SUPREME COURT
STATE OF FLORIDA

BETH LINN and
ANTHONY LINN,

Petitioners,

v.

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

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

Respondents.
_____/

JURISDICTIONAL BRIEF OF RESPONDENT BASIL D. FOSSUM, M.D.

On Review From a Decision of the
First District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

Respondent BASIL D. FOSSUM, M.D. ("Dr. Fossum") submits this jurisdictional brief pursuant to Florida Rule of Appellate Procedure 9.120(d). The issue here is whether the opinion of the First District Court of Appeal (attached as Appendix) directly and expressly conflicts with opinions from other district courts of appeal or this Court. Thus, while Dr. Fossum generally agrees with the facts recited in Petitioners' BETH LINN and ANTHONY LINN ("the Linns") jurisdictional brief, Dr. Fossum respectfully asserts that their statement of fact includes irrelevant facts and omits pertinent ones. Dr. Fossum offers the following statement.

This is a medical malpractice case involving a purported failure by Dr. Fossum to diagnose a urine leak occurring in Beth Linn's ureter. (Opinion at 2). After trial on the merits, the jury returned a verdict for Dr. Fossum. (Id. at 4).

On appeal to the First District, the Linns argued that the trial court erred by allowing defense expert Dr. Dana Weaver-Osterholtz to opine regarding the proper standard of care applicable to Dr. Fossum because Dr. Weaver-Osterholtz lacked a proper factual predicate for her opinion. (Id. at 1-2). Generally speaking, the Linns maintained that Dr. Weaver-Osterholtz improperly based her opinion *solely* on a conference she undertook with other urologists and maintained this was

improper under Schwarz v. State, 695 So.2d 452 (Fla. 4th DCA 1997). On the other hand, Dr. Fossum maintained that Dr. Weaver-Osterholtz had a proper basis for her opinion which included the conference with other urologists, but also included sworn deposition testimony, review of pertinent medical records, and her own experience, and that Schwarz was inapplicable.

The First District affirmed, finding that Dr. Weaver-Osterholtz's opinion was admissible because it was not based entirely on the statements of the other urologists. (Opinion at 8). The First DCA stated:

> The question, then, is whether the opinion given by Dr. Weaver-Osterholtz was based entirely on the hearsay statements of the other urologists. Our review of the record convinces us that it was not. As she stated in her testimony, Dr. Weaver-Osterholtz reviewed Mrs. Linn's medical records . . . as well as the deposition testimony of other witnesses in the case. In addition, she relied on her own medical education, training, and experience in forming her opinion. The consultation with her colleagues was only a part of the basis for her opinion that Dr. Fossum complied with the standard of care.

(Id. at 8).

The First District also distinguished Schwarz upon two separate grounds, and expressly noted that its decision did not conflict with Schwarz. (Id. at 10-11). The First District stated that its opinion was "consistent with Schwarz," that "the decisions are not even arguably in conflict," and that "it would

have no basis to certify conflict in any event." (Id. at 11-12). The Linns now seek review in this Court upon the argument that the First DCA's opinion expressly and directly conflicts with Schwarz.

Second, and on a related point, the Linns assert that the First DCA's opinion conflicts with this Court's decisions in Seaboard Air Line Railroad Co. v. Branham, 104 So.2d 356 (Fla. 1958), and N&L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960) on the point of conflict jurisdiction itself. (Linns' brief at 8). The Linns argue that the First District improperly found that no conflict existed because both this case and Schwarz were affirmances, and that this rationale conflicts with Branham and Doman. This argument is based on one sentence of the following paragraph from the First District's opinion:

> We think that our opinion is consistent with the analysis in Schwarz, but we would have no basis to certify conflict in any event. Article V, section 3(b)(4) of the Florida Constitution provides that the supreme court may review a decision of a district court of appeal that "is certified by it to be in direct conflict with a decision of another district court of appeal." (Emphasis added). Here, the decisions are not even arguably in conflict. Both were affirmances. At most, according to the dissent in the present case, the reasoning is different. We do not share that view, but even if we did, it would not be a basis to certify conflict.

(Id. at 11-12).

Finally, Dr. Fossum must respectfully take issue with two recurring statements found now in the Linn's jurisdictional brief. They are of little import to the jurisdictional question, but should be addressed nonetheless.

First, citing page 3 of the opinion, the Linns claim that Dr. Weaver-Osterholtz agreed with the Linns' experts about the proper standard of care. (Linns' brief at 2). That is not found on page 3 of the opinion, nor anywhere in the opinion, because that did not happen. The Linns unsuccessfully argued below that it was improper for Dr. Weaver-Osterholtz to opine that the standard of care applicable to Dr. Fossum was different than the standard of care for a specialist such as herself. (Opinion at 2, 9). Their statement is an incorrect derivation of that argument.

Second, citing no source, the Linns state that no doctor testified based upon her education, training and experience that Dr. Fossum followed the appropriate standard of care. (Linns' brief at 2). Dr. Weaver-Osterholtz testified to that, as the First District found. (Opinion at 8). Indeed, that was the entire issue on appeal.

SUMMARY OF ARGUMENT

For two reasons, there is no express and direct conflict between the First District's decision and Schwarz. First, the

district court made it clear on the face of its opinion that its ruling is "consistent with the analysis in Schwarz," that "the decisions are not even arguably in conflict," and that "it would have no basis to certify conflict." That language alone forecloses any argument that this case expressly and directly conflicts with Schwarz. Second, this case does not expressly and directly conflict with Schwarz because Schwarz is a different kind of case. The issue there was whether an expert improperly bolstered his opinion by testifying to the hearsay statements of others. The issue here was whether Dr. Weaver-Osterholtz had a proper factual basis for her opinion. (Opinion at 10-11).

There is also no express or direct conflict with Branham or Doman. The Linns assert that the First District conflicted with Branham and Doman by failing to examine the legal theories involved in Schwarz and this case when determining whether to certify conflict, and instead chose not to certify conflict simply because this case and Schwarz were "both affirmances." The First District did no such thing. Rather, it refused to certify conflict because it found Schwarz distinguishable on several grounds.[1]

1. Indeed, the Linns' jurisdictional brief attempts on the one hand to argue that the First District improperly distinguished Schwarz when considering whether to certify conflict and on the other to argue that the First District did

ARGUMENT

I. NO EXPRESS OR DIRECT CONFLICT WITH SCHWARZ

The Linns claim that the First District's decision expressly and directly conflicts with Schwarz v. State, 695 So.2d 452 (Fla. 4th DCA 1997), but there is no conflict with Schwarz at all, much less the express *and* direct conflict necessary for supreme court jurisdiction.

The question here is whether the opinion "expressly and directly" conflicts with Schwarz. Fla. Const. art. V § 3(b)(3). This means the conflict must be expressed on the face of the majority opinion, and it must be a direct conflict. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). The dissenting opinion plays no role in this analysis, as it is not the view of the Court. Id.

The opinion does not expressly and directly conflict with Schwarz. The First District made this clear right in the opinion by addressing and distinguishing Schwarz on two separate and "critical" grounds (opinion at 10-12), either of which is alone sufficient to make this case different from Schwarz, which means no conflict arises between the two decisions. Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962). Following this analysis,

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nothing more than consider that both were affirmances when considering whether to certify conflict.

the First District concluded that its opinion is "consistent with the analysis in Schwarz," that "the decisions are not even arguably in conflict," and that "it would have no basis to certify conflict." (Id. at 11).

Therefore, the First District's decision, which is comprised of the majority ruling and which expressly distinguishes and notes its consistence with Schwarz, does not expressly *or* directly conflict with Schwarz. Thus, respectfully, there is no Supreme Court jurisdiction on this ground alone, and Dr. Fossum submits that no further inquiry is required.

However, without intending to address the actual merits of the Linns' attempted appeal to this Court, and only intending to address the jurisdictional issue of whether there is an express and direct conflict here, Dr. Fossum will briefly address the Linns' argument that Schwarz "is on point and should have resulted in reversal of this case" and that the Court was wrong when it distinguished Schwarz. (Linns' brief at 5-7). After all, if the First District was correct when it distinguished Schwarz, then there is no conflict.

Schwarz is distinguishable for the two reasons explained by the First District. It does not apply here. There, Schwarz maintained on appeal that an opposing expert improperly

bolstered his opinion by testifying that he discussed the case with other experts. 695 So.2d at 454. In the instant case, as the First District noted, the Linns did not maintain that Dr. Weaver-Osterholtz was attempting to improperly bolster her opinion by testifying to the hearsay statement of the other urologists. Rather, they maintained that Dr. Weaver-Osterholtz's opinion lacked a proper factual predicate because it was based entirely on hearsay. Indeed, that was the issue on appeal. Recall the quotation of the First District:

> The question, then, is whether the opinion given by Dr. Weaver-Osterholtz was based entirely on the hearsay statements of the other urologists. Our review of the record convinces us that it was not.

(Opinion at 8).[2] Thus, Schwarz is a different case, and so a different result was reached there. (Id. at 10-12). There is no conflict between these two decisions.

In summary, there is no conflict with Schwarz for two reasons, each of which is alone sufficient to reach this conclusion. First, the First District has made it clear that its opinion does not expressly or directly conflict with Schwarz, and that it is "consistent with Schwarz," that "the

2. This case is also distinguishable from Schwarz for the second reason referenced in the First District's opinion, which Dr. Fossum respectfully will not discuss. Because the First District was correct when distinguishing Schwarz on the first (and main) ground, there is no express or direct conflict here.

decisions are not even arguably in conflict," and that "it would have no basis to certify conflict in any event." Second, upon examination of Schwarz, this is entirely correct – that case involved a different set of facts and a different legal theory.

II. NO EXPRESS OR DIRECT CONFLICT WITH BRANHAM OR DOMAN

Next, the Linns claim that the First District's decision expressly and directly conflicts with Seaboard Air Line Railroad Co. v. Branham, 104 So.2d 356 (Fla. 1958) and N&L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960) on the very point of conflict jurisdiction. The First District issued no holding on conflict jurisdiction in this case. Rather, the Linns seize one sentence of dicta – a sentence stating that both Schwarz and the instant cases are affirmances – and from it necessarily assert that the First District's entire *decision* expressly and directly conflicts with Branham and Doman because the court has focused only on the judgments entered in this case and Schwarz, and not upon their actual principles of law. (Linns' brief at 7-9).

The First District's opinion makes it clear that the court did not examine only the judgments and ignore the principles of law. The Linns claim that one sentence in the midst of the First District's explanation that it would not certify conflict – "Both were affirmances." – indicates that the First District entirely ignored the relevant principles of law when making it

decision on the merits of the appeal. *But the principles of law for the merits of the appeal are naturally found right in the opinion.* They are the very same principles of law that required affirmance. The First District explicitly discussed the principles of law applicable to this case, and to Schwarz, and found the cases dissimilar. The principles of law relevant to this case are found on pages 5-10 of the opinion, and the principles of law relevant to Schwarz directly follow. Thus, the First District did not look only at the judgments, but at the legal principles as well.

In sum, the Linns claim the First District improperly refused to certify conflict because both this case and Schwarz were affirmances. However, the opinion makes it clear that the First District did not certify conflict because the cases are factually dissimilar and involve different legal theories.

CONCLUSION

Upon the foregoing, there is no express or direct conflict between the First District's opinion and Schwarz, Doman, or Branham. The Court should (indeed, respectfully, it must) decline to accept jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Major B. Harding, Martin B. Sipple and Jennifer M. Heckman, Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302, and J. Nixon Daniel, III, Beggs & Lane, Post Office Box 12950, Pensacola, Florida 32576-2950, this 25 day of February 2005.

/s/William D. Horgan
S. WILLIAM FULLER, JR.
WILLIAM D. HORGAN

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), I hereby certify that this brief complies with the requirements of that rule.

/s/William D. Horgan
S. WILLIAM FULLER, JR.
WILLIAM D. HORGAN