

108 83

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,230

FILED

SEP 22 1966

CLERK, SUPREME COURT

By Deputy Clerk

THE FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

-vs-

GEORGE BOUCHOC, ST. FRANCIS HOSPITAL
and EDNA PETERSON,

Respondents.

On Petition to Invoke Discretionary Jurisdiction
to Review Decision of the District Court of
Appeal of Florida, Third District

BRIEF ON JURISDICTION OF RESPONDENTS,
GEORGE BOUCHOC and ST. FRANCIS HOSPITAL

KUBICKI, BRADLEY, DRAPER,
GALLAGHER & McGRANE
Attorneys for Respondents,
BOUCHOC and ST. FRANCIS
701 City National Bank Bldg.
25 West Flagler Street
Miami, Florida 33130
Telephone: 305/374-1212

I N D E X

	<u>PAGE NO.</u>
TABLE OF CITATIONS AND AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
POINT INVOLVED ON JURISDICTION	2
ARGUMENT	3-5
A. THE INSTANT DECISION DOES NOT CONFLICT WITH <u>Florida Patient's Compensation Fund v. Maurer.</u>	
B. THE INSTANT DECISION DOES NOT CONFLICT WITH <u>Citizens of the State of Florida v. Public Service Commission.</u>	
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS AND AUTHORITIES

	<u>PAGE NO.</u>
<u>Citizens of the State of Florida</u> <u>v. Public Service Commission,</u> 435 So.2d 784 (Fla. 1983)	2, 4
<u>Davis v. Mandau,</u> 410 So.2d 915 (Fla. 1982)	5 n.4
<u>Florida Patient's Compensation Fund v. Maurer,</u> So.2d (Fla. 2d DCA 1986) 11 FLW DCA 1852 (opinion filed 8/22/86)	2, 3
<u>Jenkins v. State,</u> 385 So.2d 1356, 1359 (Fla. 1980)	3, 5
 <u>OTHER AUTHORITIES:</u>	
Fla. Const. Art. V §3(b)(3)	5
Section 768.54, Florida Statutes (1985)	5 n.3

STATEMENT OF THE CASE AND FACTS¹

The FUND attempts to show a conflict between the instant decision of the Third District and a decision of this Court and a decision of the Second District Court of Appeal. Contrary to the FUND'S assertion, the majority opinion does not "expressly" state a rule of law which conflicts with the two other decisions relied on by the FUND.

¹/ Respondents object to the substance of footnote 2 of Petitioner's Brief on Jurisdiction, page 5 which is not contained in the Third District opinion.

POINT INVOLVED ON JURISDICTION

WHETHER THE INSTANT THIRD DISTRICT DECISION
CONFLICTS WITH Citizens of the State of
Florida v. Public Service Commission AND
Florida Patient's Compensation Fund v. Maurer.

A R G U M E N T

A. THE INSTANT DECISION DOES NOT CONFLICT WITH
Florida Patient's Compensation Fund v. Maurer.

The FUND seeks to invoke the jurisdiction of this case on this basis of a "direct and express" conflict with the Maurer decision which was rendered by the Second District Court of Appeal after the instant Third District case was decided. From a careful reading of the instant decision, it is clear that the opinion of the Third District does not expressly state the holding on which the FUND relies to create a conflict with the later Second District decision. The effect of the decision is merely to affirm the judgment entered below without announcing a rule of law. Indeed, the FUND relies on language from the dissenting opinion in an attempt to show the question of law addressed by the majority. Brief of Petitioner on Jurisdiction, page 2. This Court has previously held that language from dissenting opinions or concurring opinions cannot support "conflict" jurisdiction "because they are not the decision of the district court of appeal." Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). This Court should not go beyond the majority opinion of the Third District in determining whether or not there is an express conflict.

There clearly is no "direct and express" conflict between the two decisions.² This Court should not accept jurisdiction to review this case.

B. THE INSTANT DECISION DOES NOT CONFLICT WITH
Citizens of the State of Florida v. Public
Service Commission.

Petitioner argues that the instant Third District decision conflicts with this Court's decision in Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784 (Fla. 1983). Petitioner maintains that the Third District decision conflicts with the following rule of law announced in this Court's decision: "Where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent. [cites omitted] Id. at 786. The instant decision, involving facts substantially different than the Citizens of the State of Florida decision, does not announce a rule of law which conflicts with this Court's decision. The instant decision announced no principle relating at all to judicial interpretation of a statute.

The FUND solely relies on its assertion that the "result" of the Third District Court could not be reached without violating

^{2/} Respondents have refrained from arguing the substantive issues involved in the case as the Committee Notes to the 1977 Revision note that such argument is improper.

the Supreme Court's announced principle in the Citizens decision.³ This simply is not enough to meet this Court's jurisdictional requirement. Petitioner improperly construes the word "expressly" in the relevant provision of the Constitution. Fla. Const. Art. V §3(b)(3).

In Jenkins v. State,⁴ this Court specifically construed the word "expressly" contained in Art. V, §3(b)(3) and stated:

The dictionary definitions of the term "express" include: to represent in words; "to give expression to." "Expressly" is defined: "in an express manner." Webster's Third New International Dictionary, (1961 ed. unabr.).

358 So.2d at 1359.

The decision of the Third District does not directly and expressly conflict with this Court's opinion.

^{3/} Even if this Court could look beyond the majority opinion to determine whether or not there is an express and direct conflict, the Third District opinion conforms to the clear and unambiguous terms of Section 768.54, Florida Statutes (1985). Plaintiff's claim for attorney fees arose out of the "occurrence" which was a basis of the medical malpractice action.

^{4/} The Jenkins court specifically held that as a result of the Constitutional revision, this Court no longer has jurisdiction to review per curiam decisions of the district court of appeal rendered without opinion. See also Davis v. Mandau, 410 So.2d 915 (Fla. 1982).

C O N C L U S I O N

Petitioner has argued that the instant decision of the Third District Court of Appeal conflicts with a decision of the Supreme Court of Florida and a decision of the Second District Court of Appeal. Respondents argue that the decision sought to be reviewed did not announce a rule of law conflicting with a rule announced in the two cases; none of the cited decisions are factually "on all fours" with the present case.

The Supreme Court of Florida was never intended to be the court of final appellate jurisdiction to review district court decisions which do not expressly and directly conflict with other appellate court decisions.

This Court should not exercise its discretionary jurisdiction.

Respectfully submitted,

BY: Betsy E. Gallagher
BETSY E. GALLAGHER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Respondents on Jurisdiction was mailed this 18th day of September, 1986 to: JOE N. UNGER, ESQ., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; JULIAN CLARKSON, ESQ., P.O. Box 015441, Miami, Florida 33101; and to H. LAWRENCE HARDY, ESQ., 299 Alhambra Circle, Coral Gables, Florida 33134.

KUBICKI, BRADLEY, DRAPER,
GALLAGHER & McGRANE
Attorneys for Respondents,
BOUCHOC and ST. FRANCIS
701 City National Bank Bldg.
25 West Flagler Street
Miami, Florida 33130
(305) 374-1212

BY: 
BETSY E. GALLAGHER