

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC09-1115

L.T. NO.: 4D07-3703 & 4D07-4641

SHEILA M. HULICK and THE
REYNOLDS AND REYNOLDS
COMPANY,

Petitioners,

-VS-

STEPHEN J. BEERS, as Personal
Representative of the Estate of LESLEY
N. BEERS,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

On Appeal from the Fourth District Court of Appeal of the State of Florida

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STATEMENT OF THE CASE AND FACTS

The Facts as Reflected in The Fourth District's Opinion¹

1. Defendant Hulick rear-ended Mrs. Beers' vehicle, because she was following too closely and not paying attention to her driving (A1)².

2. Hulick's careless driving caused a significant impact with the rear of Mrs. Beers' vehicle (A5).

3. As a result of the impact, Mrs. Beers' vehicle crossed the median into the oncoming lanes of traffic on the other side of the median, which resulted in her vehicle being struck head-on by a second vehicle, and then by a third vehicle (A1).

4. Mrs. Beers died at the scene of the accident (Id.).

5. Hulick admitted that she was negligent in rear-ending Mrs. Beers' vehicle. However, she denied that her negligence caused Mrs. Beers' death (Id.). Hulick claimed that Mrs. Beers caused her own death by stepping on the accelerator, instead of the brake, after being rear-ended and/or that her death was caused by the negligence of the drivers who struck Mrs. Beers' vehicle on the other side of the median (Id.).

6. During the trial, Mrs. Beers' brother-in-law made an unsolicited reference

¹/References to the Fourth District Court of Appeal's April 1, 2009 Opinion in this matter will be (A____).

²/Hulick and the owner of the vehicle she was driving are referred to collectively as "Hulick" or "Petitioners."

to a “criminal traffic trial,” at which point Plaintiff’s counsel immediately interrupted the witness, so that he did not get to finish his sentence (A2). Accordingly, the witness never linked the traffic trial to Hulick (Id.). As far as the jury knew, the “traffic trial” could have involved an unrelated matter, Hulick, or either of the two drivers who struck Mrs. Beers’ vehicle on the other side of the median. One of those drivers was not a party to this lawsuit; whereas, the other driver was a Fabre non-party.

7. Hulick’s counsel moved for a mistrial because of reference to the “traffic trial,” which the trial court denied. The court offered to give a curative instruction and/or to individually *voir dire* the jury, but Hulick declined both offers (A3).

8. After the jury returned a verdict for the Plaintiff, the trial court denied Hulick’s claim that she was entitled to a new trial because of the one reference to a “criminal traffic trial” (A3), which had never even been linked to Hulick.

The Fourth District’s Ruling

The Fourth District held that there is no *per se* rule requiring reversal in every case simply because there is mention of a traffic citation (A4-5). It depends on the facts and circumstances of each case. The Fourth District distinguished other cases that had required a new trial where counsel had intentionally and/or repeatedly questioned a witness or adverse party about a traffic citation, leaving the clear impression that the adverse party had received the citation (A4); or where the reference to a traffic citation could have had a prejudicial impact on liability (A4-5); or where,

even though there was no issue as to the defendant's liability, reference to a traffic citation could have prejudicially affected the amount of damages (Id.).

Unlike those cases, the Fourth District agreed with the trial court that the mention of the traffic citation had no prejudicial impact on the jury's resolution of the remaining issues in the case. Those issues were whether Hulick's rear-ending of Mrs. Beers' vehicle, and its propulsion across the median, made Hulick responsible for the ensuing collisions with Mrs. Beers' vehicle on the other side of the median; whether Mrs. Beers was allegedly comparatively negligent after she was rear-ended by Hulick by allegedly stepping on the gas pedal rather than the brake; whether the two other drivers who struck Mrs. Beers' vehicle, after it was rear-ended by Hulick and crossed the median into oncoming traffic, were negligent; and the amount of damages (Id.).

The Fourth District also ruled that a curative instruction could have accurately informed the jury that neither Hulick nor anyone else was criminally prosecuted in regard to this accident; that since Hulick rejected the trial court's offer of a curative instruction, and since the court could have reasonably decided that such instruction would have clarified any possible misunderstanding, a mistrial was not warranted (A5).

This Court should note that sentences 3, 4 and 5 of Petitioners' footnote 1 on pages 1-2 of their brief contain facts **not reflected** in the Fourth District's Opinion. Case law is legion that it is improper to include facts in a petitioner's jurisdictional brief that are not reflected in the opinion sought to be reviewed, because those facts

cannot be used to demonstrate a direct and express conflict **between decisions**. The fact that the conflict must be “express and direct” has been interpreted to mean that the conflict must be found within the confines of the opinion under review. That opinion must, on its face, conflict with an opinion of this Court or another District Court of Appeal. Paddock v. Chacko, 553 So.2d 168, 168-69 (Fla. 1989). “For purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion.” Hardee v. State, 534 So.2d 706, 708 fn* (Fla. 1988). Since the facts in Hulick’s footnote 1 are not reflected on the face of the Fourth District’s decision, they should not be considered by the Court. Those facts should also be ignored because they are either incorrect or were disputed below.

SUMMARY OF ARGUMENT

There is no express or direct conflict between the Fourth District’s Opinion and the First District cases cited by Petitioners. The Fourth District did not hold, as Hulick claims, that a new trial is not required because of reference to a traffic citation, where negligence has been admitted. That was not the Fourth District’s ruling by any stretch of the imagination. Rather, its ruling was based on the facts and circumstances of this particular case. The trial court had determined, and the Fourth District agreed, that a new trial was not required where there was no prejudicial impact from the witness’ unsolicited one-time reference to a traffic trial that was never linked to Hulick; where Hulick had admitted negligence in rear-ending Mrs. Beers; and where Hulick declined

the court's offer of a curative instruction and/or individual interview of the jurors.

ARGUMENT

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE FOURTH DISTRICT'S OPINION IN THIS CASE AND THE FIRST DISTRICT'S DECISIONS IN GOLDEN v. TIPTON AND RYDER TRUCK RENTAL, INC. v. JOHNSON

A) No Conflict With The First District Cases

Petitioners request the Court to review the Fourth District's opinion in this case on the grounds that it expressly and directly conflicts with Golden v. Tipton, 723 So.2d 871 (Fla. 1st DCA 1998) and Ryder Truck Rental, Inc. v. Johnson, 466 So.2d 1240 (Fla. 1st DCA 1985). There is no direct and express conflict. In Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960), this Court held that a direct and express conflict exists between decisions where there is (Id. at 734):

(1) the announcement of a rule of law which conflicts with a rule previously announced by this court [or another district court of appeal] or
(2) the application of 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 this court [or another district court of appeal]. Under the first situation the facts are immaterial. It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the court of appeal. Under the second situation the controlling facts become vital and our jurisdiction may be asserted only where the court of appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in allegedly conflicting prior decisions of this court [or of another district court of appeal].

The conflict must be of such magnitude that if both decisions were rendered by the

same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962). If the two cases are distinguishable on controlling factual elements, or if the points of law settled by the two cases are not the same, then no conflict can arise (Id. at 887).

Applying Nielsen, there is no direct or express conflict between the Fourth District's decision and Golden or Ryder Truck Rental. The first prong of Nielsen has not been satisfied because the Fourth District did not announce a rule of law that conflicts with a rule of law espoused by Golden or Ryder Truck Rental. The Fourth District merely held that there is no *per se* reversal for mention of a traffic citation during trial; but rather the facts and circumstances of each particular case dictate whether a reversal is required. That pronouncement does not conflict with Golden or Ryder Truck Rental because neither of those cases held that mention of a traffic citation is *per se* reversible. In fact, Golden explicitly qualified its holding by stating that a new trial is only “**generally**” required, not that one is *per se* required. 723 So.2d at 871.

The Fourth District's pronouncement is also in accord with an opinion of the Fifth District, which holds that suggesting that a party was or was not charged with causing an accident is not *per se* error, Elsass v. Hankey, 662 So.2d 392, 393 (Fla. 5th DCA 1995); and with other opinions of the Third and Fifth Districts which hold that mention of a traffic violation will only warrant a new trial “in appropriate

circumstances.” Spangel v. Love, 585 So.2d 317, 318 (Fla. 5th DCA 1991); Probkevitz v. Velda Farms, Case No. 3D07-1052, p.14 (Fla. 3rd DCA, Sept. 9, 2009).

Moreover, this Court’s opinion in Eggers v. Phillips Hardware Co., 88 So.2d 507, 508 (Fla. 1956) held that the testimony of investigating officers that a truck driver was not arrested for violating any traffic ordinances pertaining to an accident was erroneously admitted.³ That error became reversible only because there was a direct conflict as to whether the truck driver drove through a red light (Id.). In this case, there was no conflict that Hulick rear-ended Mrs. Beers’ vehicle because Hulick admitted she was guilty of careless driving, and the overwhelming evidence showed that the rear-end collision resulted in a significant impact. Thus, unlike Eggers, the unsolicited one-time reference to a “traffic trial” was not reversible error in this case.

Also, contrary to Hulick’s claim, the Fourth District did not announce as a rule of law that mention of a traffic citation does not require reversal if the defendant has admitted negligence. Neither did Golden and Ryder Truck Rental announce the opposite rule of law, *i.e.*, that reversal is required, even if the defendant has admitted negligence, and a curative instruction has been given. All the Fourth District held was that mention of a traffic trial did not require reversal based upon the facts and circumstances of this case, including the fact that Hulick had admitted negligence.

³/ This Court equated testimony that a party was “arrested for” or “charged with” a traffic offense. 88 So.2d at 508.

Golden and Ryder Truck Rental merely found that mention of a traffic citation required reversals based on the facts of those cases. Clearly, the opinions of the Fourth District and the First District did not announce conflicting rules of law.

The second prong of Nielsen is also not satisfied. The Fourth District's decision did not apply a rule of law to produce a different result in this case involving controlling facts substantially similar to the facts in the First District cases. Both Golden and Ryder Truck Rental have numerous distinguishing factors. For example, Hulick was never linked to the traffic trial. In contrast, in Ryder Truck Rental, the plaintiff testified that he had not received a traffic citation which, combined with several other errors, required a new trial. In Golden, the plaintiff implied that the **defendant** had received a traffic citation, which was prejudicial because the severity of the impact and its effect on damages were hotly disputed. In contrast, the Fourth District found no prejudice here. First, Hulick admitted negligence in rear-ending Mrs. Beers' vehicle. Thus, even if the jury had known that Hulick received a traffic citation for doing so, that could not have affected the issue of whether the drivers who struck Mrs. Beers' vehicle on the other side of the median were also negligent. One had nothing to do with the other. Second, unlike Golden, there was no question as to the severity of the impact of the rear-end collision, because "overwhelming evidence was presented that this [Hulick's] careless driving caused a significant impact with the rear of the decedent's car" (A5).

Another factor to be considered is whether evidence that a traffic citation was issued, or not issued, was deliberately placed before the jury by a party or his attorney. Walton v. Robert E. Haas Const. Corp., 259 So.2d 731, 734 (Fla. 3rd DCA 1972), *cert. den.*, 265 So.2d 48. In Golden and Ryder Truck Rental, that evidence was deliberately placed before the jury by the parties; whereas, in this case, that evidence was completely unsolicited by Plaintiff or his counsel. The bottom line is that the facts in Golden and Ryder Truck Rental versus the facts in this case are so disparate that the requisite factual similarity is wholly absent.

Finally, any alleged conflict is moot because, although Hulick was afforded an opportunity by the trial court, *sua sponte*, to give a curative instruction or individually *voir dire* the jurors, she rejected those offers. Where the trial court has extended an opportunity to cure any alleged error, but counsel fails to take advantage of that opportunity, the alleged error was invited and will not warrant reversal. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974); Farinas v. State, 569 So.2d 425, fn7 (Fla. 1990); Lubin v. State, 754 So.2d 141, 143 (Fla. 4th DCA 2000).

B) No Conflict With Fourth District Decisions

Hulick's reliance upon alleged conflicts between the Fourth District's opinion in this case and other Fourth District opinions is misplaced for two reasons. First, Article V, Section 3(b)(3), Fla. Const. was amended in 1980 to terminate this Court's jurisdiction over purely intra-District Court of Appeal conflicts, the resolution of which

must be dealt with by a rehearing *en banc* under Florida Appellate Rule 9.331. Article V, Section 3(b)(3), Fla. Const. allows this Court to review a “decision of a district court of appeal that ... expressly and directly conflicts with the decision of **another** district court of appeal or of the Supreme Court on the same question of law” (emphasis added). Florida Appellate Rule 9.030(a)(2)(iv) provides likewise.

Accordingly, in order for this Court to have conflict jurisdiction to review the Fourth District’s opinion, Hulick must demonstrate a conflict between that opinion and **another** District Court’s opinion. Thus, Subsection B of Petitioners’ brief, which relies upon alleged conflicts with other Fourth District decisions, is legally insufficient to demonstrate the conflict required to invoke this Court’s jurisdiction.

Second, if decisions from the same District Court of Appeal conflict, and that conflict is not reconciled in an *en banc* opinion, the District Court’s decision that is later in time overrules its former decisions. In this case, Hulick filed a Motion for Rehearing *En Banc* which the Fourth District denied, implicitly finding no intra-district conflict. Even assuming an alleged conflict exists, the Fourth District’s decision in this case is deemed to overrule prior Fourth District decisions. Thus, there can be no “express and direct conflict” with those decisions.

CONCLUSION

For all of the above reasons, the Fourth District’s opinion does not directly and expressly conflict with Golden v. Tipton or Ryder Truck Rental v. Johnson, or other

Fourth District cases, and therefore this Court lacks jurisdiction to review this case on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been
furnished to all counsel on the attached Service List by mail on September 23, 2009.

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CERTIFICATE OF TYPE SIZE & STYLE

Respondent hereby certifies that the type size and style of the Brief of
Respondent on Jurisdiction is Times New Roman 14 pt.

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