IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

RAYMOND KENDRICK and
SUSIE KENDRICK,

Petitioners,

vs.

Supreme Court Docket No.: 76,114
DCA Docket No.: 89-2198

ED'S BEACH SERVICE, INC.,
et al,

Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioners, Raymond Kendrick and Susie Kendrick, are collectively referred to herein as the "Kendricks". Respondent, Ed's Beach Service, Inc., is referred to herein as "EBS". Reference to the appendix filed with the jurisdictional brief will be by the designation "Ap.". Article V, Section 3(b)(3) (1980) of the Florida Constitution shall be referred to herein as "section 3(b)(3)".

STATEMENT OF THE CASE

The Kendricks are requesting that the Florida Supreme Court invoke its discretionary jurisdiction pursuant to section 3(b)(3) to review the First District Court of Appeal's decision in Kendrick v. Ed's Beach Service, Inc. et al, 559 So. 2d 334 (Fla. 1st DCA 1990). The basis for the Kendricks' petition is that Kendrick expressly and directly conflicts with Mazzeo v. City of Sebastian, 550 So. 2d 1113 (Fla. 1989), Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) and Robbins v. Dept. of Natural Resources, 468 So. 2d 1041 (Fla. 1st DCA 1985).

STATEMENT OF FACTS

This case arises from a diving accident which occurred at Edgewater Beach Resort on Panama City Beach on July 30, 1985. Petitioner, Raymond Kendrick, was rendered a quadriplegic when he dove from a lifeguard stand into a swimming pool in an area where the water is three feet deep and struck his head on the cement bottom. The Kendricks filed a claim against the following defendants:

(1) Middlesex Development Corporation, Wesley Burnham, Nall Development Company and Rime Investment Company, (hereinafter referred to as "the owners") the alleged owners of the real property on which Edgewater Beach Resort was constructed;

(2) Edgewater Beach Resort Community Association, (hereinafter referred to as "the Association") which was formed for the purpose of assuming responsibility for management of Edgewater Beach Resort from the owners;

(3) Edgewater Beach Resort Management, Inc., (hereinafter referred to as "Edgewater") which was allegedly responsible for managing Edgewater Beach Resort for the owners and the Association;

(4) Rocky Roquemore, who allegedly provided architectural services in connection with the construction of Edgewater Beach Resort; and

(5) EBS, which allegedly was providing lifeguard services at the pool when the accident occurred.

On March 10, 1989, the Kendricks filed an amended complaint pursuant to a stipulation of the parties. The amended complaint

names the following additional defendants and as to each alleges:

(6) Monarch Corporation is one of the owners of the real property on which Edgewater Beach Resort was constructed;

(7) Edward Hickey and Edward F. Hickey, Jr. made arrangements with EBS to provide lifeguard services at Edgewater Beach Resort;

(8) Cox Building Corporation designed and/or built the swimming pool located at Edgewater Beach Resort; and

(9) W. R. Scott and Benigno Soto are engineers who designed the swimming pool at Edgewater Beach Resort and agreed to provide construction plans by which the owners could obtain "appropriate permitting for the swimming pool".

EBS filed a motion for summary judgment on two grounds. First, EBS did not have a duty to warn Raymond Kendrick of the danger associated with diving from a lifeguard chair into water three feet deep. Second, the sole proximate cause of Raymond Kendrick's accident was the negligence of Raymond Kendrick. Contrary to the argument made by the Kendricks in their brief on jurisdiction, EBS's summary judgment motion was not premised on the doctrine of express assumption of risk. (Ap. pp. 8,9) In affirming the summary judgment in favor of EBS, the First District stated:

> . . . . the testimony here is clear as to what appellant knew or should have known before he dove into the water. Because the record clearly demonstrates the cause of the injuries to be the plaintiff's intentional conduct, the nexus between any claimed negligence and injury is broken.

The foregoing language indicates the First District's decision is not based on the doctrine of express assumption of risk.

SUMMARY OF ARGUMENT

The Florida Supreme Court's jurisdiction under section 3(b)(3) is limited to cases which expressly and directly conflict on the same question of law with the opinion of another district or a decision of the Florida Supreme Court. The Kendricks' petition is essentially an attempt by the Kendricks to reargue their case on the merits. It is beyond dispute that the language in Kendrick is not expressly and directly in conflict with a decision of this court or of another court on the same question of law. Therefore, the court should not accept jurisdiction to review the First District's decision in Kendrick.

ARGUMENT

I. THE FIRST DISTRICT'S DECISION DOES NOT CONFLICT ON THE SAME QUESTION OF LAW WITH A DECISION OF THE FLORIDA SUPREME COURT OR ANOTHER DISTRICT COURT.

In support of their request for the court to review Kendrick, the Kendricks argue that the following three cases are in conflict: (1) Mazzeo v. City of Sebastian, 550 So. 2d 1113 (Fla. 1989); (2) Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977); and (3) Robbins v. Department of Natural Resources, 468 So. 2d 1041 (Fla. 1st DCa 1985). If the foregoing cases are distinguishable from Kendrick, the Supreme Court does not have jurisdiction to review the merits of this case. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983). A close reading of the cases cited by the Kendricks is not necessary to unequivocally conclude that no conflict exists in any of those decisions and the First District's decision in this case.

To begin with, the Kendricks' reliance on an alleged conflict with the First District's decision in Robbins is misplaced. Conflict jurisdiction cannot be premised on conflicting decisions within the same district. Gilliam v. State, 267 So. 2d 658 (Fla. 2nd DCA 1972). The 1980 amendments to section 3(b)(3) reaffirm the principle set forth in Gilliam that the conflict must be with the decision of the Florida Supreme Court or the decision of another district. Therefore, even if Robbins expressly and directly conflicts with the First District's opinion in this case, the Kendricks could not rely upon the conflict to invoke the

discretionary jurisdiction of the Florida Supreme Court.

Aside from the foregoing, the issue in Robbins is whether the doctrine of express assumption of risk is a viable defense in cases involving a diving accident. It cannot be disputed that the decision in Kendrick is not based on the doctrine of express assumption of risk. Therefore, no direct and express conflict on the same question of law exists between Robbins and the decision in this case.

The Kendricks also assert that the First District's decision expressly and directly conflicts with Blackburn v. Dorta, supra. In Blackburn, the court determined that the affirmative defense of implied assumption of risk should be merged into the defense of comparative negligence. No language in Kendrick expressly or otherwise suggests that the doctrine of comparative negligence was not applied. Blackburn does not hold that a plaintiff is entitled to present his or her case to a jury in all cases where evidence of improper conduct on the part of the defendant is offered even if the facts establish as a matter of law that there is no nexus between the alleged negligence and the plaintiff's accident. Accordingly, Kendrick does not directly and expressly conflict with any issue of law decided in Blackburn.

Finally, the Kendricks assert that Kendrick conflicts with Mazzeo v. City of Sebastian, supra. In Mazzeo, the court restricted the doctrine of express assumption of risk to cases involving express contracts not to sue and contact sports. As previously indicated, Kendrick is not premised on the doctrine of

express assumption of risk. This is apparent not only from the opinion itself but from the fact that EBS did not base its motion for summary judgment on the doctrine of express assumption of risk. Instead, EBS's motion for summary judgment was granted on grounds that the sole proximate cause of the accident was the negligence of Raymond Kendrick. The court in Mazzeo stated:

> We express no opinion with respect to the issues of negligence and proximate cause because they are not before us.

Id. at 1117. The foregoing language expressly demonstrates that Mazzeo is not in conflict with Kendrick. Mazzeo, Blackburn and Robbins all involve different issues of law than the ones decided in this case. Therefore, those cases cannot serve as a basis for the court to exercise conflict jurisdiction to review the merits of this case.

II. THE KENDRICKS' NOTICE TO INVOKE THE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT CONSTITUTES AN ATTEMPT TO REARGUE THE MERITS OF THEIR CLAIMS AGAINST EBS.

The Kendricks' jurisdictional brief contains a lengthy statement of facts and an appendix with documents from the record before the First District. Most of the facts alleged in the Kendricks' jurisdictional brief are not set forth in the First District's opinion. The Kendricks' reliance upon the appendix and other facts not included in the text of the First District's decision is improper. Reaves v. State, 485 So. 2d 829 (Fla. 1986).

In Reaves, the Florida Supreme Court determined that it did not have conflict jurisdiction to review a Third District opinion.

The court stated:

> Petitioner is asking that we find conflict with Nowlin. In order to do so, it would be necessary for us to either accept the dissenter's view of the evidence and his conclusion that the statements were involuntary, or to review the record itself in order to resolve the disagreement in favor of the dissenter. Neither course of action is available under the jurisdiction granted by article V, section 3(b)(3) of the Florida Constitution. Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Id. at 830. The court in Reaves further stated:

> This case illustrates common error made in preparing jurisdictional briefs based on alleged decisional conflicts. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explained in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.

Id. at 830, n. 3.

The Kendricks may argue that reference to the facts and the appendix filed in support of their jurisdictional brief is justified since the record below demonstrates that the result in this case is different from results in cases involving similar facts; therefore, a conflict between Kendrick and other cases can

be implied. However, the doctrine of implied conflict has been rejected as a basis for the Florida Supreme Court to review a decision of a district court. Department of Health and Rehabilitative Services v. National Adoption Counsel Service, Inc., 498 So. 2d 888 (Fla. 1986). In National Adoption, the court stated:

> All the cases relied on by HRS for this "implied" conflict argument were decided prior to the 1980 amendment to article V, section 3(b)(3) of the Florida Constitution. As we recently noted in Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), [c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. In other words, inherent or so-called "implied" conflict may no longer serve as a basis for this court's jurisdiction.

Id. at 889.

Under Reaves and National Adoption, the Kendricks' reference to the appendix and facts not contained in the First District's opinion is improper. Accordingly, it is unnecessary for EBS to prepare a detailed statement of facts identifying evidence in the record supporting the summary judgment. The fact that the Kendricks refer to matters outside the text of the First District's decision strongly suggests that no express or direct conflict on the same principle of law exists in Kendrick and the opinion of another district court or of the Florida Supreme Court. Rather than identifying a case expressly and directly conflicting with Kendrick, the Kendricks are merely reciting the same arguments on the merits which were previously rejected by the trial court and the First District.

CONCLUSION

To invoke the discretionary jurisdiction of the Florida Supreme Court pursuant to section 3(b)(3), the Kendricks must show from the face of the First District's opinion that Kendrick conflicts on the same question of law with the decision of another district or of the Florida Supreme Court on the same principle of law. Instead of identifying a case in conflict with the decision in this case, the Kendricks' petition constitutes an attempt to reargue their case on the merits. The First District's decision is based on inveterately applied principles of law. The issues of law resolved by the First District in this case are not in conflict with any principle of law set forth in any of the cases cited by the Kendricks. Therefore, the court should deny the Kendricks' petition to invoke the discretionary jurisdiction of this court pursuant to section 3(b)(3).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Robert Staats, 229 McKenzie Avenue, Panama City, Florida 32401, by hand delivery this 18th day of July, 1990.

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