2000); Auerback v. McKinney, 549 So.2d 1022, 1029 (Fla. 3rd DCA 1989); Burden v. Dickman, 547 So.2d 170, 172 (Fla. 3rd DCA 1989); rev. den., 557 So.2d 866 (Fla. 1989).

15. Because Terri was unrepresented, a whole series of meritorious defenses within the meaning of Savage v. Rowell Distributing Corp., supra, at 418, were not raised. The Second District's decision did not address the failure to raise those defenses. Rather, it opted to conclude that the trial court in essence acted as Terri's guardian or surrogate, even though the trial court never so described itself, nor took any action to indicate it was filling that role. In any case, the trial went forward without a guardian *ad litem* or the court acknowledging it had a duty to represent just Terri's interests and numerous meritorious defenses were not raised. These defenses included: failing to present evidence which should have been presented to understand why Mr. Schiavo could not provide clear and convincing evidence of Terri's wishes; allowing introduction of prejudicial evidence which should have been kept out; failing to conduct discovery into critical trial witnesses; failing to have independent medical examination done on Terri to assess the parents' claim that she had cognition or to even do a basic swallowing test to see if she actually needed a feeding tube to survive; failing to object to numerous leading questions rephrasing what Terri was supposed to have said; failing to introduce the

Catholic Church's actual position in these circumstances; and failing to ensure that the clear and convincing evidence standard of Browning was used instead of the one described by the trial judge as "I either believe a witness or I don't. I mean that is the standard."

16. In a 1992 medical malpractice trial, Mr. Schiavo prosecuted on Terri's behalf, he sought damages for future medical treatment to care for Terri for the rest of her life. The parties allowed a pre-trial guardian *ad litem*'s report and limited trial testimony about the malpractice trial to be the principal evidence of a contradictory judicial position of the type which precluded a clear and convincing evidence finding in Inquiry concerning Davey, 645 So.2d 348, 404-405 (Fla. 1994). While it is clear from this portion of the trial record that the guardian *ad litem* had decided the malpractice trial record so contradicted Mr. Schiavo that he could not provide clear and convincing evidence of Terri's wishes, the actual malpractice record was not submitted which contained sworn testimony of Mr. Schiavo and argument by counsel representing him and Terri. The failure to present the actual record was a failure to present a meritorious defense, especially in the face of Mr. Schiavo's trial and appellate claim that he may have thought Terri could recover.

The actual record belies this position.[4]

17. Conversely, the parties allowed a so-called societal values expert, who had never even met Terri to give opinions about her wishes and what she meant by words allegedly used concerning a decision of which this Court said "... we can conceive a few more personal or private decisions concerning one's body that one can make in the course of a lifetime than the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment." In re Guardianship of Browning, 568 So.2d 4, 10 (Fla. 1990).

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[4] The pretrial guardian *ad litem* recommended against Mr. Schiavo's petition because he found Mr. Schiavo was the only witness for the proposition that Terri had said she did not want to be sustained by artificial means, and given his malpractice position, financial interest in the outcome and his refusal to provide further treatment at or around the time the malpractice case concluded, the report concluded he could not provide clear and convincing evidence of her wishes. As mentioned that report was introduced by both sides as an exhibit at trial. However, transcripts existed before the trial but were not filed into evidence. While this has relevance to Fla. R. Civ. Pro. §1540, it should not affect the appellate argument that Terri was unrepresented had a meritorious defense which was not raised. Efforts to supplement the appellate record with aspects of this record was opposed by Mr. Schiavo and a motion was not granted. That actual trial record could have included attorneys arguing for life care in opening statement and closing argument and Mr. Schiavo's own words on the witness stand as he claimed he would care for her for life. This record which was so direct as to implicate notions of judicial estoppel; see e.g., Federated Mutual Implement & Hardware Insurance Co. v. Griffin, 237 So.2d 38 (Fla. 1st DCA 1970); cert. denied, Griffin v. Federated Mutual Implement & Hardware Insurance Co., 240 So.2d 641 (Fla. 1970), was not presented to the trial court. In any event, the fact remains that the actual record was clearly the best evidence of the contradictory position advanced by Mr. Schiavo and it was not presented to the trial court.

18. The parties also failed to conduct discovery into two key witnesses who miraculously showed up at trial from Pennsylvania, according to one of them, at the invitation of Mr. Schiavo's attorney who happened to call them up and was advised that they heard Terri make certain malleable statements which at trial impressed the lower court. However, according to the trial record, these witnesses were not disclosed until the Wednesday before trial and no discovery into their testimony or how they became last minute witnesses was ever attempted. The witnesses, Mr. Schiavo's brother and sister-in-law, were not disclosed when the pretrial guardian *ad litem* asked Mr. Schiavo if he knew of any other people who had heard Terri express wishes of the type he claimed she did. Yet at trial the new witnesses appeared and this was never addressed during discovery. Numerous inquiries into how they came to be witnesses, why they never came forward before and what was actually said by Terri as opposed to often rephrased answers in response to leading questions.

19. Moreover, Terri's parents believe their daughter has cognition, recognizes them and reacts to them. However, no experts were hired by them. While the Schindlers were repeatedly questioned by Mr. Schiavo's attorney about their lack of financial resources as a prelude to his closing argument that it showed a motive for them wanting them daughter's money, no one, including the trial court if

it was acting as a guardian or surrogate, determined if that played a role in the failure to hire experts. What matters, however, is that a guardian *ad litem* could have ensured that Terri was examined by experts not associated with the husband and his attorney. Indeed, a fundamental underpinning for Browning is that someone require life sustaining measures. However, a swallowing test was never ordered even though two physicians, who saw Terri after trial, swore in affidavits that she could swallow on her own and the husband's expert admitted he reviewed swallowing records for the first time at a post-trial hearing. Not surprisingly, he found eight year old tests satisfactory at that point, but the fact remains that this elemental test was not performed even though the other doctors said one cannot rely on such old tests because conditions change.

20. A guardian *ad litem* could also have made sure the court used the clear and convincing evidence test of Browning rather than the self described "I either believe a witness or I don't" standard that was applied. This was important given the shaky repeatedly rephrased statements given by Mr. Schiavo's brother and sister-in-law. It was also important for Mr. Schiavo's testimony in that way and one other. As mentioned, the evidence of Mr. Schiavo's position during the malpractice trial in 1992 primarily consisted of a report by a pretrial guardian *ad litem* and testimony rather than the actual record. As a result it was unfairly suggested during

trial that Mr. Schiavo was just trying to be sure before he came forward with a petition that she might get better when the exact opposite position was known and advanced in court. It is inconceivable within the meaning of Savage v. Rowell that a guardian *ad litem* representing Terri would have failed to present the actual trial record and rebutted all of Mr. Schiavo's new positions and created the contradiction between testimony recognized in Inquiry Concerning Davey.

21. The suggestion by the Second District that the trial court acted as Terri's guardian or surrogate is bad law and bad procedure. However, if the trial court was acting as a guardian or surrogate each of the above arguments as well as Canon 3 of the Code of Judicial Conduct makes clear the trial court failed in its duties.

22. As discussed in our jurisdictional brief, the Second District's decision construes the Constitution and ultimately concludes that it does not require that a guardian *ad litem* be appointed when actual or potential conflicts of interest exist, and close family members disagree on the oral wishes of the person whose constitutional rights are being decided. The ward should have her own representation in those circumstances. It also makes all trial judges guardians or surrogates in that circumstance and thus affects a class of constitutional officers. It also conflicts with Browning, Savage v. Rowell, Brown v. Ripley, and Angrand v.

Key, 657 So.2d 1146, 1149 (Fla. 1995). This Court does have jurisdiction and once accepted for the reasons set forth above the Schindlers, and all future wards ,will prevail on the merits.

23. For these reasons we believe there is a likelihood that jurisdiction will be accepted by the Supreme Court and that the Schindlers will ultimately be successful on appeal. This fact together with the fact that Terri may die when she should not, or at least before that question is fairly resolved requires a stay.

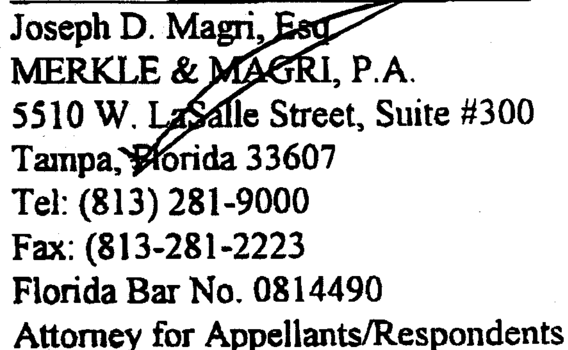
24. The relief requested is a stay of issuance of the mandate until review by this Court is complete.

25. We make this motion notwithstanding Terri's one-sidedly presented condition. Even if true she is still alive under the current definition of death. And in any event she is entitled to have her wishes fairly determined both legally and from a social policy standpoint. Alexander, Medical Science Under Dictatorship, The New England Journal of Medicine, Vol. 241, No. 2, at 39 (July 14, 1949). We further make this request in the spirit of the observation in Brown v. Ripley, supra, at 716, that the mere fact the same judge may retry this case should not operate to obviate doing what should be done.

WHEREFORE, the Schindlers respectfully request that this Honorable Court grant this Motion to Stay Issuance of the Mandate until after review by this Court.

Dated: April 17th, 2001

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was sent via U.S. Mail to Pamela A.M. Campbell, Esq., Pamela A.M. Campbell, P.A., SouthTrust Bank Building, Suite 1500, 150 Second Avenue, P.O. Drawer 1441, St. Petersburg, FL 33731-1441; George J. Felos, Esq. (also by hand delivery), Felos & Felos, P.A. 595 Main Street, Dunedin, FL 34698; Deborah Bushnell, Esq., 204 Scotland Street, Dunedin, Florida 34698: Gyneth Stanley, Esq., 1465 South Fort Harrison Avenue, Suite 202, Clearwater, Florida 33756 on the 17th day of April, 2001.

Joseph D. Magri