

IN THE SUPREME COURT OF FLORIDA

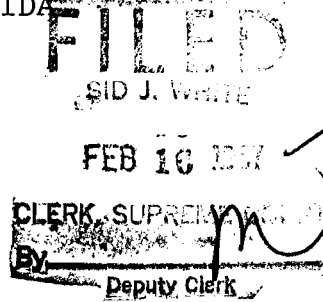
STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

EXECUTIVE HEALTH SERVICES, INC.,  
and WAYNE O. MONTGOMERY, M.D.,

Respondents.



CASE NO.: 69,897

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On Notice To Invoke Discretionary  
Jurisdiction To Review A Decision Of The  
Second District Court Of Appeal  
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RESPONDENTS' BRIEF ON JURISDICTION

CLIFFORD J. SCHOTT, ESQUIRE  
SCHOTT & DALE, P.A.  
P.O. Box 1808  
Lakeland, Florida 33802  
(813) 683-6551  
Attorney for Respondents

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## PRELIMINARY STATEMENT

In this brief, the Petitioner, STATE FARM FIRE AND CASUALTY COMPANY will be referred to as "Petitioner". The Respondents, EXECUTIVE HEALTH SERVICES, INC., and WAYNE O. MONTGOMERY, M.D., will be referred to as "Respondents" or by their respective names. The Appendix attached to this brief will be referred to as "App.", followed by the appropriate page number. The record on appeal will be referred to as "R", followed by the appropriate page number.

## STATEMENT OF THE CASE AND OF THE FACTS

In the Trial Court, a declaratory judgment action was filed by Petitioner to determine the extent of coverage under a general liability policy. A final summary judgment, in favor of Petitioner, was entered. Respondents appealed to the Second District Court of Appeal. (App. 1-2).

The Second District Court of Appeal reversed the ruling of the Trial Court because they concluded that there is a genuine issue of material fact. (App. 2,5).

Because the Second District Court of Appeal found that there is a genuine issue as to a material fact, the Appellate Court did not decide the issue of whether the summary judgment was properly granted or denied under the law. The case was remanded to the Trial Court for further proceedings. (App. 5). This case is now before the Supreme Court on the issue of jurisdiction

because the Petitioner contends the following:

"This Court must accept jurisdiction pursuant to Art. V., §3(b) (3), Fla. Const., because the decision of the Second District Court of Appeal expressly and directly conflicts with a decision of this Court and decisions of other District Courts of Appeal on the same questions of law." (See Petitioner's Brief on Jurisdiction at Page 4).

#### STATEMENT OF JURISDICTIONAL ISSUE

SHOULD THE SUPREME COURT REVIEW, BY CONFLICT CERTIORARI, THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL REVERSING THE TRIAL COURT'S ORDER OF FINAL SUMMARY JUDGMENT REASONING THAT A GENUINE ISSUE OF MATERIAL FACT EXISTS?

#### ARGUMENT

- I. THE DISTRICT COURT OF APPEAL DID NOT DECIDE THE ISSUE OF WHETHER THE SUMMARY JUDGMENT WAS PROPERLY GRANTED OR DENIED UNDER LAW. THEREFORE, THE SUPREME COURT CANNOT REVIEW BY CONFLICT CERTIORARI AN ISSUE WHICH WAS NOT DECIDED UPON BY THE DISTRICT COURT OF APPEAL.

The Supreme Court cannot review by conflict certiorari an issue which was not decided upon by the District Court of Appeal. Winn-Dixie Stores, Inc. v. Goodman, 276 So.2d 465 (Fla. 1973).

In the case at bar, the District Court of Appeal reversed the Trial Court's order of final summary judgment because the Appellate Court concluded that there was a genuine issue of material fact. (App. 1-5).

Specifically, the District Court of Appeal did not decide the issue whether the summary judgment was properly granted or denied under the law. But rather, the Appellate Court remanded the case back to the Trial Court for further proceedings.(App. 5).

Therefore, because the Court of Appeal did not decide the issue of whether the summary judgment was properly granted or denied under the law, the Supreme Court cannot review the issue by conflict certiorari.

II. THE FACTS OF THE CASE BEFORE THE COURT HAVE NOT BEEN SET. THEREFORE, A PETITION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL, ON THE GROUNDS OF CONFLICT CERTIORARI, IS PREMATURE AND SHOULD BE DENIED.

A petition for certiorari to review a decision of the District Court of Appeal on the ground of an alledged conflict of the decision with a decision of the Supreme Court is premature and should be denied, where the facts of the instant case have not yet been set or relief, if any, determined. Stein v. Darby, 134 So.2d 232 (Fla. 1961).

In the case at bar, the very reason for the reversal and remanding to the Trial Court was because the facts of the case were not yet set. Because the facts were not set, the Appellate Court could not decide the issue whether the summary judgment was properly granted or denied under the law.

The effect of the District Court's decision was to vacate and set aside the final summary judgment of the Trial Court and to remand the cause for further proceedings in conformity with the Court's view. This order requires factual issues to be re-submitted to the Trial Court for determination. Under such circumstances, there is no final judgment and, therefore, nothing for the Supreme Court to review. Feiner v. Sun Ray Drug Co. of Fla., Inc., 86 So.2d 891 (Fla. 1956); see also Pullman Company v. Fleishel, 101 So2d 188 (Fla 1958).

In any event, Respondents, respectfully submit that the mere finding that there are material issues of fact to be resolved in this case does not conflict with any holding of the Supreme Court or any District Court of Appeal. Moreover, the petition for certiorari to review the decision of the District Court of Appeal in this case is premature and should be denied, because the facts of the instant case have not yet been set.

III. THE CASE BEFORE THE COURT IS  
DISTINGUISHABLE ON ITS FACTS  
WITH THE CASES CLAIMED TO BE  
IN CONFLICT AND THEREFORE,  
REVIEW BY CERTIORARI ON THE  
GROUND OF CONFLICT WILL NOT  
LIE.

It is well established in Florida Law that where the cases claimed to be in conflict are distinguishable on their facts that review by certiorari on the ground of conflict will not lie. Florida Power & Light Co. v. Bell, 113 So.2D 697 (Fla. 1959);



Shelby Mutual Insurance company v. Russell, 137 So.2d 219 (Fla. 1962); Illinois Cent. R.Co. v. Simari, 191 So2d 427 (Fla. 1966); C.I., Inc. v. Travel Internationale,Ltd., 236 So.2d 441 (Fla. 1970); Kendel v. Pontious, 261 So.2d 167 (Fla. 1972); Bowman v. Employers Mutual Liability Insurance Co., 261 So.2d 821 (Fla. 1972); Lynch v. Peoples Gas System, Inc., 267 So.2d 81 (Fla. 1972); Di Stefano v. Langston, 274 So.2d 533 (Fla. 1973); Wilson v. Southern Bell Tel. & Tel. Co., 327 So.2d 220 (Fla. 1976).

It is also well established where cases claimed to be in conflict are distinguishable on the rule of law as applied to the facts that review by certiorari on the ground of conflict will not lie. Sinnamon v. Fowlkes, 101 So2d 375 (Fla. 1958); Cohen v. Rothman, 138 So.2d 328 (Fla. 1962); Kyle v. Kyle, 139 So.2d 885 (Fla. 1962); State v. Johnson, 280 So.2d 673 (Fla. 1973); Aetna Life Insurance Company, Inc. v. Fruchter, 283 So.2d 36 (Fla. 1973); Spradley v. State, 293 So.2d 697 (Fla. 1974); Protheroe v. Protheroe, 328 So.2d 417 (Fla. 1976).

A careful reading of the opinion and cases cited by the Second District Court of Appeal, in the case before the Court, clearly show that the Honorable District Court is well aware of the authorities cited and the arguments advanced by Petitioner in its' jurisdictional brief. (App. 1-5).

The District Court of Appeal does not challenge the cases cited by Petitioner nor does the District Court of Appeal make a pronouncement of a point of law which the bench, bar or future

litigants may fairly regard as authoritative precedent but which is in direct conflict with the pronouncement on the same point of law in a decision of the Supreme Court or a District Court of Appeal. But rather, the District Court takes notice of the opinions cited by Petitioner in its jurisdictional brief and capably distinguishes them on their facts, or on the rule of law as applied to the facts, from similar cases, such as the case at bar. (App. 1-5).

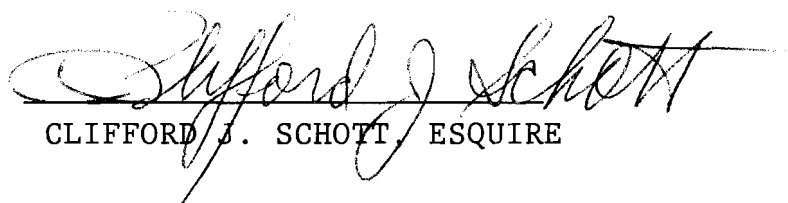
Because the cases claimed to be in conflict are distinguishable on their facts, or on the rule of law as applied to the facts, a petition for review by certiorari on the ground of conflict should be denied.

#### CONCLUSION

Respondents contend that jurisdiction should be denied based upon either one or both of the first two arguments previously advanced herein, without the necessity of further analysis.

However, assuming arguendo, that the Honorable Court should find that the facts in the instant case are set and the District Court of Appeal decided the issue of whether the Summary Judgment was properly granted or denied under the law, Respondents respectfully submit that the Court should next further analyze the opinion of the Second District Court of Appeal and cases cited therein. (App. 1-5). Based on that analysis the Court should then find that the case before the Court is distinguishable on its facts, or on the rule of law as applied to the facts, from the cases claimed to be in conflict. Therefore, petition for review by certiorari should be denied.

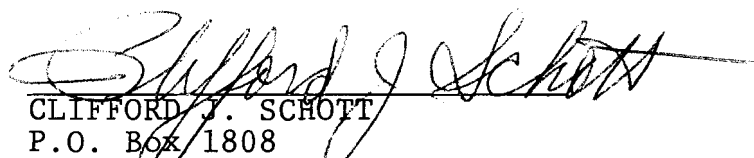
Respectfully submitted,

  
CLIFFORD J. SCHOTT, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by regular U.S. Mail to David W. Young, Esquire, P.O. Box 1108, Lakeland, Florida 33802, and Terrence E. Kehoe, Esquire, P.O. Box 19005, Orlando, Florida 32814, Attorneys for Petitioner, this 11<sup>TH</sup> day of June 1987.

SCHOTT & DALE, P.A.  
ATTORNEYS AT LAW

  
CLIFFORD J. SCHOTT  
P.O. Box 1808  
Lakeland, Florida 33802  
(813) 683-6551  
Attorney for Respondents