IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,471

CORAL RIDGE PROPERTIES, INC.
and WESTINGHOUSE ELECTRIC
CORPORATION,

Petitioners,

vs.

PLAYA DEL MAR ASSOCIATION,
INC.,

Respondent.
_____/

PETITIONERS' BRIEF ON JURISDICTION

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JURISDICTIONAL STATEMENT

This brief on jurisdiction is filed on behalf of petitioners CORAL RIDGE PROPERTIES, INC. and WESTINGHOUSE ELECTRIC CORPORATION. They seek discretionary review in this Court of the December 31, 1985, decision of the District Court of Appeal, Fourth District, in Playa Del Mar Association v. Florida Power & Light Company, et al., Cases Nos. 85-242 and 85-741, on the basis that the decision "expressly and directly conflicts with the decision of another district court of appeal or of the Supreme Court on the same question of law. . ." Fla. Const. art. V, §3(b)(3) (as amended in 1980) and Rule 9.030(a)(2)(A)(iv), Fla.R.App.P. Petitioners seek by this brief to demonstrate that discretionary review should be granted.

STATEMENT OF THE CASE AND FACTS

In December of 1979, PLAYA DEL MAR ASSOCIATION sued CORAL RIDGE PROPERTIES and WESTINGHOUSE for the defective construction of the PLAYA DEL MAR CONDOMINIUM. The complaint was a multiple count accusation of defective construction, some of which was described as latent. Not only were existing and known problems included in the prior suit, but PLAYA DEL MAR went on to allege in its complaint that the defects

> . . .are not readily recognizable by persons who lack special knowledge or training, or they are hidden by building components or finishes and they are latent defects and deficiencies to the unit owners. . .

To resolve the case, the parties negotiated and entered into a settlement agreement in February of 1982. It provided for settlement of

> . . .all matters in all causes of action arising out of the allegations set forth in said law suit, as well as all causes of action arising out of the construction and the sale of the Playa Del Mar by Coral Ridge. . . . (emphasis added)

Thus, PLAYA DEL MAR gave up all its rights regarding construction defects -- not just those matters alleged in the first suit. The agreement further provided for a general release to be signed, which was to include language releasing CORAL RIDGE PROPERTIES and WESTINGHOUSE from

> . . .all past, present and future claims, demands and causes of action arising from alleged defective construction on Playa Del Mar. . . (emphasis added)

After the releases were signed, but before the action was dismissed, however, PLAYA DEL MAR filed another suit for damages due to defective construction which allegedly caused a fire to break out in the building. CORAL RIDGE PROPERTIES and WESTINGHOUSE did not answer, but instead moved for summary judgment, which was entered on the basis that everything was released in the first case.

On appeal to the Fourth District, PLAYA DEL MAR claimed that it did not intend to release "unknown" or "latent" defects under the general release and settlement agreement. The Fourth District agreed and reversed on the basis that it was error to enter a summary final judgment based upon a signed "release" where no answer was filed raising that point as an affirmative defense.

SUMMARY OF ARGUMENT

Because of the Fourth District's decision, there is now conflict among the districts as to whether or not a defending party can move for summary judgment before he answers. The summary judgment rule specifically contemplates that a defending party need not first answer since a trial court's ruling must be based upon the strength or weaknesses of the supporting and opposing evidence (all of which was before the trial court), and an answer would have had absolutely no bearing upon anything. The Fourth District nevertheless held that an answer should have been filed. This, of course, creates conflicting precedent among the districts involving a key procedural rule which should be resolved by this Court.

The decision of the Fourth District creates further conflict on the question of whether the mere assertion of "mistake" in the execution of a release would automatically give a party opposing summary judgment the right to introduce evidence to attack an otherwise unambiguous release. If that is what is meant, then the Fourth District has overlooked a cardinal rule of construction, as well as the practical effect that the ruling will have in future cases. More specifically, the Fourth District is saying that extrinsic evidence should be admissible to explain the claim of "mistake" in the execution and meaning of a clear document. The law of Florida simply does not permit this. Because of the Fourth District's

decision, however, no release can be safely accepted as the last step in resolving a litigation issue because all a party need do now is claim that he really did not understand the future consequences of his signing. And in a case like this he would predictably say that "all claims arising out of construction" did not contemplate matters which he did not anticipate. The holding is contrary to the decisions of this state and the policy of the law favoring amicable settlements.

ARGUMENT

I.

As a jurisdictional predicate, it should be noted that in Ford Motor Company v. Kikis, 401 So. 2d 1341 (Fla. 1981), this Court defined the scope of its conflict jurisdiction to resolve a decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law." Art. V., §3(b)(3), Fla. Const. In so doing, it rejected a standard requiring a district court of appeal to "explicitly identify conflicting district court or Supreme Court decisions in its opinion in order to create an express conflict under §3(b)(3)." 401 So. 2d at 1342. Instead, the Court held that legal principles discussed by the appellate court in rendering its decision "supplies a sufficient basis for a petition fr conflict review." (emphasis added) Id. at 1342. This is exactly the situation in this case.

While the opinion of the Fourth District is admirably short and concise, its wording nevertheless creates a conflict among the district courts of appeal of this state regarding the time for filing a motion for summary judgment. The Fourth District held essentially that defenses which would normally be called "affirmative" defenses must first be raised by way of an answer if a defending party wishes to use that defense as a basis for summary judgment.

Rule 1.510 of the Florida Rules of Civil Procedure already contemplates the filing of a motion for summary judgment before a defendant has answered. Subsection (b) of the rule states:

> A party against whom a claim, counterclaim, cross-claim or third party claim is asserted or a declaratory judgment is sought may move for summary judgment in his favor as to all or any part thereof at any time with or without supporting affidavits. (Emphasis added).

The decision is not only inconsistent with the rule itself, but it creates conflict with Edgewater Drugs, Inc. v. Jax Drugs, Inc., 138 So. 2d 525 (Fla. 1st DCA 1962), holding that a defending party may make the motion at any time, setting out defenses by affidavit, and thus effect a speedy termination of the action. 30A West's Florida Statutes Annot., Rule 1.510 Fla. R. Civ. P. at 388; see also, 49 Fla. Jur. 2d Summary Judgment §25 at 431-32.

The summary judgment rule itself permits what was done by CORAL RIDGE PROPERTIES and WESTINGHOUSE because the rule clearly says that a defending party can move for summary judgment at any time. Rule 1.510(b), Fla. R. Civ. P. As a result of the Fourth District's decision, however, there is now conflict between and among the districts which hopefully the Supreme Court -- as the rule- making body -- will address.[1/]

1/ While not forming the basis of conflict jurisdiction, it should nevertheless be noted that there is an internal lack of uniformity within the Fourth District between this case and Gutterman - Musicant - Kreitzman, Inc., v. IG Realty Company, 436 So. 2d 1216 (Fla. 4th DCA 1983). Gutterman, holds that either party -- plaintiff or defendant -- can move for summary judgment before an answer is filed so long as there is a proper record before the court. In this case, PLAYA DEL MAR filed of record all of its opposing affidavits and interrogatory answers to avoid summary judgment. In other words, the trial record was full of "evidence" supporting PLAYA DEL MAR's position.

II.

The mere assertion of "mistake" as to unexpected consequences of the settled construction defects case should not give PLAYA DEL MAR the right to introduce evidence in the new case to contradict the terms of the earlier release. As authority for its position that evidence should have been considered by the trial court in support of the "mistake" claim, however, the Fourth District relies upon its own decision in Ayr v. Chance, 372 So. 2d 1000 (Fla. 4th DCA 1979). That ruling would make sense if this case were anything like Ayr v. Chance because there a release was being asserted as a defense by defendants who were not even parties to the release. And this fact was obvious from the face of the release. That is why the Fourth District properly could hold in Ayr v. Chance that summary judgment entered in favor of those unnamed defendants was wrong. They were simply trying to get out of a case based upon a defense which did not even apply to them. To let the decision in this case stand, however, creates a serious conflict with DeWitt v. Miami Transit Company, 95 So. 2d 898 (Fla. 1957), because DeWitt held that the effectiveness of a release cannot be challenged factually or legally based upon allegations of "mistake" as to unexpected consequences of a known situation. In DeWitt, this Court said:

> While a release executed pursuant to a mistake as to a past or present fact may on proper showing be set aside, unknown or unexpected consequences of known injuries will not result in invalidating the release. An erroneous opinion or error of judgment respecting future conditions as a

> result of presently known facts will not justify setting the release aside. If the rule were otherwise no release could be safely accepted. . . The end result would be that all such claims would be forced into litigation. Such a conclusion would be directly contrary to the policy of the law favoring amicable settlement of disputes and the avoidance of litigation.
>
> [Id. at 901.]

The settlement agreement entered into in the first PLAYA DEL MAR case provided for settlement of all matters arising out of the construction and sale of the building, including the "latent" defects mentioned in the complaint. The release then included language releasing CORAL RIDGE PROPERTIES and WESTINGHOUSE from all past, present and future claims arising out of defective construction. In other words, everything was considered and everything was released. Nothing was excluded. The Fourth District has nevertheless permitted the release to be the subject of "interpretation" based upon a claim of "mistake".[2/] This is in direct conflict with Ross v. Savage, 66 Fla. 106, 62 So. 148 (1913), the watershed decision of this Court excluding extrinsic evidence from the interpretation of a writing, and J.M. Montgomery Roofing Company, Inc. v. Fred Holland, Inc., 98 So. 2d 484 (Fla. 1957), holding that where the terms and conditions of an unambiguous writing are clear, neither party is entitled to allege or prove by extrinsic evidence any facts which would vary or contradict its terms. CORAL RIDGE PROPERTIES and WESTINGHOUSE would urge this Court to resolve the conflict.

2/ Interestingly enough, this was not a reformation case it was a damage case for construction defects -- just like the first suit.

CONCLUSION

Jurisdiction should be accepted in this case for two essential reasons. First, there is now conflict among the district courts as to whether a defending party may move for summary judgment without first answering the complaint. Second, there is conflict among the district courts and the Supreme Court as to whether a party can avoid the effect of summary judgment regarding an unambiguous release simply by claiming "mistake". CORAL RIDGE PROPERTIES and WESTINGHOUSE are therefore requesting that this Court review the Fourth District's decision, take jurisdiction and let CORAL RIDGE PROPERTIES and WESTINGHOUSE convince the Court that its position is correct.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing was furnished by U.S. Mail to JOHN PAPPAS, ESQUIRE, Butler, Burnett, Wood & Freemon, 501 E. Kennedy Blvd., Tampa, FL 33602; ROBERT J. MANNE, ESQUIRE, Becker, Poliakoff, Streitfeld, P.A., 6520 N. Andrews Ave., Fort Lauderdale, FL 33310; and PAUL REGENSDORF, ESQUIRE, Fleming, O'Bryan & Fleming, P.O. Drawer 7028, Fort Lauderdale, FL 33338, this 21 day of March, 1986.

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