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INTRODUCTION

The Petitioner, Yolanda Felix, as personal representative of the Estate of Kevin Felix-Baptiste, was the Petitioner in the District Court of Appeal and the Plaintiff in the trial court. The Respondent, Hoffmann-LaRoche, Inc., was the Respondent in the Third District Court of Appeal and the Defendant in the trial court.

JURISDICTIONAL STATEMENT & SUMMARY OF ARGUMENT

Petitioner, pursuant to Rule 9.030 (a)(2)(A)(iv) of the Florida Rules of Appellate Procedure, seeks to invoke the discretionary jurisdiction of this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution, to review the decision of Felix v. Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla 3d DCA 1987). The decision of the Third District Court of Appeal in this case expressly and directly conflicts with decisions of this Supreme Court and other district courts of appeal on the same question of law.

The Felix decision is within this Supreme Court's jurisdiction since it expressly and directly conflicts with the following decisions:

Tampa Drug Company v. Wait, 103 So.2d 603 (Fla. 1958)

Ricci v. Parke-Davis & Company, 491 So.2d 1182 (Fla. 4th DCA 1986); Rev. den. 501 So.2d 1283 (Fla. 1986)

Macmurdo v. UpJohn Co., 444 So.2d 449 (Fla. 4th DCA 1983)

Lake v. Konstantinu, 189 So.2d 171 (Fla. 2nd DCA 1966)

In summary, while the above decisions of this Supreme Court and other district courts all hold that the issue as to the sufficiency of product warnings involving unavoidably dangerous products is **always** a jury issue and not appropriate for summary judgement, and further, in Ricci, that the testimony of a prescribing physician is not conclusive proof of a drug's having sufficient warnings where conflicting evidence suggests inadequacy, so that summary judgement for a defendant on such issues cannot be granted; the Third District in Felix ruled that a court can upon its own reading determine as a matter of law that particular warnings were adequate, and that despite conflicting evidence a prescribing physician's testimony that he read a warning and was aware of the product's dangers is conclusive as to the lack of a manufacturer's liability, and affirmed summary judgement on such issues.

STATEMENT OF THE CASE AND FACTS

Petitioner, Yolanda Felix, as Personal Representative of the Estate of Kevin Felix-Baptiste, was Plaintiff in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida and Appellant in the Third District Court of Appeal. Respondents, Hoffmann-LaRoche, Inc., Roche Biomedical Laboratories, Bindley-Western Industries, Gray Drug Stores, Inc., Gray Drug Stores Inc. of Miami, The Sherwin Williams Company, and Lester M. Wachman, were Defendants in the Circuit Court and Appellees in the Third District Court of Appeal.

Decedent, Kevin Felix-Baptiste, died on November 24, 1983, having been born June 26, 1983 with multiple, severe birth defects, as a proximate result of a prescription drug prescribed to his mother for acne in October 1982 when she was pregnant. The drug, Accutane, had been placed on the market in September 1982 by Hoffmann-LaRoche, Inc. Hoffmann-LaRoche disseminated printed advertisements, warnings and product information about the product aimed at physicians, including wording which it referred to as its "package insert."

A wrongful death action against Hoffmann-LaRoche was filed September 4, 1984, in Dade County Circuit Court by the personal representative of the decedent's estate.

A Summary Judgment was entered in Circuit Court on all counts in favor of the product's manufacturer, distributors, retailers and the manufacturer's detailman (promotional salesman), on May 13, 1986. (Appendix Exhibit "A").

The Summary Judgment was appealed to the Third District Court of Appeal via timely Notice of Appeal filed July 14, 1986. (Appendix Exhibit "B").

The Third District Court of Appeal issued a written opinion on September 29, 1987, affirming the Summary Judgment. Felix v. Hoffmann-LaRoche, Inc., (Appendix Exhibit "C"). The Third District's written opinion addressed only one point of several raised before it in the appeal.

A Motion for Re-Hearing or Clarification of the Third District's decision was timely filed pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure on October 14, 1987. (Appendix Exhibit "D"). The Third District entered an Order denying that motion on November 17, 1987. (Appendix Exhibit "E").

Petitioner herein timely filed a notice to invoke the discretionary jurisdiction of this court in accordance with Rule 9.120(b) of the Florida Rules of Appellate Procedure. (Appendix Exhibit "F").

This Court has jurisdiction to exercise its discretionary jurisdiction because the Third District's decision expressly and directly conflicts with a decision of other district courts of appeal and of this Supreme Court on the same question of law.

ISSUE FOR REVIEW

Whether the Third District Court's opinion that the adequacy or inadequacy of warnings concerning prescription pharmaceutical products can be determined by a Court as a matter of law in summary judgment proceedings, rather than allowing such issue to be determined by a jury upon the full circumstances, is in express direct conflict with decisions of this Supreme Court and other district courts on the same legal issue.

ARGUMENT ON JURISDICTION

Petitioner herein, Plaintiff/Appellant below, files this brief pursuant to Florida Rule of Appellate Procedure 9.120 (d), to demonstrate jurisdiction pursuant to Article V, Section 3

(b)(3), Florida Constitution, and seeks review of Felix v. Hoffmann-LaRoche, Inc., 513 So.2d 1319 (Fla. 3d DCA 1987), because that decision expressly and directly conflicts with decisions of other district courts of appeal and this Supreme Court on the same question of law. Fla. R. App. P. 9.030 (a)(2)(iv).

In Felix, the Third District affirmed a summary judgment for a prescription drug manufacturer and co-defendants, holding that:

If the warning given to the medical community is sufficient, then the drug manufacturer is not liable for injuries sustained by the physician's patients as a result of the side effects of the drugs. **The warning given was adequate as a matter of law.** Felix, at 1320. (Emphasis added).

The Felix Court expressly followed and cited to the dissenting opinion in MacMurdo v. UpJohn Co., 444 So.2d 449 (Fla. 4th DCA 1983). Felix, supra., at 1320.

In Macmurdo v. UpJohn Co., supra., the Fourth District reversed summary judgment for a prescription drug manufacturer, holding that:

It is clear that the trial Court read the warning subjectively and determined as a matter of law that same was sufficient and adequate. This was error under the law of this state. It is not for judges but it is for the jury to determine if a particular warning is adequate under the circumstances. Macmurdo, at 450, 451.

Felix concludes that, although, "whether a warning is adequate is usually a jury question," summary judgment is proper where a court is satisfied certain factors are present in the warning and the circumstances of the product's use. Felix at 1321.

In direct conflict with this, the Fourth District concluded; "In all events, the adequacy of the warning is for the jury to decide and may not be disposed of by Summary Judgment." MacMurdo, at 451.

The Fourth District states that it is an, "unsound position," to maintain that adequacy of a particular warning is **only generally** a question of fact, i.e., it refutes the possibility that summary judgment on that issue could be proper. MacMurdo, at 451.

Florida's Supreme Court has ruled that whether warnings given by a manufacturer of an inherently dangerous product are adequate cannot be concluded as a matter of law; and that the sufficiency of warnings is a jury issue. Tampa Drug Company v. Wait, 103 So.2d 603 (Fla. 1958). Felix expressly and directly conflicts with Tampa Drug on the same question of law.

The Second District, in Lake v. Konstantinu, 189 So.2d 171 (Fla. 2nd DCA 1966), said that the issue of sufficiency of the warnings undertaken by a prescription drug manufacturer must certainly be submitted to a jury, and reversed summary judgment for a defendant entered in the trial court, citing to Tampa Drug, Supra. Felix is in express direct conflict with Lake on the same question of law.

In Ricci v. Parke-Davis & Company, 491 So.2d 1182 (Fla. 4th DCA 1986), the Fourth District held:

The primary issue to be tried in this case was the sufficiency of the warnings and information furnished by Parke-Davis & Company to the doctors and health care providers prescribing and administering the pills. The adequacy and sufficiency of these warnings is clearly a jury issue in Florida. Ricci, at 491.

Reversing a summary judgment for a pharmaceutical manufacturer and co-defendants, the Ricci Court said that although there was argued to be, "overwhelming evidence that the doctors in this case all received and understood the warnings they were furnished, and that they considered the warnings and information provided by it adequate... appellant is entitled to have these disputed fact issues determined by a jury and not as a matter of law." Ricci, at 491, 492.

In express, direct conflict with Ricci is Felix, where, in addition to the conflicting legal pronouncements already described, the Third District ruled that the prescribing physician's claims that he understood the warnings and was adequately informed of the product's dangers justify affirmation of summary judgment on the issue of proximate cause, despite the disputed facts indicating the patient was pregnant when the physician prescribed the drug and that he had not warned her of the risks involved.

Even where a district court of appeal's opinion purports to be in accord with Supreme Court or other districts' opinions, this Court will take jurisdiction under Article V, Section 3(b)(3), Florida Constitution, where the district court's opinion nevertheless demonstrates a direct conflict. See Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986); Wolmer v. Chrysler Corp., 474 So.2d 834 (Fla. 4th DCA 1985).

It is imperative that this Honorable Court accept jurisdiction to resolve these conflicts, because this inter-district conflict concerning an aggrieved party's right to jury trial will force venue shopping and foster uneven application of civil justice, and is particularly intolerable because of the statewide character of prescription drug marketing and distribution which calls for uniformity in this area of law.

CONCLUSION

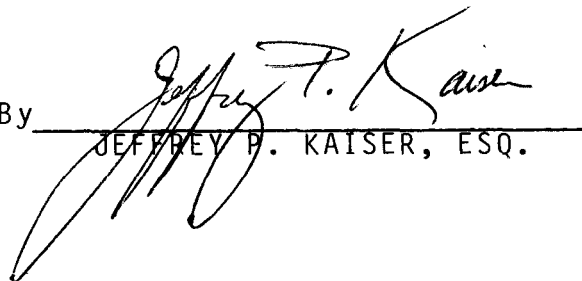
It is clear from the contradictory legal rulings and holdings that the decision of the Third District Court of Appeal in Felix v. Hoffmann-LaRoche, Inc., supra, expressly and directly conflicts with the decisions of this Supreme Court and the Fourth and Second District Courts of Appeal discussed in this brief. Therefore, this Honorable Court has discretionary jurisdiction to consider this appeal.

It is of great importance that these conflicts be resolved by the exercise of this Court's discretionary review, because the Courts of this state and its litigants require uniformity and clarity in resolving the issue of whether there exists a right to jury trial on disputes involving pharmaceutical product warnings in Florida, or alternatively, whether instructions to physicians and the emphasis provided in warnings can be subjectively determined by a trial judge to be adequate, removing the issue from the hands of expert witnesses and jury resolution.

Respectfully submitted,

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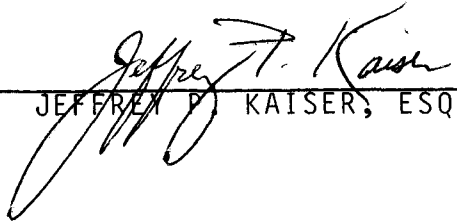

JEFFREY P. KAISER, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to Mercer Clarke, Esq., Attorney for Hoffmann-LaRoche, 100 Chopin Plaza, Suite 2400, Miami, Florida 33131, this 28th day of December, 1987.

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