

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,400

PAMELA MARRERO,  
Petitioner,

vs.

MALCOLM G. GOLDSMITH, M.D.,  
et al,

Respondents.

---

**FILED**

S'D J WHITE

JUN 4 1984

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

BRIEF OF PETITIONER ON JURISDICTION

HORTON, PERSE & GINSBERG  
410 Concord Building  
Miami, Florida 33130  
and  
ALLDREDGE & GRAY  
Biscayne Building  
Miami, Florida 33130  
Attorneys for Petitioner

TOPICAL INDEX

	<u>Page No.</u>
INTRODUCTION	1
JURISDICTIONAL STATEMENT	1-2
STATEMENT OF CASE AND FACTS	2-4
POINT INVOLVED	4
ARGUMENT	4-7
CONCLUSION	8
CERTIFICATE OF SERVICE	8-9

LIST OF CITATIONS AND AUTHORITIES

	<u>Page No.</u>
BELCHER v. BELCHER 271 So. 2d 7 (Fla. 1972)	5
BENIGNO v. CYPRES COMMUNITY HOSPITAL, INC. 386 So. 2d 1303 (Fla. 4 DCA 1980)	2
DODI PUBLISHING CO. v. EDITORIAL AMERICA, S.A. 385 So. 2d 1369 (Fla. 1980)	2
FRASH v. SARRES 60 S. 2d 924 (Fla. 1952)	6
JENKINS v. STATE 385 So. 2d 1356 (Fla. 1980)	2
NIELSEN v. CITY OF SARASOTA 177 So. 2d 731 (Fla. 1960)	5
SOUTH FLORIDA HOSPITAL CORP. v. McCREA 118 So. 2d 25 (Fla. 1960)	2
WALE v. BARNES 278 So. 2d 601 (Fla. 1973)	5

I.

INTRODUCTION

Petitioner was personal injury/medical malpractice in the operating theatre plaintiff in the trial court and appellant in the District Court of Appeal. Respondent physicians were defendants in the trial court and appellees in the District Court of Appeal. In the District Court of Appeal, petitioner sought review of adverse final judgments rendered pursuant to jury verdict finding all three attending physicians not guilty of any negligence. Her first point on appeal challenged the trial court's refusal to instruct the jury on the doctrine of res ipsa loquitur. In the decision sought to be reviewed, the District Court of Appeal affirmed the judgments appealed.

The parties will alternately be referred to herein as they stand on appeal and as follows: petitioner as "MARRERO;" and respondents as "GOLDSMITH," "KITSOS," and "BREWSTER" respectively. The symbol "A" shall stand for petitioner's rule required appendix to be filed contemporaneously herewith.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

JURISDICTIONAL STATEMENT

This proceeding has been instituted, and the jurisdiction of this Court is invoked, under the aegis of Article V, § 3(b)(3) of the Florida Constitution--as amended April 1, 1980--and Rule 9.030(2), Fla. R. App. P., as construed by this

Court in JENKINS v. STATE, 385 So. 2d 1356 (Fla. 1980), and DODI PUBLISHING CO. v. EDITORIAL AMERICA, S.A., 385 So. 2d 1369 (Fla. 1980). Petitioner contends that the decision of the District Court of Appeal, Third District, sought to be reviewed, is in express and direct conflict with the decision rendered by this Court in SOUTH FLORIDA HOSPITAL CORP. v. McCREA, 118 So. 2d 25 (Fla. 1960); and BENIGNO v. CYPRES COMMUNITY HOSPITAL, INC., 386 So. 2d 1303 (Fla. 4 DCA 1980).

III.

STATEMENT OF CASE AND FACTS

The following are the pertinent facts of this case:

1. MARRERO underwent multiple surgery with BREWSTER (anesthesiologist) administering a general anesthesia; GOLDSMITH (rectal surgeon) performing a hemorrhoidectomy, and KITSOS (a plastic surgeon) performing a "tummy tuck" and cyst removal. The operation lasted for a considerable period of time. (A. 1-2)

2. Before surgery MARRERO had full use of and no problems with her left arm. After surgery she was left with permanent numbness and pain in her left arm which was diagnosed as brachial plexopathy. (A. 2)

3. In due course MARRERO brought suit against respondents. Her complaint charged each respondent with departures from the requisite standard of care including the failure to properly position her arms during surgery. (A. 4-9)

4. Each defendant answered denying any departure from the requisite standard of care and denying that MARRERO'S arms had been improperly positioned during surgery. (A. 10-16)

5. At trial respondents defended--and produced expert testimony in support of the defense--by contending that there had been no departure from the requisite standard of care, and that there had been no mispositioning of MARRERO'S arms during the course of surgery. MARRERO did produce "at least one expert" who testified that her "injury was caused by the defendants' incorrect positioning of the plaintiff's arms during surgery or by failure to change the arm position during the course of the operations." (A. 2)

6. At trial MARRERO'S request to charge the jury on the doctrine of res ipsa loquitur was denied. (A. 2) The jury returned a "no negligence" verdict in favor of all defendants, and the final judgments appealed were rendered in accordance therewith.

7. On the foregoing facts, the District Court of Appeal affirmed the judgments appealed stating and holding, inter alia:

\* \* \*

"The first issue raised by Mrs. Marrero is that the trial court erred in denying her request to instruct the jury on res ipsa loquitur. The doctrine is one of extremely limited application. 'It provides an injured plaintiff with a common sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present.' Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358 So. 2d 1339 (Fla. 1978). We need not even consider these elements because we find that direct proof of negligence is not wanting in this case. To the contrary, plaintiff presented expert testimony regarding the alleged negligence of the defendants. Metropolitan Dade County v. St. Claire, No. 83-386 (Fla. 3d DCA Jan. 31, 1984); Benigno v. Cypress Community Hospital, Inc., 386 So. 2d 1303 (Fla. 4th DCA 1980). Accordingly, the trial court was correct in denying the requested instruction." (A. 1-3)

\* \* \*

8. MARRERO'S timely filed motion for rehearing (A. 17-18) was denied by the District Court of Appeal by order dated May 2, 1984. (A. 19) These certiorari proceedings followed in due course.

IV.

POINT INVOLVED ON JURISDICTION

WHETHER ON THIS RECORD THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE DECISIONS RENDERED BY THIS COURT IN SOUTH FLORIDA HOSPITAL CORP. v. McCREA, supra, 118 So. 2d 25, AND BY THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IN BENIGNO v. CYPRESS COMMUNITY HOSPITAL, INC., supra, 386 So. 2d 1303.

V.

ARGUMENT

A.

APPLICABLE JURISDICTIONAL PRINCIPLES

Petitioner does not believe that the recent amendment to Article V as construed by the decisions rendered by this Court in JENKINS v. STATE, supra, 385 So. 2d 1356, and DODI PUBLISHING CO. v. EDITORIAL AMERICA, S.A., supra, 385 So. 2d 1369, change in any appreciable way the guidelines utilized to ascertain and/or establish existence of "direct conflict" in a case such as this which does not fall within the JENKINS and DODI ambit. That is to say, this Court has jurisdiction to review the decisions of District Courts of Appeal on direct conflict grounds to resolve embarrassing conflict between decisions. That jurisdiction may be invoked where a District Court of Appeal: (1) announces a rule of law which conflicts with a rule previously announced by another Florida appellate

court; or (2) applies 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 a Florida appellate court; or (3) misapplies precedent; or (4) misapplies and/or refuses to apply applicable law to a case under consideration. See Article V, § 3, Florida Constitution, supra; WALE v. BARNES, 278 So. 2d 601 (Fla. 1973); BELCHER v. BELCHER, 271 So. 2d 7 (Fla. 1972); and NIELSEN v. CITY OF SARASOTA, 177 So. 2d 731 (Fla. 1960). The "record proper rule" is, of course, still efficacious in a case of this description.

B.

ON THIS RECORD THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE DECISIONS RENDERED BY THIS COURT IN SOUTH FLORIDA HOSPITAL CORP. v. McCREA, supra, 118 So. 2d 25, AND BY THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IN BENIGNO v. CYPRESS COMMUNITY HOSPITAL, INC., supra, 386 So. 2d 1303.

In SOUTH FLORIDA HOSPITAL CORP. v. McCREA, supra, the plaintiff, in the recovery room after surgery, sustained fractures of both arms. In her subsequent action against the hospital and its agents, the plaintiff alleged that she was injured as a result of the hospital's negligence in permitting her to fall while under anesthesia, that is, while under the defendant's total control. The defendants denied that the plaintiff had suffered her injuries in a fall, denied that there was a departure from the requisite standard of care and contended that plaintiff's injuries were probably self-inflicted by the plaintiff's involuntary convulsions. Thus, in McCREA the exact cause of the plaintiff's injuries was spe-

culative and the subject of a dispute between the parties, and evidence to establish what transpired, after all, the plaintiff was under anesthesia and under the total control of the defendants, was unavailable. In McCREA this Court adopting the majority rule that a plaintiff may, in certain cases, resort to both evidence of specific negligence as well as the inferences available under the doctrine of res ipsa loquitur, held that an instruction on res ipsa loquitur was properly given. This Court characterized the majority rule in the following terms:

\* \* \*

"[T]he introduction of evidence of specific negligence which does not clearly establish the precise cause of the injury, will not preclude reliance on the otherwise-applicable res ipsa doctrine. The view is taken that, except in the clearest cases, both the specific evidence and the appropriate inferences from the happening of the accident should be permitted to go to the jury, which, if it rejects the specific proof, may still find against the defendant on the basis of inference." (Emphasis the court's.)

\* \* \*

In McCREA this Court stated in finding no conflict with FRASH v. SARRES, 60 So. 2d 924 (Fla. 1952), "there is no need or room for the operation of any inference or presumption under the res ipsa loquitur doctrine where the evidence in the case reveals all of the facts and circumstances surrounding the occurrence in the suit and clearly establishes the precise cause of plaintiff's injury."

In BENIGNO v. CYPRESS COMMUNITY HOSPITAL, INC., supra, the District Court of Appeal held that the doctrine of res

ipsa loquitur could not be applied to a case where everyone agreed that the claimant fell from a chair in which he had been placed by a hospital employee pursuant to doctor's orders. In BENIGNO no one disputed the facts. However, the defendant hospital simply contended there was no departure from the requisite standard of care.

For the reasons which follow, the decision sought to be reviewed is in direct conflict with the cited decisions rendered by this Court and the District Court of Appeal, Fourth District:

1. Here, the parties did not agree with regard to just how petitioner's injury came about. Petitioner contended they were caused by mispositioning of her arms during surgery. Respondents denied that this was the case. Thus, this record is not one in which the evidence "reveals all of the facts and circumstances surrounding the occurrence in the suit and clearly establishes the precise cause of plaintiff's injury."

2. The foregoing being true, the District Court of Appeal here rendered a decision in direct conflict with the cited decisions because--it announces a rule of law which conflicts with a rule previously announced by this Court and another Florida District Court of Appeal; it applies a rule of law to produce a different result in a case with substantially the same controlling facts as McCREA and BENIGNO; it misapplied precedent by its reliance on BENIGNO to support the conclusion reached here; and it misapplied and/or refused to apply applicable law to the case at Bar.

VI.

CONCLUSION

It is respectfully submitted that for the reasons and authorities set forth herein, the decision sought to be reviewed is in express and direct conflict with the decisions rendered by this Court and the District Court of Appeal, Fourth District, in McCREA and BENIGNO. This Court should exercise its discretionary jurisdiction in the premises both because of an embarrassing conflict between decisions, and because a large class of potential Florida litigants will be affected by the decision sought to be reviewed should they become involved in a similar imbroglio.

Respectfully submitted,

HORTON, PERSE & GINSBERG  
410 Concord Building  
Miami, Florida 33130

and

ALLDREDGE & GRAY, P.A.  
Biscayne Building  
Miami, Florida 33130  
Attorneys for Petitioner

By: 

Edward A. Perse

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner was mailed to the following counsel of record this 1 day of June, 1984.

ALAN E. GREENFIELD, ESQ.  
1000 Rivergate Plaza  
444 Brickell Avenue  
Miami, Florida 33131

JOHN E. HERNDON, ESQ.  
720 Biscayne Building  
Miami, Florida 33130

MELVIN C. ALLDREDGE, ESQ.  
518 Biscayne Building  
Miami, Florida 33130

EVAN LANGBEIN, ESQ.  
908 City National Bank Building  
Miami, Florida 33130

STEPHENS, LYNN, CHERNAY, KLEIN & ZUCKERMAN  
2400 One Biscayne Tower  
Miami, Florida 33131

By:   
Edward A. Perse