IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC08-2087

CHRISTY AILLS,

Petitioner,

v.

LUCIANO BOEMI, M.D., and LUCIANO BOEMI, M.D., P.A.,

Respondents.

RESPONDENTS' AMENDED BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
SECOND DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 1

I. The "conflict" jurisdiction of the Supreme Court should not be exercised to determine whether Ms. Aills is subject to retrial of her medical malpractice claim against Dr. Boemi 1

II. There is no express and direct conflict with any decision holding that an appellate court cannot consider a ground for objection which was not presented to the trial court. 4

III. The district court correctly held that the two-issue rule cannot be applied in this case. 6

A. There is no express and direct conflict with the Fourth District's decision applying the two-issue rule. 7

B. The district court properly determined that an application of the two-issue rule in this case would violate due process of law. 9

CONCLUSION 10

CERTIFICATE OF SERVICE 12

CERTIFICATE OF COMPLIANCE 12

TABLE OF CITATIONS

Page

Cases

Aills v. Boemi
990 So. 2d 540 (Fla. 2d DCA 2008)..... passim

Ansin v. Thurston
101 So. 2d 808 (Fla. 1958) 3

B.D.M. Fin. Corp. v. Department of Bus. & Prof. Reg.
698 So. 2d 1359 (Fla. 1st DCA 1997) 9

Barth v. Khubani
748 So. 2d 260 (Fla. 1999) 8

Chua v. Hilbert
846 So. 2d 1179 (Fla. 4th DCA 2003)..... 7, 8, 9

Florida Greyhound Owners & Breeders Ass'n, Inc. v. West Flagler Assocs., Ltd.
347 So. 2d 408 (Fla. 1977) 3

Goldschmidt v. Holman
571 So. 2d 422 (Fla. 1990) 9

Lake v. Lake
103 So. 2d 639 (Fla. 1958) 3

Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC
986 So. 2d 1244 (Fla. 2008) 5

Reaves v. State
485 So. 2d 829 (Fla. 1986) 5

Ricks v. Jackson
159 N.E.2d 225 (Ohio 1959) 8

Tamiami Trail Tours, Inc. v. Cotton
463 So. 2d 1126 (Fla. 1985) 9

Whitman v. Castelwood Int'l Corp.
383 So. 2d 618 (Fla. 1980) 8

TABLE OF CITATIONS
(Continued)

Page

Constitutional Provisions

Art. V, § 3(b)(3), Fla. Const.....6

STATEMENT OF THE CASE AND FACTS

Dr. Boemi accepts the Statement of the Case and Facts which petitioner Christy Aills has in is large part taken from the face of the district court's opinion.

SUMMARY OF ARGUMENT

Ms. Aills offers the Court no policy reason to exercise its discretion to grant review of the district court's decision, which in any event does not expressly or directly conflict with any decision of another Florida appellate court.

ARGUMENT

Christy Aills has invoked the "conflict" jurisdiction of the Court to request that she not be required to retry her claim of medical malpractice against Dr. Boemi. Nowhere in her jurisdictional brief does she suggest that the district court's decision creates broad-based, statewide jurisprudential disharmony in Florida's law, or that the court's decision has any significance to anyone other than her.

The discretionary jurisdiction of the Supreme Court does not exist to second-guess the error-correcting function of the district courts of appeal. Ms. Aills' request for a second review of her flawed first trial should be denied.

I. The "conflict" jurisdiction of the Supreme Court should not be exercised to determine whether Ms. Aills is subject to retrial of her medical malpractice claim against Dr. Boemi.

The Second District Court of Appeal ordered a retrial of Ms. Aills' malpractice claim against Dr. Boemi because her trial counsel "sandbagged" Dr. Boemi in closing argument with a legal theory which had neither been pled nor

tried.[1] The court found from a thorough review of the record that counsel's argument on Dr. Boemi's alleged post-operative negligence was "completely outside the issues that were presented at trial," yet was raised for the first time in closing and argued to the jury with "dramatic and vivid rhetoric" that the court found to be "disturbing and inflammatory" and not harmless.[2]

The district court made its determination to require a new trial after carefully reviewing the pleadings, the trial testimony, and the arguments of counsel,[3] and then setting out in its opinion a detailed discussion of Ms. Aills' claim,[4] her second amended complaint,[5] the evidence,[6] the verdict form,[7] the remarks of her counsel during closing argument,[8] the jury's verdict,[9] the post-trial motions and court rulings (*Id.*), the parties' points on appeal,[10] and the standard of review.[11] This is precisely the form of thoughtful appellate review for which the district courts of appeal were created in 1956, and given finality. *Lake v. Lake,* 103 So. 2d 639,

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1 *Aills v. Boemi*, 990 So. 2d 540, 549 (Fla. 2d DCA 2008).

2 *Id*. at 548-49.

3 *Id*. at 543-45.

4 *Id*. at 542-43.

5 *Id*. at 543.

6 *Id*. at 543-44.

7 *Id*. at 544.

8 *Id*. at 544-45.

9 *Id*. at 545.

10 *Id*. at 545-46.

11 *Id*. at 546.

641-42 (Fla. 1958), (the district courts of appeal "were meant to be courts of final, appellate jurisdiction," and not "way stations on the road to the Supreme Court").

In contrast to the district courts, the Supreme Court "functions as a supervisory body in the judicial system for the State" in order to settle "issues of public importance and the preservation of uniformity of principle and practice." *Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958). Under the present Constitution, a district court decision which lacks an *express* conflict is ineligible for the Court's review, and broad discretion is given the Court to decline the review of decisions which might appear to conflict but create no disharmony in the state's jurisprudence.[12] Those are the conditions which exist in this case.

Ms. Aills asks the Court to set aside the district court's decision for no reason other than her personal desire not to be "required to retry the entire case from beginning to end."[13] She identifies no broad-based, statewide confusion or disharmony in the law, and suggests no public policy reason for the Court to address any issue on which the district court grounded its decision. If for no other reason than the absence of any general disharmony in the law, the Court should decline to exercise its discretion to review the district court's decision even if the

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12 The jurisprudential harmonization function of the Court, as expressed in *Ansin*, was reprised in *Florida Greyhound Owners & Breeders Ass'n, Inc. v. West Flagler Assocs., Ltd*., 347 So. 2d 408 (Fla. 1977) (England, J. concurring), which helped lay the groundwork for the 1980 constitutional amendment that reformed the Supreme Court's jurisdiction.

13 Jurisdictional Brief at 4.

Court could find a modicum of the decisional conflict which Dr. Boemi believes does not exist.

II. There is no express and direct conflict with any decision holding that an appellate court cannot consider a ground for objection which was not presented to the trial court.

The district court held that it constituted legal error for Ms. Aills' counsel to argue to the jury over a timely objection "a theory of medical negligence that was not within the issues presented at trial."[14] Ms. Aills asserts that Dr. Boemi did not object on the ground that post-operative negligence had not been pled with specificity in the complaint, and that the district court "simply invented" that objection in order to "finesse" the two-issue rule.[15]

The basis for Ms. Aills' contention is one sentence in the district court's opinion which references a sidebar conference at which Dr. Boemi's counsel objected to the absence of any record basis for either post-operative negligence or causation.[16] Ms. Aills would have the Court infer that this reference to counsel's objection in the district court's decision essentially constitutes a recognition by the panel that Dr. Boemi's counsel did *not* object on the ground that Ms. Aills' claim of post-operative negligence was not pled with specificity, and that this *inferred* recognition creates express and direct conflict with decisions which hold that

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14 *Aills*, 990 So. 2d at 542.

15 Jurisdictional Brief at 5.

16 *Aills*, 990 So. 2d at 544.

grounds for an objection which are not raised at trial are not eligible for appellate review.[17]

Ms. Aills' accusation – that the Second District arbitrarily made up a record objection so it could justify ordering a new trial – is a startling bit of advocacy which the Court cannot verify from the four corners of the district court's decision.[18] The court's decision does not say, either expressly or directly, that Dr. Boemi's counsel failed to raise an objection at trial based on a pleading insufficiency. Any such notion would have to be at best inferred, *indirectly*, from the court's recitation of counsel's objection on other grounds. Thus, Ms. Aills' "conflict" argument depends on a two-step determination by the Court: first, to view the district court's reference to counsel's objection as a silent application of the doctrine that the mention of one thing implies the exclusion of another,[19] in order to determine that a different objection was *not* made; and then, second, to conclude that this "implied" application of the doctrine creates express and direct conflict with decisions which hold that objections not raised at trial are not preserved for appellate review.

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17 Ms. Aills nowhere suggests that the negative implication on which she asks the Court to infer conflict is likely to have a broad, statewide impact on the law governing preservation of error.

18 *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986) ("The only facts relevant to our decision to accept or reject [jurisdictional] petitions are those facts contained within the four corners of the decisions allegedly in conflict.").

19 *Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So. 2d 1244, 1258 (Fla. 2008).

Ms. Aills argument is not based on error preservation conflict found "expressly and directly" in the district court's decision, as required by Article V, section 3(b)(3) of the Florida Constitution. For that reason, the Court lacks jurisdiction to do a "conflict" two-step in order to even consider exercising its discretionary jurisdiction to delve into the record in order to verify Ms. Aill's contention that the district court "sandbagged" her.[20]

III. The district court correctly held that the two-issue rule cannot be applied in this case.

The district court determined from its review of the trial court record that the disturbing and inflammatory remarks of Ms. Aills' counsel in closing argument were not harmless,[21] and that an application of the two-issue rule would violate procedural due process.[22] Ms. Aills does not deny that her counsel's comments were harmful, and she does not dispute that Dr. Boemi was denied due process by her counsel's surprise argument on post-operative negligence. Rather, she disagrees with the district court's record-based determination that Dr. Boemi's counsel had no notice of that unpled and untried legal theory before closing argument, and she asserts that the district court's decision cannot be reconciled with the two-issue rule as expressed in one decision of the Fourth District Court of Appeal. Neither of these contentions is sound, or provides a reason for the Court's review.

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20 Jurisdictional Brief at 6.

21 *Aills*, 990 So. 2d at 548-49.

22 *Id*. at 550.

A. There is no express and direct conflict with the Fourth District's decision applying the two-issue rule.

Ms. Aills first disagrees with the district court's determination that Dr. Boemi had no notice that post-operative negligence was an issue in the case, and based on such disagreement, asserts that Dr. Boemi's counsel should have requested a special interrogatory verdict in order to avoid the two-issue rule.[23] Ms. Aills' disagreement with the district court about the record, including its citations to various indications in the record as to how Dr. Boemi's counsel was misled, obviously provides no jurisdictional basis for the Court's review. Ms. Aills has not offered some other Florida appellate court decision which "conflicts" with her contention that the district court misstated the trial record.

Ms. Aills then argues that, even if the district court was correct in its review of the record and her trial counsel did improperly make a non-harmless and disturbing closing argument on a "theory of medical negligence that was not within the issues presented at trial,"[24] the district court's decision conflicts with *Chua v. Hilbert*, 846 So. 2d 1179 (Fla. 4th DCA 2003).[25] It does not, though.

In *Chua*, the district court held that the two-issue rule was applicable in a medical malpractice case where "the patient went to trial on multiple theories of liability with regard to [her physician's] performance of a procedure."[26] The court

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23 Jurisdictional Brief at 7.

24 *Aills*, 990 So. 2d at 542.

25 Jurisdictional brief at 8.

26 *Chua*, 846 So. 2d at 1181.

noted that each of the plaintiff's three, separate causes of action in that case were *pled and tried*, and the court applied the two-issue rule because the general verdict on liability given to the jury did not specify which of the three theories were in fact proved. *Id*. The *Chua* case involved the precise situation for which the two-issue rule was adopted in Florida, both for plaintiffs and for defendants. *See Whitman v. Castelwood Int'l Corp.*, 383 So. 2d 618, 619 (Fla. 1980), applying the two-issue rule where the "plaintiffs . . . *presented to the jury* two theories of liability" (emphasis added), and *Barth v. Khubani*, 748 So. 2d 260 (Fla. 1999), applying the two-issue rule where "the [defendant] *pled* two or more defenses at trial" (emphasis added).

The Second District was fully aware of the two-issue rule, and in fact acknowledged and referenced both the *Whitman* and the *Barth* decisions.[27] The court noted, however, that unlike those cases, this case involved a legal theory which was never pled *or* presented to the jury.[28] The court was unwilling to extend the two-issue rule to a case in which a defendant can be

> "sandbagged" by being found liable on a theory of liability that neither he nor his counsel had any inkling would be submitted to the jury . . . .[29]

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27 *Aills*, 990 So. 2d at 549.

28 *Id.* at 542.

29 *Aills*, 990 So. 2d at 549. This was not a novel proposition. In *Barth*, the Court had looked to Ohio jurisprudence in considering adoption of the two-issue rule (*Barth*, 748 So. 2d at 262), and in that state the two-issue rule has no application when a legal theory should not have been presented to the jury. *E.g., Ricks v. Jackson*, 159 N.E.2d 225 (Ohio 1959).

Rather, the court followed the principle expressed by this Court in *Goldschmidt v. Holman*, 571 So. 2d 422, 423-24 (Fla. 1990), that a jury will *not* be permitted to consider a claim of medical malpractice which has not been specifically pled.[30]

There is no express and direct conflict between this case and *Chua*. Nor is there any reason for concern that the judges and lawyers in Florida will fail to understand that the decision in this case follows the principle of *Goldschmidt*, and is not at decisional odds with the two-issue principle appropriately applied in *Chua*.

B. The district court properly determined that an application of the two-issue rule in this case would violate due process of law.

Another independent reason for denying review here is grounded in the district court's observation that an application of the two-issue rule here, where the defendant had no notice of the legal theory urged on the jury for the first time in closing argument, would violate procedural due process.[31] Ms. Aills has not challenged that determination by the district court, which in fact is well-grounded in Florida law. *See Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1128 (Fla. 1985) (liability cannot be based on a theory the defendant "never had an opportunity to rebut at trial").

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30 *Aills*, 990 So. 2d at 550.

31 At a minimum, arguing to the jury a legal theory which was not pled or tried constitutes fundamental error. *E.g., B.D.M. Fin. Corp. v. Department of Bus. & Prof. Reg.*, 698 So. 2d 1359, 1363 (Fla. 1st DCA 1997) (fundamental error to award damages not supported by the allegations of the complaint).

The district court held that an application of the two-issue rule in this situation would run afoul of the Constitution. Were the Court to accept this case for review, and were it even to go on to find that the district court misapplied the two-issue rule (which Dr. Boemi contends is not the case), the Court could not grant the relief Ms. Aills seeks without also addressing the constitutionality of its application. No citation is required to remind the Court that courts will always avoid constitutional issues if there is a basis for resolving a case on a non-constitutional ground. In this case, the Court would avoid addressing the constitutional issue which Ms. Aills' has not denied exists simply by denying review.

CONCLUSION

The four corners of the district court's decision in this case exhibit no decisional conflict, and Ms. Aills has not suggested that Florida's jurisprudence is in such disharmony that the Court's intercession is important to its constitutional role of preserving uniformity in Florida's legal principles or procedures. Review of the district court's decision should be denied.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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