IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,471

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| CORAL RIDGE PROPERTIES, INC. and WESTINGHOUSE ELECTRIC CORPORATION, | : |
| Petitioners, | : |
| v. | : |
| PLAYA DEL MAR ASSOCIATION, INC., | : |
| Respondent. | : |

## RESPONDENT'S BRIEF ON JURISDICTION

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## STATEMENT OF THE CASE AND FACTS

Pursuant to Rule 9.210, Fla.R.App.P., Playa del Mar Association, Inc. (hereafter "Respondent") submits its own Statement of the Case and Facts, since the version submitted by Coral Ridge Properties, Inc. and Westinghouse Electric Corp. (hereafter "Petitioners") is incomplete and inaccurate.

Respondent filed its Fifth Amended Complaint in the trial court in this matter on October 26, 1984, seeking damages against Petitioners for the replacement of a defective electrical bus duct system installed at the time that the Playa del Mar Condominium was originally constructed. The multi-count Complaint alleged that Petitioners were, among other things, the Developers of the Playa del Mar Condominium and were liable for damages to Respondent and its unit owner members pursuant to various legal theories, including breach of warranty and negligence. The lawsuit alleged that the defective electrical bus ducts were discovered as a result of an investigation which followed a fire that occurred at the Condominium on August 31, 1982.

Without filing an Answer to the Complaint, Petitioners moved for Summary Judgment, contending that a Settlement Agreement, entered into between Respondent and Petitioners in February, 1982 relating to a 1979 lawsuit for construction deficiencies, barred the instant lawsuit. More specifically, Petitioners maintained that the Settlement Agreement, Releases and Order of Dismissal were unambiguous, and, as a result, that the claims in the instant lawsuit were released, constituting res judicata as

to the instant case. In response to the Motion for Summary Judgment, Respondent asserted that before a summary judgment motion could be entertained, an answer and affirmative defenses would have to be pled. Furthermore, Respondent asserted that the Settlement Agreement was ambiguous, and that it was never the intention of the parties to release any claims relating to defects, such as the electrical bus duct system, which were not known at the time of the settlement. Moreover, Respondent argued that the Settlement Agreement resulted from a mutual mistake; that the language of the Agreement did not reflect the true intention of the executing parties.

The trial court granted Petitioners' Motion for Summary Judgment and entered a Final Summary Judgment.

On appeal, the District Court of Appeal, Fourth District, reversed, stating that it was inappropriate for the trial court to grant the Summary Judgment where an answer and affirmative defenses had not yet been filed. In addition, the Court noted that, based on the case of *Ayr v. Chance*, 372 So.2d 1000 (Fla. 4th DCA 1979), the entry of the Summary Judgment was most likely error, since there was a factual issue of mutual mistake to which Respondent should have been given an opportunity to introduce evidence at the trial court proceeding.

Petitioners now attempt to invoke the discretionary jurisdiction of this Court, contending that the Opinion of the District Court of Appeal, Fourth District, *directly* and *expressly* conflicts with decisions of other District Courts of Appeal and of the

Supreme Court on two issues. Petitioners contend as follows:

1. That a defendant may move for summary judgment based upon release and res judicata without first asserting them in an answer and affirmative defenses; and

2. That in response to a defense of release, a plaintiff may not submit evidence to assert that the release resulted from a mutual mistake; that is, that the release did not reflect the true intention of the parties.

SUMMARY OF ARGUMENT

This Court should deny Petitioners' request that it invoke its discretionary jurisdiction for the following reasons:

1. Petitioners' contention that the District Court's opinion in this case conflicts with a decision of the Supreme Court and another District Court on the issue of whether a Defendant must file an answer before moving for summary judgment is incorrect. The District Court's opinion is not inconsistent with any decision of the Supreme Court or a District Court. To the contrary, the only decisions addressing this issue are Danford v. City of Rockledge, 387 So.2d 968 (Fla. 5th DCA 1980), and Meigs v. Lear, 191 So.2d 286 (Fla. 1st DCA 1966), which are in agreement with the District Court's opinion herein. The case cited by Petitioners, Edgewater Drugs, Inc. v. Jax Drugs, Inc., 138 So.2d 525 (Fla. 1st DCA 1962) is inapplicable because that decision applied to an old version of the Florida Rules of Civil Procedure, which is no longer in effect, and which further addressed the question of when a Plaintiff, rather than a Defendant, may move for summary judgment.

2. Petitioners' contention that the District Court's opinion conflicts with other cases on the issue of mutual mistake is likewise without merit. The only cases cited for authority by Petitioners are DeWitt v. Miami Transit Company, 95 So.2d 898 (Fla. 1957); Ross v. Savage, 66 Fla. 106, 63 So. 148 (1913); and J.M. Montgomery Roofing Co., Inc. v. Fred Howland, Inc., 98 So.2d 484 (Fla. 1957), which are not cases involving mutual mistake and, thus, are inapplicable.

## ARGUMENT

### A. INTRODUCTION

The Florida Rules of Appellate Procedure establish that this Court should invoke its discretionary jurisdiction in a limited number of circumstances. Rule 9.030, Fla.R.App.P. The only basis for jurisdiction asserted by Petitioners is that the Opinion of the District Court of Appeal expressly and directly conflicts with an opinion of this Court or that of another District Court of Appeal on the same question of law. Rule 9.030(a)(2)(IV), Fla.R.App.P. A review of the law cited by Petitioners demonstrates that there is no express or direct conflict, and that their petition is without merit.

### B.

### THE OPINION IN THE INSTANT CASE DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH ANY DECISIONS ON THE ISSUE OF WHETHER A DEFENDANT MAY MOVE FOR SUMMARY JUDGMENT BEFORE FILING AN ANSWER AND AFFIRMATIVE DEFENSES

Petitioners contend that the decision in the instant case expressly and directly conflicts with other decisions regarding when a defendant may move for summary judgment.

First, Petitioners argue that the decision here is inconsistent with the wording of Rule 1.510, Fla.R.Civ.P. However, this argument does not constitute a ground for this Court to invoke its jurisdiction, since this is not a direct and express conflict with a decision of the Supreme Court on the same question of law. Simply stated, the District Court of Appeal in this case was being called upon

to interpret one of the Rules of Civil Procedure. It did so in a fashion consistent with a number of decisions of the other District Courts which have already addressed this issue. See Danford v. City of Rockledge, supra; Meigs v. Lear, supra. In the event this Court were to grant jurisdiction every time that a District Court of this State interpreted one of the Rules of Civil Procedure, it would be faced with a never ending barrage of cases with petitioners making the same argument in order to trigger this Court's conflict jurisdiction.

Petitioners next assert that the instant decision directly and expressly conflicts with Edgewater Drugs, Inc. v. Jax Drugs, supra. Petitioners maintain that the Edgewater decision enables a defending party, at any time, to move for summary judgment. Petitioners' argument is inapplicable to the instant case because, among other things, the Edgewater case involves a plaintiff, and not a defendant, who moved for summary judgment.

In Edgewater, supra, a case not even decided under the current Rules of Civil Procedure, the Plaintiff moved for Summary Judgment after the Defendant had filed a Motion to Dismiss the Complaint because of improper venue. The Court, after noting that there was nothing in the record which indicated that Defendant had any kind of defense to the claim, held that, under the special circumstances before the Court, a summary judgment could be entered for Plaintiff before Defendant had filed an answer. The Edgewater decision is a far cry from the facts of the instant case, and constitutes a departure from other decisions, such as Danford

v. City of Rockledge, supra, and Meigs v. Lear, supra, where Courts have held that a defendant may not move for summary judgment without first submitting an answer and affirmative defenses.

Thus, there is no express or direct conflict, and the request to invoke jurisdiction in this regard should be denied.

C.

THE OPINION IN THE INSTANT CASE DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH ANY DECISIONS ON THE ISSUE OF MUTUAL MISTAKE

As previously stated, the District Court, after holding that the entry of summary judgment by the trial court was erroneous because an answer had not been filed, noted that it appeared that there was a genuine issue of fact on the question of mutual mistake. The Court cited Ayr v. Chance, supra, as one of the cases in support of its position. See also Steffens v. Steffens, 422 So.2d 963 (Fla. 4th DCA 1982); Bagnasco v. Smith, 382 So.2d 401 (Fla. 4th DCA 1980).

Petitioners now assert that the District Court's holding in this regard creates direct and express conflict with DeWitt v. Miami Transit Company, supra, a case cited in the Petitioners' Brief to the District Court.

A review of DeWitt v. Miami Transit Company, supra, demonstrates why the District Court did not rely on it, and why there is no basis for conflict jurisdiction. DeWitt v. Miami Transit Company is not a case based on mutual mistake, which occurs when a document or contract such as a release does not reflect the true intention

of the parties. See Ayr v. Chance, supra; Bagnasco v. Smith, supra. Rather, DeWitt is a case involving unilateral mistake as to an unknown consequence of a known injury. Besides being irrelevant, because the instant lawsuit involves an unknown injury rather than an unknown consequence of a known injury [See Ormsby v. Ginolfi, 107 So.2d 272 (Fla. 3d DCA 1958) and Boole v. Florida Power & Light, 3 So.2d 335 (Fla. 1941)], DeWitt simply does not deal with the issue of mutual mistake. Thus, there is no direct or express conflict with the instant case.

Similarly, Petitioners contend that there is conflict with Ross v. Savage, supra, or J.M. Montgomery Roofing v. Fred Howland, supra. Both of these cases address the issue of whether intrinsic evidence is admissible when a document or contract is ambiguous. If the District Court had held that it was going to admit extrinsic evidence to clarify an ambiguity, there may be a basis for asserting conflict jurisdiction. However, the argument presented to the District Court, upon which the Court based its decision, was whether the document or release was entered into as a result of mutual mistake, and whether extrinsic evidence was admissible on that issue.

Because these two issues are completely different, there is no express or direct conflict on the same question of law, and jurisdiction with this Court should be denied.

## CONCLUSION

The decision of the District Court of Appeal, Fourth District, in the instant case does not expressly or directly conflict with any decisions of the Supreme Court of Florida or another District Court. Petitioners' request that this Court invoke its discretionary jurisdiction should be denied.

Respectfully submitted,

BECKER, POLIAKOFF & STREITFELD, P.A.

By:
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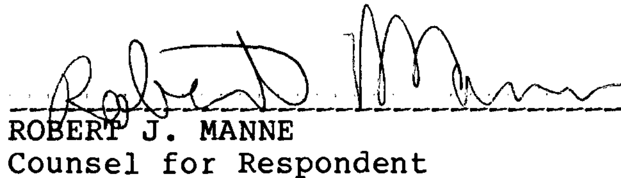
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to JOHN PAPPAS, ESQUIRE, Butler, Burnett, Wood & Freemon, 501 Kennedy Boulevard, Tampa, FL 33062; JOHN HARGROVE, ESQUIRE, Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey, P.A., Attorneys for Petitioners, One Corporate Plaza, 18th Floor, 110 E. Broward Blvd., Ft. Lauderdale, FL 33301; PAUL REGENSDORF, ESQUIRE, Fleming, O'Bryan & Fleming, P. O. Drawer 7028, Ft. Lauderdale, FL 33338, this 4th day of April, 1986.



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