SUPREME COURT
STATE OF FLORIDA

BETH LINN and ANTHONY LINN,

Petitioners,

v.

BASIL D. FOSSUM, M.D. and
DENNIS M. LEWIS, M.D.,

Respondents.
_____/

Case No. SC05-134
L.T. Case No.: 1D03-4152

AMENDED JURISDICTIONAL BRIEF OF PETITIONERS, BETH AND ANTHONY LINN

ON REVIEW FROM THE DECISION OF THE
DISTRICT COURT OF APPEAL OF THE FIRST DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

This is a jurisdictional brief on conflict pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.120(d). Attached as an appendix is the opinion of the First District Court of Appeal in Beth Linn and Anthony Linn v. Basil D. Fossum, M.D. and Dennis M. Lewis, M.D., Case No. 1D03-4152 (Fla. 1st DCA October 18, 2004).

This is a medical malpractice case involving the failure to diagnose a leak of urine from Beth Linn's ureter. (Slip. Op., p. 2). The facts are as stated in the First District's majority opinion and the dissent of Judge Charles J. Kahn, Jr. The defendant, Dr. Basil Fossum, is a urologist. (Slip. Op., p. 2). Dr. Fossum was presented with a radiological test strongly suggestive of a uretal leak. (Slip. Op., p. 13). He performed a second test designed to confirm the leak, but failed to diagnose it. (Slip. Op., p. 14). Despite the inconsistent test results, Dr. Fossum performed no further tests. (Slip. Op., p. 14). Ms. Linn's condition deteriorated and she and her husband became so frustrated that they traveled to Atlanta, where an emergency room physician at Emory University ordered a CT scan. (Slip. Op., p. 14). The doctors in Atlanta quickly diagnosed

the leak, which by that time had become infected. (Slip. Op., p. 14).

The fundamental issue at trial was whether Dr. Fossum's reliance on the second test as conclusive for the non-existence of a leak met the standard of care. At trial, an expert testified on behalf of Ms. Linn that Dr. Fossum should have taken additional action in light of the inconsistent test results, and accordingly did not meet the standard of care. (Slip. Op., p. 3). Dr. Fossum called a single expert witness – Dr. Dana Weaver-Osterholtz. (Slip. Op., p. 2). Dr. Weaver-Osterholtz ***agreed*** with Ms. Linn's experts that the proper course of action would be to drain the ureter and insert a stent. (Slip. Op., p. 3). Not a single doctor testified, based upon his or her education, training and experience, that Dr. Fossum followed the standard of care required under the circumstances.

Nevertheless, over plaintiffs' objection, Dr. Weaver-Osterholtz was permitted to testify that Dr. Fossum complied with the standard of care ***based upon a short "curbside consult" with several unidentified colleagues***. (Slip. Op., p. 3). The jury returned a defense verdict. (Slip. Op., p. 4). On appeal, the First District affirmed over a dissent by Judge Kahn. The Court held that it was not error for the trial court to allow Dr. Weaver-Osterholtz to testify that her opinion was based on the "curbside consult." (Slip. Op., p. 12).

SUMMARY OF ARGUMENT

In affirming, the First District permitted a defense expert to present "standard of care" testimony based upon hearsay evidence of a "curbside consult" with several unidentified colleagues. The First District's decision conflicts with the decision of the Fourth District Court of Appeal in Schwarz v. State, 695 So.2d 452 (Fla. 4th DCA 1997). In Schwarz, the court held under materially identical circumstances that "such testimony improperly permits one expert to become a conduit for the opinion of another expert who is not subject to cross-examination." Id. at 455.

The First District also held that Schwarz does not present a conflict because both this case and Schwarz "were affirmances." (Slip. Op., p. 11). This holding conflicts will settled law in this State that conflict jurisdiction is based upon conflict between principles of law as reflected in the opinions of different courts, not the happenstance of whether both are affirmances or reversals. See, e.g. Seaboard Air Line Railroad Co. v. Branham, 104 So.2d 356, 358 (Fla. 1958); N & L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960). This Court should therefore exercise its discretion and accept jurisdiction.

ARGUMENT

The First District's decision conflicts with the decision of the Fourth District Court in Schwarz v. State, 695 So.2d 452

(Fla. 4th DCA 1997).[1] Accordingly, this Court should exercise its discretion and accept jurisdiction.

Schwarz was a criminal case in which the defendant was charged with second-degree murder following the death of her stepson in a swimming pool. The defendant asserted that the boy's death was the result of suicide or an accident. The prosecution offered a forensic pathologist to present expert testimony that the cause of death was homicide. Over the defendant's objection, the trial court permitted the expert to testify that he regularly consulted with other pathologists and had consulted with five pathologists in forming his opinion.

The Fourth District held that the trial court erred in permitting the expert to testify that he had consulted with other pathologists. Id. at 455. The court relied on the established rule that experts cannot, on direct examination, bolster their testimony by testifying that a treatise agrees with their opinion. Id., citing Tallahassee Memorial Regional Medical Center v. Mitchell, 407 So.2d 601 (Fla. 1st DCA 1981). The court also relied on decisions from other jurisdictions

[1] In his dissent, Judge Kahn notes that, in addition to the conflict with Schwarz, the majority's decision is also in direct conflict with Gerber v. Iyengar, 725 So.2d 1181 (Fla. 3d DCA 1998), Maklakiewicz v. Berton, 652 So.2d 1208 (Fla. 3d DCA 1995), and Riggins v. Mariner Boat Works, Inc., 545 So.2d 430 (Fla. 2d DCA 1989). (See Slip. Op., p. 24). Because, as recognized by Judge Kahn, the conflict with Schwarz is "particularly inescapable" (Slip. Op., p. 24), this brief will focus on that case.

holding that experts cannot bolster or corroborate their opinions with the opinions of other experts who do not testify. Schwarz, 695 So.2d at 455 (collecting cases).

The court recognized the existence of Section 90.704, Fla. Stat., upon which the majority heavily relied in this case. Nevertheless, the Fourth District concluded that "[s]uch testimony improperly permits one expert to become a conduit for the opinion of another expert who is not subject to cross-examination." Id. The court further held that "[a]ny probative value would be 'substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury.'" Id., quoting Section 90.403, Fla. Stat. Accord Kim v. Nazarian, 576 N.E.2d 427, 434 (Ill. App. 1991) ("The fact that a colleague agreed with the testifying expert's opinion is of dubious value in explaining the basis of an opinion. The party who is unable to cross-examine the corroborative opinion of the expert's colleague, on the other hand, will likely be prejudiced.").

Schwarz is directly on point and should have resulted in the First District reversing this case. Dr. Fossum's expert served as a conduit for the hearsay testimony of her unidentified colleagues who participated in the "curbside consult." The record is clear that while the witness testified that she reviewed other material, the basis for her testimony was exclusively the "curbside consult." (Slip. Op., p. 17).

Section 90.704, Fla. Stat., does not sanction the admission of such testimony. As Judge Kahn explains in his dissent:

> Dr. Weaver-Osterholz certainly could have utilized otherwise inadmissible medical records to support her opinion concerning standard of care. Such is not really subject to controversy. The rule, however, is not broad enough to encompass a situation, as occurred here, where the expert merely quotes the findings of other physicians, which would be hearsay if they were offered for their truth.

(Slip. Op., p. 21).

The majority offers three arguments why Schwarz is distinguishable, none of which are convincing. First, the majority asserts that Schwarz is inapplicable because it involved "bolstering," whereas in this case Dr. Weaver-Osterholz admitted that "she did not personally share the views of the doctors she consulted." (Slip. Op., pp. 10-11). With respect, the fact that the expert in this case disagreed with the alleged consultants ***heightens*** the prejudice. At least in Schwarz the defense was able to cross-examine the testifying expert as to the basis for ***his*** opinion that the cause of death was homicide. Here, ***nobody*** testified at trial that, based upon his or her education, training and experience, Dr. Fossum followed the standard of care. Thus, the Linns were precluded from cross-examining anybody who purportedly held that view. All they could do was attempt to deal with the paradox that, while Dr. Fossum's own expert agreed that he handled the case improperly,

some sort of informal poll indicated that most doctors would handle it the same way.[2]

The majority's second attempt to distinguish Schwarz is the assertion that "Dr. Weaver-Osterholz did not testify on direct examination that other experts agreed with the opinion she was about to give." (Slip. Op., p. 11). This rationale is incorrect for two reasons. First, Dr. Weaver-Osterholz ***did*** testify on direct examination about the "curbside consult." (Slip. Op., p. 4). Second, the expert in Schwarz ***did not*** testify that the other pathologists agreed with his opinion, only that he had consulted with them. Schwarz, 695 So.2d at 454-55. Again, to the extent there exists any material difference, the scenario in this case is ***more*** unfair and prejudicial than in Schwarz.

Finally, and perhaps most puzzling, the majority asserts that Schwarz does not "even arguably" present a conflict because both this case and Schwarz "were affirmances." (Slip. Op., p. 11). This interpretation of conflict jurisdiction itself conflicts with decisions of the Florida Supreme Court and also presents an issue of great public importance warranting certification for Supreme Court review.

[2] One of the many questions created by the majority's opinion is whether it is even necessary to retain an expert to relay the results of such a "mini-poll." After all, anyone could have relayed the results of the mini-poll just as easily as Dr. Weaver-Osterholz.

The majority's interpretation of conflict jurisdiction directly conflicts with established law that such jurisdiction is concerned with "*decisions* as precedents as opposed to adjudications of the rights of particular litigants." Seaboard Air Line Railroad Co. v. Branham, 104 So.2d 356, 358 (Fla. 1958) (emphasis in original). The Supreme Court has long held that, for purposes of conflict jurisdiction, the term "decision" comprehends ***both*** the opinion and the judgment. Id. The Court explained this concept further in N & L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960):

> The question of a conflict is of concern to this Court only in those cases where the opinion and judgment of the district court announces a ***principle or principles of law*** that are in conflict with a principle or principles of law of another district court or this Court. Our concern is with the decision under review as a legal precedent to the end that conflicts in the body of the law of this State will be reduced to an absolute minimum and that the law announced in the decision of the appellate courts of this State shall be uniform throughout.

Id. at 412 (emphasis added).

The majority's holding that this case does not conflict with Schwarz because both happen to be affirmances is directly contrary to the holdings in Seaboard and Doman. These decisions make clear that conflict jurisdiction is based upon conflict between "principles of law" reflected in the "opinions" of two

courts.[3] The majority's approach incorrectly focuses only on the "judgment" that both are affirmances, and is thus in direct conflict with settled law in this State.[4]

The majority's opinion would significantly change the law of conflict jurisdiction. Regardless of the outcome of particular cases, this Court should have the opportunity to resolve conflicts in published opinions that announce conflicting legal principles. Such authority is necessary to the efficient and fair administration of justice. Litigants cannot adequately advise their clients as to the likelihood of success, or the merits of settlement, in the face of published opinions reflecting conflicting legal principles. Nor can circuit judges rule on issues arising before them. The majority's approach to conflict jurisdiction is inconsistent with settled law and is bad policy.

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[3] Indeed, the Third District recently certified a conflict between one of its decisions and a decision of the Second District, both of which were reversals of trial court orders granting motions to dismiss. See Pollock v. Florida Dept. of Hwy. Patrol, Case Nos. SC99-8, SC99-41, 2004 WL 1274334 (Fla. June 10, 2004).

[4] It is worth noting that Schwarz involved a non-jury trial. The Fourth District held that, had the trial been to a jury, the probability of reversible error due to improper admission of the hearsay would have been substantially higher. Schwarz, 695 So.2d at 456. This illustrates the problem with basing conflict jurisdiction on such vagaries.

CONCLUSION

As Judge Kahn's dissent notes, the majority's opinion is "a radical departure from the conduct of trials in this State" (Slip. Op., p. 23). The decision undermines the bedrock principle that an expert testify based upon his or her education, training and experience. For all of the foregoing reasons, this Court should exercise its discretion and review the case on the merits because the First District Court's decision conflicts with the decision of the Fourth District Court of Appeal in Schwarz v. State, 695 So.2d 452 (Fla. 4th DCA 1997).

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

Respectfully submitted,

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