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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,269

H. C. HODGES CASH & CARRY,
INC., a Florida Corporation,

Petitioner,

vs .

WALTON DODGE CHRYSLER-PLYMOUTH
JEEP AND EAGLE, a Florida
Corporation,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	8
CERTIFICATE	9

TABLE OF AUTHORITIES

CASES :

<u>Adoptive Hotline, Inc., v. State, Department of Health and Rehabilitative Services, 385 So.2d 682 (Fla. 3d DCA 1980).....</u>	5
<u>American Television and Communications Corporation v. Florida Power Corporation, 21 Fla. L. Weekly D1668 (Fla. 2d DCA July 17, 1996).....</u>	6
<u>Breakers Palm Beach, Inc., v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994).....</u>	7
<u>Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986).....</u>	5
<u>Hastings v. Demming, 21 Fla. L. Weekly D1756 (Fla. 2d DCA July 31, 1996).....</u>	2,6,7
<u>Jenkins v. State, 385 So.2d 1356 (Fla. 1980).....</u>	4
<u>Pizza Hut of America v. Miller, 674 So.2d 178 (Fla. 2d DCA 1996).....</u>	6
<u>Reaves v. State, 485 So.2d 829 (Fla. 1986).....</u>	1,5

OTHER AUTHORITIES

Fla.R.App.P.9.030(a)(2)(A)(iv)	1
Fla.R.App.P.9.130(a)(3)(C)(vi)	7

STATUTES

Section 440.11 Florida Statutes	3
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STATEMENT OF THE CASE AND FACTS

Respondent agrees that this case is before the Court upon the Petitioner's request that this Court exercise its discretionary jurisdiction pursuant to F.R.App.P.9.030(a)(2)(A)(iv) which provides that the discretionary jurisdiction of the Supreme Court may be sought to review decisions of District Courts of Appeal that "expressly and directly conflict with a decision of another District Court of Appeal or with the Supreme Court on the same question of law.. ."

Respondent objects to the Statement of the Facts to the extent that it co-mingles the facts or the lack of facts contained solely in the dissenting opinion. Respondent further objects to the incorporation of a portion of the transcript of the hearing in the Statement of Facts and Appendix to suggest why the Trial Court denied the Motion for Summary Judgment. The decision on whether or not to accept discretionary review must be based solely on the facts contained in the majority opinion. This Court instructed the Bar in a footnote in Reaves v. State, 485 So.2d 829 (Fla. 1986) as follows: "This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. 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 explain 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 the facts not appearing in the decision below, with citations to the record, as Petitioner provided here. Similarly, voluminous appendixes are normally not relevant." at 830.

SUMMARY OF ARGUMENT

The First District Court of Appeal's decision in the case sub judice does not expressly and directly conflict with the decisions of the Second District Court of Appeal. The Petitioner never raised the issue of jurisdiction in the District Court other than suggesting the Court certify conflict with *Hastings v. Demming*, 21 Fla. L. Weekly D1756 (Fla. 2d DCA July 31, 1996). However, the First District Court of Appeal considered the issue sua sponte and held that their exercise of jurisdiction was not in conflict with ~~*Hastings v. Demming*~~, Supra, in that the record clearly and conclusively demonstrated that there were no disputed issues of material fact and that the Motion and Order were based on the exclusivity provisions of Section 440.11 Florida Statutes (1993).

ARGUMENT

This Court should decline jurisdiction of this matter since the decision of the First District Court of Appeal does not expressly and directly conflict with decisions of the Second District Court of Appeal. The 1980 Amendments to Article V, Section 3, of the Florida Constitution pertaining to jurisdiction substantially revised those cases appealable to the Supreme Court. The purpose of the constitutional changes were to limit the number of cases heard by the Supreme Court by confirming that the District Courts are Appellate Courts and not merely intermediate courts. The First District Court of Appeal declined to certify this case as being in conflict with the decision of another District Court of Appeal and further declined to certify any question of great public importance. Consequently, the Petitioner has requested this Court exercise its discretionary review for any decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law.

The substantive change in this Section of the Constitution was the additional requirement that conflicts not only be direct, but also be expressed. In interpreting the Amendments to the Florida Constitution this Court in Jenkins v. State, 385 So.2d 1356 (Fla.

1980) stated: "the pertinent language of Section 3(b)(3) leaves no room for doubt. This Court may only review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. The dictionary definition of the term 'express' includes: 'to represent in words', 'to give expression to.'" (Emphasis in original) Jenkins at 1359.

In Reaves v. State, 483 So.2d 829 (Fla. 1986) this Court accepted jurisdiction based on asserted conflict, but then determined it had improvidentially granted jurisdiction since the conflict was expressed in a dissenting opinion. The Court established the rule that the express and direct conflict between the decisions of the District Courts of Appeal must appear within the four corners of the majority decision. The Court cannot utilize a dissenting opinion or even the record itself to establish jurisdiction. The rule otherwise would require the Court to either accept a dissenter's view of the evidence and his conclusions of law, or require the Court to review the record itself in order to resolve the disagreement in favor of the dissenter.

The conflict found in the majority opinion must be both real and relevant. In Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986) the HRS requested discretionary review for alleged conflict between that case and Adoptive Hotline, Inc., v. State, Department of Health and Rehabilitative Services, 385 So.2d 682 (Fla. 3d DCA 1980). In both of those cases HRS had attempted to enjoin alleged

unlicensed child placing agencies from engaging in further placement or referral activity in violation of Florida Chapter 63. While the claims for injunctive relief were the same, the resolution of the issue by the Appellate Court in Adoptive Hotline was based on the merits while the resolution of the issue in National Adoption was based on a finding of lack of standing on the part of HRS. While HRS conceded that there was not direct conflict between the two decisions, they argued that there was inferential or implied conflict inherent in the decisions. This Court noted that all of HRS's authority pre-dated the 1980 Amendment and that inferential or implied conflict may no longer service as a basis for jurisdiction.

There is no express and direct conflict between the decision of the First District Court of Appeal and the decisions of the Second District Court of Appeal as in Pizza Hut of America v. Miller, 674 So.2d 178 (Fla. 2d DCA 1996); American Television and Communications Corporation v. Florida Power Corporation, 21 Fla. L. Weekly D1668 (Fla. 2d DCA July 17, 1996); or Hastings v. Demming, 21 Fla. Law Weekly D1756 (Fla. 2d DCA July 21, 1996). Although these decisions were handed down on May 22, July 17, and July 31, 1996, respectively, Petitioner never raised the issue of jurisdiction at the Appellate level, The First District Court of Appeal did raise the issue of jurisdiction sua sponte and found that their exercise of jurisdiction complied with both of the tests

promulgated in Hastings v. Demming, Supra¹, as well as the test promulgated in Breakers Palm Beach, Inc., v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994). In Hastings the Second District Court of Appeal questioned whether an Appellate Court had jurisdiction under Fla.R.App.P.9.130(a)(3)(C)(vi) to review a Non-Final Order denying a Motion for Summary Judgment asserting Workers' Compensation immunity when there exist material disputes of fact. However, the Court also recognized that "the Supreme Court intended Rule 9.130(a)(3)(C)(vi) to apply only when an Appellate Court is presented with a record with facts so manifest that it can readily conclude that a Plaintiff's exclusive remedy is in fact Workers' Compensation, thereby promoting an early resolution of the case at the Appellate level." Hastings at D1757. The First District Court of Appeal in the case sub judice noted that they had jurisdiction to review this matter since the record clearly and conclusively established there were no disputed issues of material fact and therefor the issue should have been resolved by the trial judge as a matter of law². Consequently, there is no express and direct conflict with the Second District Court of Appeal.

¹The Second District Court of Appeal decisions of Pizza Hut, Supra, and American Television, Supra, are consistent with the holding of Hastings, Supra.

²Petitioner's Appendix A-10.

CONCLUSION

Respondent respectfully requests that this Court decline to exercise its discretionary jurisdiction to accept review of this case on the grounds there is no express and direct conflict with the cited decisions of the Second District Court of Appeal.


Respectfully submitted,



CHARLES A. SCHUSTER, Esquire

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished to Alan Horkey, Esquire, Belinda de Kozan, Esquire, 700 South Palafox Street, Suite 300, Pensacola, Florida, Robert Crongeyer, Esquire, Beggs & Lane, Blount Building, Pensacola, Florida,, and David Simpson, Esquire, 909 Mar Walt Drive, Suite 1024, Ft. Walton Beach, Florida, by hand delivery or U. S. Mail this ²⁷ 3 day of December, 1996.



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