IN THE SUPREME COURT OF THE STATE OF FLORIDA

SPRINGTREE PROPERTIES, INC.,
SPRINGTREE PROPERTIES, INC.,
as General Partner of
SPRINGTREE LTD., PHASE I,
and HARDEE'S FOOD SYSTEMS, INC.,

Petitioners,

vs.

Supreme Court Case No. 87,684
Second DCA Case No. 95-0714

JAMES P. HAMMOND, JR. and
LUCY R. HAMMOND, his wife,

Respondents.
_____/

RESPONDENTS' BRIEF ON JURISDICTION

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SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the decision of the district court below and any of the other decisions cited by Petitioners. All of the decisions relied upon by Petitioner to show conflict are clearly distinguishable on their facts. The decision of the court below specifically noted all of the cases on which Petitioners purport to predicate conflict jurisdiction (App. p. 4 at note 1), and that such "cases differ slightly, depending on" various facts. (App. p. 4).

Factually dissimilar cases do not create the express and direct conflict requisite for this honorable Court's exercise of discretionary review jurisdiction. Additionally, to the extent that any such conflict might otherwise have existed (a point Respondents do not concede), the cases relied upon by Petitioners have been impliedly overruled by this Court's pronouncements on the nature of foreseeability in *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992), a case also cited and discussed by the district court in its opinion below. (App. at 5-6).

ARGUMENT

THE DECISION OF THE COURT BELOW DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH ANY DECISIONS OF THIS COURT, NOR WITH ANY DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

Each of the five cases relied on by Petitioners is easily distinguishable

from the instant case on a factual basis, such that no conflict whatsoever has been shown, much less the express and direct conflict necessary for this Court's discretionary review jurisdiction to properly be invoked. In describing each case, Petitioners have carefully *omitted* any mention of the underlying facts of the cases which are so clearly different than those of the instant case.

For example, Petitioners rely on *Schatz v. 7-Eleven, Inc.*, 128 So.2d 901 (Fla. 1st DCA 1961) (Brief at 4-5), but gloss over the fact that the plaintiff in *Schatz* was struck by an automobile while *inside* the defendant's store building, unlike Respondent in the instant case. The foreseeability of being struck by an automobile while *inside* a building is a totally separate consideration from the foreseeability of being struck by a car while standing outside, on a sidewalk directly adjacent to a parking space in which automobiles are expected to park facing towards pedestrians, as in the case *sub judice*. Injury from an automobile while the injured party is standing *inside* a building probably is not reasonably foreseeable, and thus there is no conflict, express or otherwise, between *Schatz* and the decision below.

The same analysis and distinction as applied above to *Schatz* is equally applicable to *Cabals v. Elkins*, 368 So.2d 96 (Fla. 1979) (Brief at 5) and *Krispy Kreme Doughnut Co. v. Cornett*, 312 So.2d 771 (Fla. 1st DCA 1975) (Brief at 6). In both these cases, the injured plaintiffs again were

inside the defendants' buildings when they were struck and injured by a motor vehicle. Thus, once again, no conflict has been demonstrated.

Perhaps at first glance the case of *Winn Dixie Stores, Inc. v. Carn*, 473 So.2d 742 (Fla. 4th DCA 1985) (Brief at 5) appears to be more on point, since the plaintiff in *Carn* was injured while outside a building and standing on a sidewalk. *Carn*, however, is also inapposite to the instant case, and thus presents no conflict, because the automobile in *Carn left the roadway* and struck a plaintiff who was standing on a *public* sidewalk adjacent to the public road. This fact is not mentioned in Petitioners' discussion of *Carn* (Brief at 5), for obvious reasons.

The only remaining case on which Petitioners rest their assertion of conflict is *Molinares v. El Centro Gallego, Inc.*, 545 So.2d 387 (Fla. 3d DCA 1989). (Brief at 6). As in *Carn* (and unlike *Schatz*, *Cabals*, and *Krispy Kreme*) *Molinares* did involve a customer who was injured while not inside the defendant's store building. However, unlike the instant case, the *Molinares* opinion does not reflect that the plaintiffs introduced expert testimony indicating that the defendants were negligent in failing to protect their customers, nor that the defendants' premises were virtually surrounded by some forty-five other business establishments that *had* taken the very safety precautions deemed necessary in the opinion of Respondents' expert witness. (Brief at p. 2). This crucial difference between the instant case

and *Molinares* alone eliminates any conflict between the two.

In addition to the foregoing demonstration that all five cases relied upon by Petitioners are easily distinguishable from the instant case on their facts, Respondents respectfully assert that other, independent, reasons exist which further indicate that no conflict has been shown by Petitioners. For example, *Carn* cannot provide "conflict" with the instant case in light of *Cohen v. Schrider*, 533 So.2d 859 (Fla. 4th DCA 1988). In *Cohen* the same district court of appeal that decided *Carn* specifically limited *Carn* to its facts (i.e., where a vehicle leaves a *public roadway* to injure a customer), *id.* at 860-61, and it has already been pointed out that no such facts are present here.

Additionally, all the cases relied upon by Petitioners as establishing conflict predate this Court's opinion in *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992). In *McCain*, this Court explained the different ways that foreseeability properly relates to duty, versus causation. The decision below was partially based upon *McCain* (App. at pp. 5-6) (although the district court also stated that "[e]ven without *McCain*," it would still be "inclined to reverse"). To whatever extent the various *district* court opinions relied upon by Petitioners to establish conflict are contrary to *McCain*, the court below was duty-bound to follow this Court's precedent. *See, e.g., Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).

Even if all *five* of the cases relied upon by Petitioners *are* in perfect accord with *McCain*, however (a point that Respondents do not concede), the partial reliance of the court below on *McCain* nevertheless conclusively shows that no "express" conflict exists between the instant case and the cases relied upon by Petitioners. This conclusion is inescapable, because when a "conflict," if it indeed exists, is not present in the court's actual written opinion, it is not an "express" conflict as required by Article V, Section 3(b)(3), Florida Constitution and Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure.

This Court has long recognized that the purpose of its conflict review is to ensure precedential consistency rather than to see that justice is done in a particular case. *Lake v. Lake*, 103 So.2d 639, 642-43 (Fla. 1958). This policy was reaffirmed by the 1980 amendments to Article V, Section 3(b), Florida Constitution, requiring that the conflict be "express." *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). This Court now lacks jurisdiction where:

> [N]o direct conflict *expressly appears* in the written order *of the district court of appeal.*

Pena v. Tampa Fed. Sav. & Loan Ass'n, 385 So.2d 1370, 1370 (Fla. 1980) (emphasis supplied).

In the instant case, the appellate court simply applied *McCain*, and nowhere in its decision did it purport to do otherwise, nor to disagree with

any of the cases on which Petitioners now purport to predicate conflict. Even before the constitution was amended so as to specifically require *express* conflict, this Court recognized that its conflict jurisdiction should be exercised only when one district court's opinion was "wholly irreconcilable" with that of another district court of appeal. *Williams v. Duggan*, 153 So.2d 726 (Fla. 1963).

In the instant case, none of the cases relied upon by Petitioners could possibly provide "express" conflict with the decision below, which expressly relied, in part, upon *McCain*, a decision of this Court rendered *after* all the cases cited by Petitioners. *If* any of the *other* district courts of appeal disagree with the reading of *McCain* by the court below, *then* there might, someday, exist the express and "irreconcilable" type of conflict that this Court should resolve.

As it stands now, however, it is clear that Petitioners' complaint is essentially that the district court simply reached the "wrong" conclusion. Clearly, such is not a sufficient basis to invoke this Court's jurisdiction. *Lake v. Lake, supra*; *Jenkins v. State, supra*.

CONCLUSION

For the foregoing reasons, Petitioners have failed to show any direct and express conflict between the opinion of the court below and any of the cases cited by Petitioners, and thus this honorable Court should deny the petition for discretionary review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of April, 1996, to: Shelley H. Leinicke, Esq., WICKER, SMITH, TUTAN, O'HARE, McCOY, GRAHAM & LANE, P.A., attorneys for Petitioners, One East Broward Blvd., Fifth Floor, P. O. Box 14460, Fort Lauderdale, Florida 33302; and A. Craig Cameron, Esq., attorney for Gretel G. Ashley, 15 West Church Street, Orlando, Florida 32801.

Respectfully submitted,

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