IN THE SUPREME COURT
OF FLORIDA

ETHEL THOMPSON SWEITZER,

Petitioner,

vs.

DAWN M. THOMAS.

Respondent.
_____/

CASE NO. SC03-165
5th DCA CASE NO. 5D02-34

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**RESPONDENT'S BRIEF OPPOSING JURISDICTION**

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## PREFACE

After a jury awarded plaintiff/respondent, Dawn Thomas, damages for injuries she suffered in an accident admittedly caused by defendant/petitioner, Ethel Thompson Sweitzer, the Fifth District affirmed on all five issues raised on appeal by the defendant. The Fifth District then summarily denied defendant's motions for rehearing, rehearing en banc, and certification. Defendant now seeks discretionary review in this Court claiming that the Fifth District's opinion somehow expressly and directly conflicts with decisions of three other district courts. The plaintiff/respondent, Dawn Thomas, will be referred to as plaintiff or by her proper name. Defendant/petitioner, Ethel Thompson Sweitzer, will be referred to as defendant or by her proper name.

## STATEMENT OF THE FACTS AND CASE

Ethel Sweitzer admitted causing the collision at issue (Slip Op., p. 1). The trial court instructed the jury to determine whether she also caused Ms. Thomas' shoulder injury, and if so, the amount of damages Ms. Thomas deserved (Slip Op., p. 1). The trial court also instructed the jury that certain non-economic damages could be recovered from the defendant even without a finding of a permanent injury. (Slip Op., p. 2). Subsequent to the entry of final judgment, other districts opined on the issue of whether such a jury instruction was appropriate (Slip Op., p. 3). The First, Second,

and Fourth Districts all concluded in opinions issued subsequent to the instant trial, that an injured plaintiff must always satisfy the threshold requirements of §627.737(2) in order to be entitled to recover non-economic damages from the tortfeasor. (Slip Op., p. 3). The Fifth District explicitly ***agreed*** with that articulated law (Slip Op., p. 3).

Notwithstanding its agreement with the principle of law emanating from those other cases, the Fifth District still affirmed because the case arose out of different facts. The court noted that the jury in this case found that plaintiff **did indeed** suffer a permanent injury. (Slip Op., p. 4). As the court wrote:

> Therefore, we conclude that in the absence of the threshold injury, as defined in section 627.737(2), there can be no recovery for any non-economic damages. Conversely, in cases involving a threshold injury, the plaintiff may recover all non-economic damages recoverable under common law. Accordingly, **because the jury in this case found that appellee did sustain a permanent injury, she was entitled to recover all of her non-economic damages, and the challenge instruction did not result in harm to appellant**. (Slip Op., p. 4)(Emphasis added).

Any claim that this opinion conflicts with the other districts is disingenuous at best.

## SUMMARY OF ARGUMENT

The Fifth District's opinion below in no way "expressly and directly" conflicts with decisions from its sister courts, and it is incredible to suggest otherwise. The Fifth District actually explicitly **agreed** with the rule of law articulated by the other districts, finding no non-economic damages are available to persons in automobile accident cases when the jury finds no permanent injury was suffered. Because the jury in this case found that the plaintiff did in fact suffer a permanent injury however, the Fifth District held the facts were distinguishable from Loring v. Winters, 802 So. 2d 335 (Fla. 2nd DCA 2001), Gill v. McGuire, 806 So. 2d 629 (Fla. 4th DCA 2002), and Giles v. Luckie, 816 So. 2d 248 (Fla. 1st DCA), rev. dismissed, 832 So. 2d 104 (Fla. 2002), and correctly affirmed the decision. It is simply impossible for there to be express and direct conflict when the controlling facts are substantially different between purportedly conflicting cases.[1]

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[1]Petitioner's summary of argument states "the fifth district held that a trial judge may instruct a jury that it may consider awarding non-economic damages to a plaintiff *even if the jury finds that the plaintiff did not sustain a permanent injury*." (Petitioner's Brief on Jurisdiction, p. 4). A review of the Fifth District's opinion reveals that said statement is untrue. In reality, the court held "Therefore, we conclude that in the absence of a threshold injury, as defined in §627.737(2), there can be no recovery for any non-economic damages." (Slip Op., p. 4). Thus, to assert conflict with Chapman v. Dillon, State Farm Mutual Automobile Insurance Co. v. Gomez, and Lasky v. State Farm Insurance Co., it is completely untenable.

## ARGUMENT

**THE FIFTH DISTRICT EXPLICITLY AGREED WITH THE LAW ARTICULATED BY ITS SISTER COURTS, BUT REACHED A DIFFERENT CONCLUSION HERE BASED ON DISTINGUISHABLE FACTS, THEREFORE, NO EXPRESS AND DIRECT CONFLICT EXISTS AND THIS COURT SHOULD NOT ACCEPT JURISDICTION.**

In Florida Power and Light Co. v. Bell, 113 So. 2d 697, 699 (Fla. 1959), this Court explained that its primary function in the area of conflicts is to "stabilize the law by a review of decisions which form patently irreconcilable precedents." This Court has consistently reiterated that principle. See e.g., Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960)(Acknowledging that one of the principle situations justifying the invocation of this Court's jurisdiction to review decisions of the courts of appeal based on alleged conflict, involves the application of a rule of law to produce a different result in a case involving almost the same controlling facts as a prior case disposed of by this Court); Chrysler Corp. v. Wolmer, 499 So. 2d 823, 827-829 (Fla. 1986)(Barkett, J., dissenting)(In dissent, Justice Barkett questioned whether jurisdiction existed because the case below did not involve the same controlling facts). As the Nielsen court wrote:

> [T]he **controlling facts become vital** and our jurisdiction may be asserted only where the court of appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving **substantially the same controlling facts** as were involved in allegedly conflicting prior decisions of this Court.

Nielsen, 117 So. 2d at 734 (Emphasis added).

In this case, the Fifth District explicitly agreed with the rule of law articulated by the courts in Loring v. Winters, 802 So. 2d 335 (Fla. 2nd DCA 2001), Gill v. McGuire, 806 So. 2d 629 (Fla. 4th DCA 2002) and Giles v. Luckie, 816 So. 2d 248 (Fla. 1st DCA), rev. dismissed, 832 So. 2d 104 (Fla. 2002), all holding that an injured plaintiff cannot collect non-economic damages unless she meets the threshold permanent injury requirements of §627.737(2) (Slip Op., p. 3). Because the jury did indeed find that the plaintiff in this case met the threshold and suffered a permanent injury, the court found she was entitled to recover all of her non-economic damages recoverable under the common law. Therefore, while the Fifth District agreed with the rule of law articulated by its sister courts, it simply did not believe the rule applied under the facts of **this** case.

Where the controlling facts are materially different, there can be no "express and direct conflict" with the decisions of the other district courts. It is incongruous for

petitioner to argue otherwise. There is simply no "express and direct conflict" for this Court to resolve.

## CONCLUSION

Because the Fifth District agreed with the rule of law set forth by the other district courts of appeal and has explicitly distinguished the facts of this case from the facts in those cases, there is no express and direct conflict pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), and this Court lacks the constitutional authority to accept jurisdiction of this case.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been forwarded by U.S. mail this 18th day of February, 2003, to:

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Respondent's Brief Opposing Jurisdiction has been typed using the 14 point Times New Roman font.

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