

ORIGINAL

A34735-7/SHL/vsc/257334

SUPREME COURT OF FLORIDA
CASE NO. 87,684
2D DCA CASE NO. 95-00714

FILED
SID J. WHITE
SEP 9 1996
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Chief Deputy Clerk

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

Petitioners,

vs.

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

Respondents.

_____ /

REPLY BRIEF OF PETITIONERS

✓
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
ISSUE	1
WHETHER THE INSTANT DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE CASES OF <i>SCHATZ v. 7-ELEVEN, INC.</i> , 128 SO.2D 901 (FLA. 1ST DCA 1961); <i>WINN-DIXIE STORES, INC. v. CARN</i> , 473 SO.2D 742 (FLA. 4TH DCA 1985); <i>REV. DENIED</i> , 484 SO.2D 7 (FLA. 1986); <i>MOLINARES v. EL CENTRO GALLEGO, INC.</i> , 545 SO.2D 387 (FLA. 3D DCA 1989), <i>REV. DENIED</i> , 557 SO.2D 866 (FLA. 1989); <i>CABALS v. ELKINS</i> , 368 SO.2D 96 (FLA. 1979); AND <i>KRISPY KREME DOUGHNUT CO. v. CORNETT</i> , 312 SO.2D 771 (FLA. 1ST DCA 1975), <i>CERT. DENIED</i> , 330 SO.2D 16 (FLA. 1976).	1
ARGUMENT	1
THE INSTANT DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE CASES OF <i>SCHATZ v. 7-ELEVEN, INC.</i> , 128 SO.2D 901 (FLA. 1ST DCA 1961); <i>WINN-DIXIE STORES, INC. v. CARN</i> , 473 SO.2D 742 (FLA. 4TH DCA 1985); <i>REV. DENIED</i> , 484 SO.2D 7 (FLA. 1986); <i>MOLINARES v. EL CENTRO GALLEGO, INC.</i> , 545 SO.2D 387 (FLA. 3D DCA 1989), <i>REV. DENIED</i> , 557 SO.2D 866 (FLA. 1989); <i>CABALS v. ELKINS</i> , 368 SO.2D 96 (FLA. 1979); AND <i>KRISPY KREME DOUGHNUT CO. v. CORNETT</i> , 312 SO.2D 771 (FLA. 1ST DCA 1975), <i>CERT. DENIED</i> , 330 SO.2D 16 (FLA. 1976).	1
CONCLUSION	3
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

	<u>PAGE</u>
<i>Cabals v. Elkins</i> , 368 So.2d 96 (Fla. 1979)	1
<i>Cohen v. Schrider</i> , 533 So.2d 859 (Fla. 4th DCA 1988)	3
<i>Grissett v. Circle K Corp. of Texas</i> , 593 So.2d 291 (Fla. 2nd DCA 1992)	3
<i>Johnson v. Hatoum</i> , 239 So. 2d 22 (Fla. 4th DCA 1970)	3
<i>Krispy Kreme Doughnut Co. v. Cornett</i> , 312 So.2d 771 (Fla. 1st DCA 1975) <i>cert. denied</i> , 330 So.2d 16 (Fla. 1976)	1
<i>Molinares v. El Centro Gallego, Inc.</i> , 545 So.2d 387 (Fla. 3d DCA 1989) <i>rev. denied</i> , 557 So.2d 866 (Fla. 1989)	1, 2
<i>Schatz v. 7-Eleven Inc.</i> , 128 So.2d 901 (Fla. 1st DCA 1961)	1
<i>Thompson v. Ward Enterprises</i> , 341 So.2d 837 (Fla. 3d DCA 1977)	3
<i>Winn Dixie Stores, Inc. v. Carn</i> , 473 So.2d 742 (Fla. 4th DCA 1985); <i>rev. denied</i> , 484 So.2d 7 (Fla. 1986)	1, 2

ISSUE

WHETHER THE INSTANT DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE CASES OF *SCHATZ v. 7-ELEVEN, INC.*, 128 SO.2D 901 (FLA. 1ST DCA 1961); *WINN-DIXIE STORES, INC. v. CARN*, 473 SO.2D 742 (FLA. 4TH DCA 1985); *REV. DENIED*, 484 SO.2D 7 (FLA. 1986); *MOLINARES v. EL CENTRO GALLEGO, INC.*, 545 SO.2D 387 (FLA. 3D DCA 1989), *REV. DENIED*, 557 SO.2D 866 (FLA. 1989); *CABALS v. ELKINS*, 368 SO.2D 96 (FLA. 1979); AND *KRISPY KREME DOUGHNUT CO. v. CORNETT*, 312 SO.2D 771 (FLA. 1ST DCA 1975), *CERT. DENIED*, 330 SO.2D 16 (FLA. 1976).

ARGUMENT

THE INSTANT DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE CASES OF *SCHATZ v. 7-ELEVEN, INC.*, 128 SO.2D 901 (FLA. 1ST DCA 1961); *WINN-DIXIE STORES, INC. v. CARN*, 473 SO.2D 742 (FLA. 4TH DCA 1985); *REV. DENIED*, 484 SO.2D 7 (FLA. 1986); *MOLINARES v. EL CENTRO GALLEGO, INC.*, 545 SO.2D 387 (FLA. 3D DCA 1989), *REV. DENIED*, 557 SO.2D 866 (FLA. 1989); *CABALS v. ELKINS*, 368 SO.2D 96 (FLA. 1979); AND *KRISPY KREME DOUGHNUT CO. v. CORNETT*, 312 SO.2D 771 (FLA. 1ST DCA 1975), *CERT. DENIED*, 330 SO.2D 16 (FLA. 1976).

Hammond's argument tries to avoid the fact that his injury occurred because a car unexpectedly and without warning jumped over a standard, code-compliant, six-inch curb, rather than stopping in a clearly marked, designated parking area. The fact that the area for vehicles was plainly restricted by both demarcations on the pavement and a curb between the pavement and the sidewalk

(plus the fact there were no prior incidents at this or any other Hardee's Restaurant) separates the instant case from the decisions cited by Hammond. Hammond attempts to distinguish the case law cited by Hardee's on such grounds as the fact that the instant action involved a "private" sidewalk, rather than a "public" sidewalk.¹ (See: *Winn Dixie Stores, Inc. v. Carn*, 473 So.2d 742 (Fla. 4th DCA 1985); *rev. denied*, 484 So.2d 7 (Fla. 1986)), although there is no suggestion in the *Carn* case that the "public" sidewalk along the roadway was constructed any differently than the instant one. Indeed (because of the number of vehicles on a roadway and the speeds at which they travel), one would be more likely to expect a vehicle to jump a curb onto a "public" sidewalk than to jump a curb in a parking lot (where there are fewer vehicles and they are slowing down to park).

Hammond acknowledges that the case of *Molinares v. El Centro Gallego, Inc.*, 545 So.2d 387 (Fla. 3d DCA 1989) cannot be distinguished. Indeed, if the appellate court appropriately determined that there could be no liability for the *Molinares* defendant where the plaintiff was injured by a vehicle that jumped a two-inch curb, surely the same result should be reached in the instant case where the plaintiff was on a sidewalk which was protected by a six-inch curb.

As explained in detail in Petitioner's Initial Brief, the four cases cited by Hammond can be distinguished either because the defendant/owner of the premises was put on notice of prior problems involving vehicular traffic (see, *Grissett v.*

¹Contrary to Hardee's assertion at page 7 of its brief, this irrelevant distinction is specifically noted on page 8 of Petitioner's Brief on the Merits.

Circle K Corp. of Texas, 593 So.2d 291 (Fla. 2nd DCA 1992) and *Cohen v. Schrider*, 533 So.2d 859 (Fla. 4th DCA 1988)) or because a plaintiff was injured while standing on a sidewalk where there was neither a curb nor a designated, marked parking area to serve as a protective barrier from vehicular traffic. (See, *Thompson v. Ward Enterprises*, 341 So.2d 837 (Fla. 3d DCA 1977); and *Johnson v. Hatoum*, 239 So. 2d 22 (Fla. 4th DCA 1970)).

Finally, Hammond's reference to the fact that bollards are used elsewhere on the Hardee's premises is irrelevant and does not create any question of material fact that could bear on this case. Such barriers are used around trash dumpsters and/or electrical boxes on the Hardee's property precisely because there are no sidewalks and curbs to direct cars away from these areas.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that this Court quash the decision of the Second District and reinstate the summary judgment in favor of the defendants/petitioners which was entered where a review of all evidence in the record establish that there were no genuine issues of material fact and that summary judgment was proper as a matter of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 5th day of September, 1996, to: Charles B. Draper, Esq., 705 West Emmett Street, P.O. Drawer 422084, Kissimmee, Florida 34742-2084, Attorney for James P. Hammond and Lucy R. Hammond; A. Craig Cameron, Esq., 15 West Church Street, Orlando, Florida 32801, Attorney for Gretel G. Ashley.

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