

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

**Case No.:** SC09-1914  
4 DCA Case No.: 08-2482  
L.C. Case No.: 07-035738

DONALD WENDT, KENNETH WENDT,  
and CLARKE WARNE,

Petitioners,

vs.

LA COSTA BEACH RESORT  
CONDOMINIUM ASSOCIATION, INC.

Respondent.

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**RESPONDENT'S JURISDICTIONAL ANSWER BRIEF**

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## STATEMENT OF THE CASE AND OF THE FACTS

Respondent, LA COSTA BEACH RESORT CONDOMINIUM ASSOCIATION, INC. (the “Association”), generally accepts the Statement of the Case And Facts provided by Petitioners, DONALD WENDT, KENNY WENDT, and CLARKE WARNE (collectively “Petitioners” and/or the “Former Directors”), with the following noted exceptions.

The Former Directors state that there was “*no final adjudication in the prior action*” (referring to the Association’s action against them for breach of fiduciary duty). (P.B:1).<sup>1</sup> The Former Directors neglect to inform this Court that a jury found they breached their fiduciary duties by misappropriating time share weeks at the La Costa residential time share complex for their own benefit and awarded the Association \$275,000.00 in damages. (A:1).<sup>2</sup> While a new trial was granted (A:1), it has not occurred in light of the Association’s pending appeal from the order granting a new trial.<sup>3</sup>

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<sup>1</sup> References to Petitioners’ Brief On Jurisdiction shall be as follows: “(P.B:)” followed by the page number(s) from the Brief.

<sup>2</sup> References to the Appendix to Petitioners’ Brief On Jurisdiction shall be as follows: “(A: )” followed by the page number(s) from the Appendix.

<sup>3</sup> See, *La Costa Beach Resort Condominium Association, Inc., Appellant v. Alphonso Carioti, Donald Wendt, et. al., Appellees*, Case No.: 4D07- 4838.

Contrary to the Former Directors statement that the Fourth District affirmed the order on appeal “*in all respects...*” (P.B:2), the Fourth District states that it was “*not necessary for this court to address the trial court’s alternative ruling that the directors were required to have filed those claims [for contractual and statutory indemnification] as compulsory counterclaims in the original lawsuit.*” (A:5).

The Former Directors also state that the Fourth District “*held DIRECTORS did not and could not state a cause of action for contractual or statutory indemnification in connection with the action brought against them by ASSOCIATION under Florida law*”. (P.B:2). However, what the Fourth District actually states, on two (2) separate occasions, is that the trial court’s order dismissing the complaint was affirmed because the Former Directors could not state a cause of action for indemnification “*under the circumstances of this case.*” (A:1, 3).

### **SUMMARY OF THE ARGUMENT**

Review on the merits must be declined since this Court lacks jurisdiction pursuant to Article V, §3(b)(3) and §3(b)(4) of the Florida Constitution - the two (2) bases upon which the Former Directors rely for establishing discretionary jurisdiction.

Article V, §3(b)(3) jurisdiction does not exist since there is no express and direct conflict on the same question of law between the decision in *Wendt v. La*

*Costa Beach Resort Condominium, Inc.*, 14 So.3d 1179 (Fla. 4<sup>th</sup> DCA 2009) (“*Wendt*”) and any decision by this Court, or from any other district court of appeal including *Turkey Creek Master Owners Association, Inc. v. Hope*, 766 So.2d 1245 (Fla. 1<sup>st</sup> DCA 2000) (“*Turkey Creek*”) and *Myakka Valley Ranches Improvement Association, Inc. v. Bieschke*, 610 So.2d 3 (Fla. 2d DCA 1992) (“*Myakka Valley Ranches*”). The cases are factually distinguishable from one another; the issue(s) on appeal were different; and the questions of law addressed and the decisions reached in each case are not the same. Since there is no conflict between the *Wendt* and *Turkey Creek* decisions, Article V, §3(b)(4) jurisdiction also does not exist.

Article V, §3(b)(3) and §3(b)(4) only confer this Court with jurisdiction to review directly conflicting appellate court “decisions”. The last paragraph in *Turkey Creek* upon which the Fourth District has certified conflict (A:4), does not reflect the First District’s decision in that case. Rather, it is mere commentary which is non-binding *obiter dictum*. Seemingly in recognition of this, the *Wendt* court did not certify a “direct conflict” between these two (2) decisions. Rather, it merely certified “*conflict*” with such non-binding *obiter dictum* which is specifically quoted and emphasized in *Wendt*. (A:4). However, Article V, §3(b)(4) jurisdiction does not exist unless an appellate court certifies direct conflict between

“decisions” from different district courts of appeal. There is no conflict (much less direct conflict) between the *Wendt* and *Turkey Creek* decisions.

## ARGUMENT

**I. ARTICLE V, §3(b)(3) JURISDICTION DOES NOT EXIST SINCE THE *WENDT* DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT ON THE SAME QUESTION OF LAW WITH ANY DECISION BY THIS COURT AND/OR ANY DECISION FROM ANOTHER DISTRICT COURT OF APPEAL INCLUDING *TURKEY CREEK* OR *MYAKKA VALLEY RANCHES*.**

Article V, §3(b)(3) only permits discretionary review where a decision from one district court of appeal: “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 constitutional standard is: “whether the decision of the District Court on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents”. *See, Kincaid v. World Insurance Company*, 157 So.2d 517 (Fla. 1963). “[C]onflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter... If the two cases are distinguishable in controlling factual elements<sup>4</sup> or if

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<sup>4</sup> *See, Morningstar v. State of Florida*, 405 So.2d 778, 783 (Fla. 4<sup>th</sup> DCA 1981) Anstead J. concurring (“Obviously, two cases cannot be in conflict if they can be validly distinguished...”), affirmed, 428 So.2d 220 (Fla. 1982).



the points of law settled by the two cases are not the same, then no conflict can arise...”. *See, Kyle v. Kyle*, 139 So.2d 885, 887 (Fla. 1962). Article V, §3(b)(3) “express and direct conflict” jurisdiction does not exist since the issues on appeal and questions of law decided in *Wendt*, *Turkey Creek*, and *Myakka Valley Ranches* are not the same. Moreover, the decisions are also factually distinguishable from one another.

In *Wendt*, the issue on appeal focused on whether the trial court erred in granting the Association’s motion to dismiss the Former Directors’ complaint for failing to state causes of action for contractual indemnification pursuant to Article XII of the Association’s bylaws and for statutory indemnification pursuant to Fla. Stat. §607.0850. (A:1). The Fourth District held that the complaint failed to state such causes of action: “*under the circumstances of this case*” - where the Former Directors were seeking indemnity from the Association that sued them for breaching their fiduciary duties and where the Association had already obtained a verdict against the Former Directors (subject to the pending appeal relating to the order granting a new trial). (A:1, 4).

In contrast, the issue on appeal in *Turkey Creek* had nothing to do with a motion to dismiss and/or whether the complaint by the former directors of the Turkey Creek Association stated a cause of action for contractual and/or statutory indemnification pursuant to Fla. Stat. §607.0850. Rather, the issue focused on

whether the trial court erred in awarding indemnification to the former directors pursuant to §607.0850(9)(c) based solely on the language of that provision and the parties' pleadings. 766 So.2d at 1246. The First District held as follows:

*“...[W]e hold that there was an insufficient basis for the trial court to conclude that the defendants were fairly and reasonably entitled to the payment of their expenses by Turkey Creek under the statute. The parties agreed at oral argument that the trial court granted the defendants' motion **based solely on the pleadings and statute...**”* (emphasis supplied). *Id.*<sup>5</sup>

In *Myakka Valley Ranches*, the two (2) issues on appeal had nothing to do with whether the complaint by the former directors of the Myakka Valley Ranches Improvement Association stated a cause of action for contractual and/or statutory indemnification pursuant to §607.0850. Rather, the first issue focused on whether the trial court erred in imposing an award of attorney's fees and costs against the individual members of the association. The second issue focused on whether the trial court erred in awarding attorney's fees and costs without considering the factors set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145

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<sup>5</sup> The Former Directors incorrectly state that the First District's holding was as follows: “Section 607.0850(9), *Florida Statutes (1993)* provides that the trial court may order a corporate plaintiff to indemnify the defendant for fees and expenses in an action by the corporation against one or more of its directors or employees.” (P.B: 4-5). **That is not the First District's holding in *Turkey Creek*. The holding is as set forth above and is directly quoted from the decision itself.**

(Fla. 1985). 610 So.2d at 4. The Second District held that the trial court erred in both regards. *Id.*<sup>6</sup>

Based on the foregoing, Article V, §3(b)(3) “express and direct conflict” jurisdiction does not exist since the issue on appeal and point of law decided in *Wendt* clearly is not the same as the issues on appeal and points of law decided in *Turkey Creek* and *Myakka Valley Ranches*. The *Wendt* decision clearly does not directly “collide” with either of these decisions. *Kincaid, supra.*<sup>7</sup> Since there is no direct conflict between these decisions, there is neither Article V, §3(b)(3) or §3(b)(4) jurisdiction.

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<sup>6</sup> Conflict jurisdiction also does not exist since *Wendt* is factually distinguishable from both decisions. In *Turkey Creek*, the former directors were never found by a jury to have breached their fiduciary duties and notably, **the award in their favor was reversed and there is no subsequent reported decision(s) reflecting whether they ever obtained indemnification (much less affirming such an award)**. In *Myakka Valley Ranches*, the former directors were seeking reimbursement of their attorney’s fees and costs *in their action against the association* (the opposite of this suit).

<sup>7</sup> The Former Directors also state that the *Wendt* decision “*creates intradistrict conflict with O’Brien v. Precision Response Corp.*, 942 So.2d 1030 (Fla. 4<sup>th</sup> DCA 2006)...” (P.B:5-6, fn.2). Even assuming, *arguendo*, that this was true (which the Association disputes), intradistrict conflict is not a basis for invoking the discretionary jurisdiction of this Court as it is not one of the enumerated grounds set forth in Article V, §3(b) of the Florida Constitution. *See, Little v. State of Florida*, 206 So.2d 9, 10 (Fla.1968) (noting that alleged conflict between decisions of the same district court of appeal do not convey jurisdiction to the Supreme Court).

**II. ARTICLE V, §3(b)(3) AND §3(b)(4) JURISDICTION DO NOT EXIST SINCE THE LANGUAGE FROM *TURKEY CREEK* CERTIFIED TO BE IN CONFLICT WITH THE *WENDT* DECISION IS NON-BINDING *OBITER DICTUM*.**

Article V, §3(b)(3) and §3(b)(4) both require the existence of direct conflict between “decisions” from different appellate district courts:

(b) Jurisdiction.—The supreme court:

(3) May review *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.

(4) May review *any decision* of a district court of appeal...that is certified by it to be in direct conflict with *a decision* of another district court of appeal. (emphasis supplied).

“It is conflict of Decisions, not conflict of Opinions or reasons that supplies jurisdiction for review...”. See, *Gibson v. Maloney*, 231 So.2d 823, 824

(Fla.1970). “We have to look at the decision, rather than a conflict in the opinion, to find that we have jurisdiction”. See, *Niemann v. Niemann*, 312 So.2d 733, 734-735 (Fla. 1975). This Court has discharged jurisdiction where district court decisions are merely in conflict with dictum from appellate court decisions from other districts. See, *Ciongoli v. State of Florida*, 337 So.2d 780 (Fla.1976) and *South Florida Hospital Corporation v. McCrea*, 118 So.2d 25 (Fla. 1960).<sup>8</sup>

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<sup>8</sup> Compare, *Baez v. State of Florida*, 814 So.2d 1149, 1152 (Fla. 4<sup>th</sup> DCA 2002) (“under Article V, Section 3(b)(4) our supreme court has discretionary jurisdiction to review any ‘decision’ of a district court of appeal that is certified to be in direct

The *Turkey Creek* decision clearly holds that a trial court cannot award indemnification pursuant to §607.0850(9)(c) based solely on the language of this statutory provision coupled with the allegations in the parties' pleadings:

*“...we hold that there was an insufficient basis for the trial court to conclude that the defendants were fairly and reasonably entitled to the payment of their expenses by Turkey Creek under the statute. The parties agreed at oral argument that the trial court granted the defendants' motion based solely on the pleadings and statute...”* (emphasis supplied). 766 So.2d at 1246.

The language in the last paragraph of *Turkey Creek* which follows the above holding (and upon which the *Wendt* court certified conflict), is merely non binding obiter dictum commentary: *“We note that section 607.0850 is more likely to be applied when corporate employee or director is sued by a third party...”* (emphasis supplied). Such non-binding *obiter dictum* commentary from *Turkey Creek* does not serve as a basis for conflict jurisdiction since there is no conflict between the *Turkey Creek* and *Wendt* decisions.<sup>9</sup>

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conflict with a decision of a different district court of appeal. *We do not consider a conflict by virtue of dicta to present conflicting 'decisions'...*”) (emphasis supplied).

<sup>9</sup> The Former Directors also suggest that this Court should accept jurisdiction because the Fourth District's decision in *Wendt* “*contravenes the plain language of §§607.0850(2), 607.0850(3), 607.0850(7) and 607.0850(9), Fla. Stat.*” and that as such, the *Wendt* decision “*is of exceptional importance*”. (P.B: 6-8). However, that is not one of the specifically enumerated provisions in Article V, §3(b) of the Florida Constitution for invoking this Court's discretionary jurisdiction.

Seemingly recognizing that the last paragraph from *Turkey Creek* is non-binding *obiter dictum*, and not the holding of the case, the *Wendt* court did not certify a direct conflict but, rather, merely certified “*conflict*” with such language. (A:4). However, Article V, §3(b)(4) requires an appellate court to certify “direct conflict” with a decision by another district court of appeal. *See, Gandy v. State of Florida*, 846 So.2d 1141, 1143 (Fla. 2003) (“The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, §3(b) of the Florida Constitution”). The constitutional requirements for exercising certified conflict jurisdiction under Article V, §3(b)(4) do not exist since the *Wendt* court has not certified a “direct conflict” with *Turkey Creek*, and there is none for all of the reasons set forth above.<sup>10</sup>

### CONCLUSION

For the foregoing reasons, the Association respectfully requests this Honorable Court decline to exercise jurisdiction.

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<sup>10</sup> As discussed by Anstead, Kogan, Hall & Waters in *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova Law Rev. 431, 530, fn. 594-595, the fact that a district court certifies conflict is not sufficient, in and of itself, to require this Court to exercise jurisdiction under Article V, §3(b). This Court has dismissed numerous petitions for review upon determining that discretionary jurisdiction was improvidently granted based on a conflict certification when in fact no conflict in the decisions existed. *See, Vega v. Independent Fire Insurance Company*, 666 So.2d 897 (Fla. 1996); *Blevins v. State of Florida*, 829 So.2d 872 (Fla. 2002); *Famiglietti v. State of Florida*, 838 So.2d 528 (Fla. 2003).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of Respondent's Jurisdictional Answer Brief was served by U.S. Regular Mail on this 18<sup>th</sup> day of November, 2009 to: Keith T. Grumer, Esquire, Grumer & Macaluso, P.A., *Attorneys For Petitioners*, One East Broward Blvd., Suite 1501, Fort Lauderdale, FL 33301.

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that Respondent's Jurisdictional Answer Brief complies with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure in that Times New Roman 14 point font has been used.

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