

IN THE SUPREME COURT OF FLORIDA

CASE NO. :

74 407

FLORIDA PATIENT'S COMPENSATION  
FUND, MAX W. WILSON, M.D., and  
WILSON, MEIGS, MASTRIOLE &  
SUTHERLAND, M.D.s P.A., et al.,

Defendants/Petitioners,

v.

DORIS WASSER, as Personal  
Representative, etc., et al.,

Plaintiffs/Respondents.

**FILED**  
SID J. WHITE

JUL 10 1989

CLERK, SUPREME COURT  
By   
Deputy Clerk

DISCRETIONARY PROCEEDING TO REVIEW A  
DECISION OF THE DISTRICT COURT OF APPEAL  
FOURTH DISTRICT OF FLORIDA,  
CASE NO.: 87-1820 and 87-2555

PETITIONERS' BRIEF ON JURISDICTION

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QUESTION PRESENTED

WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE  
JUNE 14, 1989 DECISION OF THE FOURTH DISTRICT COURT  
OF APPEAL, PURSUANT TO ARTICLE V, SECTION 3(b)(3),  
FLORIDA CONSTITUTION.

-iii-

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## PREFACE

This brief is submitted on behalf of Petitioners, MAX W. WILSON, M.D. and WILSON, MEIGS, MASTRIOLE & SUTHERLAND, M.D.s, P.A., in support of their position that this Court has jurisdiction to review the decision of the Fourth District Court of Appeal dated June 14, 1989, pursuant to Article V, section 3(b)(3), Florida Constitution. In this brief, the parties will be referred to by name or as Petitioners and Respondents. Reference to the Appendix hereto will be by A.1-3.

## STATEMENT OF THE CASE AND FACTS

Respondent, DORIS WASSER ("Wasser"), as Personal Representative of the Estate of JACOB WASSER, brought a wrongful death action against Petitioners, MAX W. WILSON, M.D. and WILSON, MEIGS, MASTRIOLE & SUTHERLAND, M.D.s, P.A. (collectively "Wilson"), and against the FLORIDA PATIENT'S COMPENSATION FUND ("the Fund") alleging medical malpractice. The jury returned a verdict awarding \$4,367.05 to the estate and \$90,000.00 to Wasser. Attorney's fees in the amount of \$101,700.00 and costs in the amount of \$7,753.80 were awarded to Wasser. These fees and costs were imposed by the trial court against Wilson and the Fund. The trial court clarified the final judgment to hold that the Fund was responsible for that portion of the judgment exceeding \$100,000.00, Wilson's underlying insurance coverage (A.2).

Both Wilson and the Fund appealed the attorney's fee award to the District Court of Appeal for the Fourth District, challenging

the amount awarded. In addition, the Fund argued that Wilson's primary carrier should be wholly responsible for the attorney's fees, relying upon the Fourth District's decision in Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988).

The Fourth District rendered its opinion on June 14, 1989, affirming the amount of the attorney's fees but reversing that portion of the final judgment which imposed liability on the Fund for payment of those fees. The District Court opinion was based squarely upon the Sitomer decision (A.1-3).

Petitioners Wilson have invoked the discretionary jurisdiction of this Court to review the June 14, 1989 decision, based on the fact that this Court presently has the Sitomer case before it for review sub. nom. Smith v. Sitomer, Case No.: 72,610.

SUMMARY OF ARGUMENT

This Court has jurisdiction to review the June 14, 1989 decision of the Fourth District Court of Appeal pursuant to Article V, section 3(b)(3), Florida Constitution. The Fourth District's decision cites as controlling authority a decision that is pending review before this Court, thus constituting prima facie express conflict which allows this Court to exercise its jurisdiction.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE JUNE 14, 1989 DECISION OF THE FOURTH DISTRICT COURT OF APPEAL, PURSUANT TO ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION.

In the opinion presented to this Court for review, the Fourth District cited as controlling authority its earlier decision in Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988). That decision is presently pending before this Court ~~sub. non.~~ Smith v. Sitomer, Case No.: 72,610.

This Court held in Jollie v. State, 405 So.2d 418 (Fla. 1981) that a District Court of Appeal opinion which cites as controlling authority a decision that is pending review by this Court constitutes "prima facie express conflict" and allows this Court to exercise its jurisdiction. Id. at 420.

Since a reversal in Sitomer will require reversal in the present case as well, this Court is respectfully requested to accept jurisdiction over the present case.

CONCLUSION

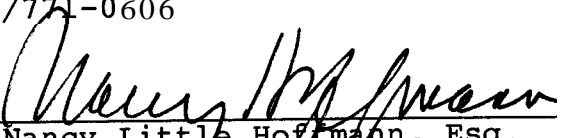
For the reasons set forth above, this Court is respectfully requested to accept jurisdiction over the present decision.

Respectfully submitted,

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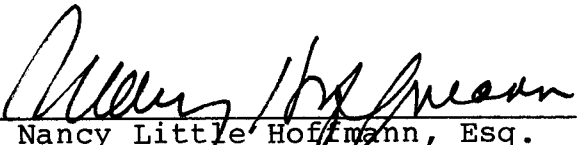
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By

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by mail this 10th day of July, 1989, to: Steven Billing, Esquire, Billing, Cochran, Heath, Lyles & Mauro, P.A., 888 Southeast Third Avenue, Suite 301, Fort Lauderdale, Florida 33316; Steven K. Deutsch, Deutsch & Blumberg, P.A., New World Tower, Suite 2802, 100 North Biscayne Boulevard, Miami, Florida 33132; James C. Blecke, Esquire, James C. Blecke, P.A., Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130; and Melanie G. May, Esquire, Bunnell, Denman & Woulfe, P.A., Post Office Drawer 22988, Fort Lauderdale, Florida 33335.

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