IN THE DISTRICT COURT OF APPEALS
OF THE STATE OF FLORIDA
FOURTH DISTRICT

PATRICIA MICHELLE FRANK,

Appellant(s)

vs.

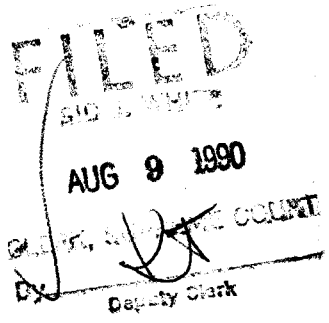
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellee(s).

_____/

CASE NO. 76,338

DCA CASE NO. 89-0614




BRIEF ON JURISDICTION FOR RESPONDENT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ON APPEAL FROM AN ORDER OF THE FOURTH DISTRICT COURT OF APPEALS

Richard C. Singer, Esquire
1286 South Florida Avenue
Suite One
Rockledge, Florida 32955
(407) 639-1340
Attorney for Appellant

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## STATEMENT OF CASE AND FACTS

Respondent agrees with the Statement of the Case and Facts as set forth by Petitioner.

## SUMMARY OF ARGUMENT

The Appellant attempts to assert discretionary jurisdiction of the Supreme Court based upon a conflict with a decision of another District Court of Appeals pursuant to Article V, Section 3(b)(3) of the Florida Constitution. In reviewing the Fourth District Court of Appeals Per Curiam Affirmance in Frank vs. State Farm, there is no express or direct conflict with another opinion of another District Court of Appeals.

Based upon the line of cases beginning with Jenkins vs. State Farm, 385 So.2d 1356 (Fla. 1980), the lack of an express or direct conflict would result in a denial of discretionary jurisdiction by the Florida Supreme Court.

## ARGUMENT

Petitioner attempts to assert the discretionary jurisdiction of the Florida Supreme Court pursuant to Article 5, Section 3(b)(3) of the Florida Constitution, citing a conflict between this decision and a decision in another jurisdiction.

Respondent would state that such reliance is misplaced and that there is, in fact, no conflict apparent from the record contained herein.

The leading case on this point is Jenkins vs. State, 385 So.2d 1356 (Fla. 1980). In Jenkins, the Court noted,

> "This COURT may only review a decision by the District Court of Appeals that expressly (italics supplied), and directly conflicts with the decision of another District Court of Appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." Webster's Third New International Dictionary, (1961 ed. unabr.). The single word "affirmed" comports with none of these depositions. Furthermore, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the District Court of Appeals.

The Supreme Court went on to hold that they do lack jurisdictional review in Per Curiam decisions of the several district courts rendered without opinion when the basis for

such review is an alleged conflict with that decision with the decision of another District Court of Appeals. In other words, in the case at bar, there is no express or direct conflict with any other decision of another District Court of Appeals. The decision in the instant case was rendered Per Curiam Affirmed based upon the authority of Palacino vs. State Farm, 15 FLW 1583 (Fla. 4th DCA, June, 13, 1980) (en banc).

In drafting the Per Curiam Affirmed, the Fourth District Court of Appeals did not indicate any contrary authority within the Per Curiam Affirmed. Stevens vs. Jefferson, 436 So.2d 33 (Fla. 1983). In Stevens, the Court did note that there was discretionary jurisdiction because the District Court did indicate contradictory authority. Stevens vs. Jefferson, 408 So.2d 634 (Fla. 5th DCA, 1981).

In Stevens, the Fifth District Court of Appeals did set out that there was contradictory authority expressly in its opinion in Stevens vs. Jefferson, 408 at 634. In the case at bar, the Fourth District Court of Appeals chose not to set out that there was, in fact, contrary authority in conflict with their decision. It is clear by the provisions of Article V, Section 3(b)(3) that there must be an expressed and/or direct conflict with a decision of another District Court and the failure of the Fourth District Court of Appeals

to expressly and directly set forth that there is conflict with the decision of another District Court of Appeals is a fatal blow to the Appellant's attempt to assert the discretionary jurisdiction of the Florida Supreme Court.

In the instant case the affirmance of the Circuit Court decision by the Fourth District Court of Appeals did not render a statement of law capable of causing confusion of disharmony in the law of the State of Florida; and, in fact, the decision of the Fourth District Court of Appeals did not indicate any contrary authority; and, therefore, this is not the kind of case that is subject to the discretionary review of the Supreme Court. Jenkins vs. State, 385 So.2d 1356 (Fla. 1980); Dodi Publishing Company vs. Editorial America, 385 So.2d 1369 (Fla. 1980).

In Reaves vs. State, 485 So.2d 829 (Fla. 1986), the Supreme Court initially accepted the jurisdiction based upon an asserted conflict, but upon closer examination they stated that it was clear that there was no direct or expressed conflict, and the review was improperly granted. In Reaves, the Court cited Jenkins vs. State, with approval and stated the following:

> "Conflict between decisions must be expressed 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". Reaves at 830.

Under similar facts, the Supreme Court has stated that they cannot search the record to see whether a District Court affirmance creates a necessary conflict. Rather, the standard is that there must be a direct and expressed conflict. Whipple vs. State, 431 So. 2d 1011 (Fla. 2nd DCA, 1983).

In summary, since the Fourth District Court of Appeals affirmance did not set out that there was any dorect or express conflict with any other decision of another District Court of Appeals, then the discretionary jurisdiction of the Supreme Court pursuant to Article V, Section 3(b)(3) of the Florida Constitution should not be granted.