reasons. First, the actual holding of Ed Ricke is that the attorney violated a Pre-Trial Order, which stated "that no party, attorney or witness was to make known to the jury that there had been a prior lawsuit and/or settlement," which occurred between the plaintiff and Dade County. Id. The attorney in Ed Ricke clearly informed the jury, through examination of a witness, that there had been a prior lawsuit. Green v. Ed Ricke and Sons, Inc., 438 So. 2d 25, 26 (Fla. 3d DCA 1983). On another occasion, the attorney in that case attempted to elicit from a witness that he was retained as an expert by a

4 Plaintiff's own expert, Dr. DeSantis, was critical of Dr. Wengler.

prior defendant. Id. Finally, after improperly putting before the jury evidence of a prior lawsuit regarding the incident, the attorney in Ed Ricke implored the jury during closing argument to ask the plaintiff why Dade County was "not a defendant **in this litigation.**" Id. Because the jury in that case had been informed there was, in fact, a prior lawsuit, this comment suggested that the prior defendant, Dade County, had settled or suffered a judgment. Significantly, this Court recognized that an empty chair argument is appropriate, but found that the problem with the argument in that case was that "counsel emphasized that there had been a prior lawsuit against that empty chair." Id.

In this case, defense counsel did not make known to the jury that there had been a lawsuit against Dr. Wengler and the Hospital. Counsel certainly did not emphasize that there had been a suit against Dr. Wengler or the Hospital. PETITIONER cites numerous other cases to support her argument that the statement here was so prejudicial as to require a new trial. Builder's Square, Inc. v. Shaw, 755 So.2d 721 (Fla. 4th DCA 1999); Hernandez v. State Farm Fire & Casualty Co., 700 So.2d 451 (Fla. 4th DCA 1997); Henry v. Beacon Ambulance Services, Inc., 424 So.2d 914 (Fla. 4th DCA 1982); Webb v. Priest, 413 So.2d 43 (Fla. 3d DCA 1982); State Farm Fire & Casualty v. Higgins, 788 So.2d 992 (Fla. 4th DCA 2001) (en banc) pet. for rev. granted, 794 So.2d 604 (Fla. 2001). All of these cases are distinguishable because they all involved disclosure to the jury of the fact of a settlement or a discharged

defendant in violation of Section 768.041. More analogous is the case of Cenvill Communities, Inc. v. Patti, 458 So. 2d 778 (Fla. 4th DCA 1984), which is discussed in the Higgins case cited by PETITIONER. In Cenvill, the defense attorney mentioned that the evidence would show that the plaintiff had made a "claim" against someone not a party to the litigation as a result of the same accident at issue in the litigation. Id. The trial court granted a new trial based on the comment during opening. Id. The Fourth District distinguished Green v. Ed Ricke and Sons, Inc., 438 So. 2d 25 (Fla. 3d DCA 1983), because unlike the comment there, the reference to a "claim" did not violate Section 768.041. Id. The Fourth District found the comment to be innocuous and appellant had met the stronger showing necessary to reverse the order granting a new trial. Id.

Even if the comment in this case was a violation of the spirit of Section 768.041(3), under the circumstances, the violation was harmless error. Not every violation of Section 768.041(3) requires a new trial. Samick Corporation v. Jackson, 645 So. 2d 1095 (Fla. 4th DCA 1994)(holding that a violation of Section 768.041(3) is subject to a harmless error analysis). In Samick, the trial court granted a new trial based on a violation of Section 768.041(3) without determining whether evidence of a claim made by the plaintiff against a third party was harmless error. The Fourth District reversed, stating that the trial court must determine whether the error was harmless and noted that if the comment is "innocuous," it does not require a new trial

(Id. at 1096, n.2). In this case, the comment was much more innocuous than the comment in Samick. In Samick, the attorney elicited testimony from a witness that he had previously been a defendant in the lawsuit and reiterated that information during closing argument. Id. Here, the comment was isolated, at the very beginning of trial, and not accompanied by any evidence or reference to the fact that Dr. Wengler or the Hospital had been defendants or that there had been a settlement.

Furthermore, PETITIONER argues that the comment was harmful error because of "changes in our tort system". On the contrary, the changes in our tort system regarding apportionment of fault made the comment in this case less significant. The jury was instructed that they would first be asked whether DR. LOYOLA was negligent (T. 1297). They were then instructed that if they answered that question in the affirmative, they would then be asked to determine whether Dr. Wengler and the Hospital were also negligent, and if so, what share of the fault should be apportioned to them. (T. 1298). Thus, unlike the empty chair argument in Ed Ricke, which is an all or nothing defense, the jury in this case knew that they would have an opportunity to apportion fault to Dr. Wengler and the Hospital. Therefore, any speculation the jury engaged in regarding the involvement of Dr. Wengler and the Hospital would be expressed only if they reached the apportionment question. Here, the jury never reached that issue because they found that the evidence established that DR. LOYOLA had not been negligent. Accordingly, even if the comment was error, it

was necessarily harmless error.

PETITIONER argues that the comment was harmful because it "challeng[ed] PETITIONER and counsel to explain that which they were not permitted to explain" and "created an incurable impression in the Jury's mind that the Plaintiff was hiding relevant evidence from the Jury." (R. 424-29). On the contrary, PETITIONER's counsel did explain to the jury, during closing argument, that DR. LOYOLA was the only defendant, because PETITIONER's injuries were "[n]obody else's fault" (T. 1247). This is the response anytime a plaintiff is confronted with the traditional empty chair defense. PETITIONER was even permitted to introduce, over objection, the testimony of former Co-Defendant's expert witness to establish an evidentiary basis for this explanation to the jury.

PETITIONER also argues that it was somehow improper for RESPONDENT to amend his Answer following the settlement to affirmatively allege the negligence of Dr. Wengler and the Hospital and that RESPONDENT's opening was "rife with accusations of misconduct." Both of these arguments are meritless.

First, it is well established that when plaintiff settles with an alleged joint tortfeasor, it is proper for the remaining defendant to amend to allege the *Fabre* affirmative defense of the negligence of the settling defendant(s) and to include the settling defendants on the verdict form for apportionment. Phillips v. Guarneri, 26 Fla. L. Weekly D1354 (Fla. 4th DCA May 23, 2001); East West Karate Association,

Inc. v. Riquelme, 638 So. 2d 604 (Fla. 4th DCA 1994); Schindler Elevator Corporation v. Viera, 644 So. 2d 563 (Fla. 3d DCA 1994).

In support of her sensational assertion that RESPONDENT's opening was "rife with accusations of misconduct", PETITIONER cites to pages 47 and 48 of the transcript. A review of those pages reveals that RESPONDENT's counsel merely informed the jury that the testimony would show that PETITIONER's only expert witness was deposed twice and could not offer a causation opinion against DR. LOYOLA, and did not offer a causation opinion until after a motion for summary judgment had been filed. (T. 47-48). Clearly, this was proper opening statement discussing important evidence regarding the credibility of PETITIONER's expert witness. PETITIONER did not object to this opening statement.

PETITIONER also asserts that "this defense theme of misconduct continued against Rick's counsel and her expert during trial." (I.B. 22). There was no defense theme of misconduct. A review of the transcript pages cited by PETITIONER to support this statement reflect that defense counsel merely established that PETITIONER's expert was deposed twice and could not offer a causation opinion against DR. LOYOLA either time, and that he did not formulate a causation opinion until after a motion for summary judgment had been filed. (T. 468-69; 471-72; 1158-64). PETITIONER's counsel did not object to this line of questioning. Indeed, it is so well established that this type of testimony is relevant and admissible on the issue

of the credibility of the expert witness that it warrants no further discussion here. It is ironic that PETITIONER would raise this issue because it actually emphasizes that the defense verdict in this case was not the result of the innocuous comment during opening statement, but rather a result of PETITIONER's inability to retain a credible expert who was critical of DR. LOYOLA.

III. IF THIS COURT WERE TO QUASH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL, THE CASE MUST BE REMANDED TO THE FOURTH DISTRICT COURT OF APPEAL FOR CONSIDERATION OF AN ISSUE NOT RESOLVED IN THE OPINION AND NOT BRIEFED BY PETITIONER HERE.

Because the Fourth District Court of Appeal reversed the order granting a new trial based on its conclusion that the trial court abused its discretion in reserving ruling on the motion for mistrial during opening statement, the court did not address an additional point of error asserted by RESPONDENT as a basis to reverse the order granting a new trial. RESPONDENT asserted before the district court that the trial court had erred by permitting PETITIONER to avoid a summary judgment by filing an affidavit from her expert witness offering a causation opinion against DR. LOYOLA that he did not offer at his deposition. RESPONDENT argued before the district court that the explanation for the change in testimony was not credible, and therefore the trial court should not have permitted the affidavit to be filed in opposition to the motion for summary judgment. PETITIONER has not briefed the issue before this Court.

This Court has consistently held that when a decision of the district court is quashed, it is proper to remand the case for consideration by the district court of any issues which it has not previously reached. Rosen v. Florida Insuarance Guaranty Association, 26 Fla. L. Weekly S 611 (Fla. 2001); Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039 (Fla. 1982). Thus, if this Court concludes that it does have jurisdiction and quashes the decision of the Fourth District, it is respectfully requested that the case be remanded to the Fourth District for consideration of the issue of whether the trial court erroneously permitted PETITIONER's expert to change his sworn testimony in order to avoid a motion for summary judgment.

CONCLUSION

The Fourth District's decision in this case is not in conflict with this Court's holding in Ed Ricke because the Fourth District applied the exact same legal standard announced by this Court in Ed Ricke. Also, it cannot be said that the Fourth District applied the rule of law to produce a different result in a different case which involves substantially the same facts because in Ed Ricke, the reservation of ruling occurred during closing argument, this Court indicated the timing was important, and the reservation of ruling in this case occurred during opening statement. Furthermore, the Fourth District correctly held that the comment at issue did not violate Florida Statute 768.041 and even if the comment was otherwise improper, it was harmless error in

light of the whole case. Finally, if this Court accepts jurisdiction and quashes the decision, it will be necessary for the case to be remanded to the Fourth District for consideration of an issue briefed before that court but not reached in its opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 28th day of November, 2001 to all counsel on the attached service list.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used is Times New Roman 14 point.

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