

IN THE SUPREME COURT
THE STATE OF FLORIDA

CASE NO. _____
4DCA CASE NO. 4D08-2482

DONALD WENDT, KENNY WENDT and CLARKE WARNE,

Petitioners,

v.

LA COSTA BEACH RESORT CONDOMINIUM ASSOCIATION, INC.,

Respondent.

PETITIONERS' BRIEF ON JURISDICTION

**ON DISCRETIONARY REVIEW FROM A DECISION OF THE FOURTH
DISTRICT COURT OF APPEAL**

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TABLE OF CONTENTS

	Page No.
TABLE OF CITATIONS.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT	4
 THE DECISION CREATES A REAL AND DIRECT CONFLICT WITH OTHER DECISIONS THAT RECOGNIZE THE PLAIN LANGUAGE OF §§607.0850(2), 607.0850(3), 607.0850(7) AND 607.0850(9), FLA. STAT. PROVIDES FOR INDEMNIFICATION IN ACTIONS BETWEEN A CORPORATION AND ITS DIRECTORS	4
 JURISDICTION SHOULD BE EXERCISED TO ENSURE CONSISTENT APPLICATION OF §607.0850, FLA. STAT. AND RESOLVE THE INTERDISTRICT CONFLICTS.....	6
 CONCLUSION.....	9
 CERTIFICATE OF SERVICE	10
 CERTIFICATE OF FONT COMPLIANCE.....	11

TABLE OF CITATIONS

Cases	Page(s)
<i>Myakka Valley Ranches Imp. Ass'n, Inc. v. Bieschke</i> , 610 So.2d 3 (Fla. 2 nd DCA 1992)	3,5
<i>O'Brien v. Precision Response Corp.</i> , 942 So.2d 1030 (Fla. 4th DCA 2006)	5,6
<i>PNR, Inc. v. Beacon Property Management, Inc.</i> , 842 So.2d 773 (Fla. 2003)	6
<i>Turkey Creek Master Owners Ass'n, Inc. v. Hope</i> , 766 So.2d 1245 (Fla. 1 st DCA 2000)	3,4, 5
 Constitution	
<i>Art. V, §3(b)(3) Fla. Const.</i>	4, 9
<i>Art. V, §3(b)(4), Fla. Const.</i>	4, 9
 Statutes	
§607.0850, <i>Fla. Stat.</i>	3,5,6,8
§607.0850(2), <i>Fla. Stat.</i>	1,3,4,6,7
§607.0850(3), <i>Fla. Stat.</i>	1,3,4,6,7
§607.0850(7), <i>Fla. Stat.</i>	3,4,7
§607.0850(9), <i>Fla. Stat.</i>	3,4,5,7
§607.0850(9)(a), <i>Fla. Stat.</i>	1
§607.0850(9)(b), <i>Fla. Stat.</i>	1

§607.0850(9)(c), *Fla. Stat.*1,4,5

§608.13(14)(b), *Fla. Stat.*.....6

§608.13(14)(c), *Fla. Stat.*.....6

§617.0831, *Fla. Stat.*7,8

Laws

Ch. 87-245, §1, *Laws of Fla.*.....7

Rules

Fla. R. App. P. 9.030(a)(2)(A)(iv).....4,9

Fla. R. App. P. 9.030(a)(2)(A)(vi).....4,9

STATEMENT OF THE CASE AND FACTS

Petitioners, DONALD WENDT, KENNY WENDT and CLARKE WARNE ("DIRECTORS"), are former directors of Respondent, LA COSTA BEACH RESORT CONDOMINIUM ASSOCIATION, INC. ("ASSOCIATION"), a Florida not for profit corporation responsible for the operation of a residential time share condominium. (A:1)

DIRECTORS filed a complaint against ASSOCIATION (the "Indemnification Proceeding") seeking (i) contractual indemnification pursuant to ASSOCIATION's bylaws¹ and §607.0850(9)(b), *Fla. Stat.*; (ii) mandatory statutory indemnification pursuant to §§607.0850(2), 607.0850(3) and 607.0850(9)(a), *Fla. Stat.* and (iii) statutory indemnification and advancement of expenses pursuant to §607.0850(9)(c), *Fla. Stat.* after being sued by ASSOCIATION for breach of fiduciary duty. (A:1)

There was no final adjudication in the prior action. (A:1)

ASSOCIATION moved to dismiss the Indemnification Proceeding on the

¹ Article XII entitled "Indemnifications" provides:

The Association shall indemnify every Director . . . against all loss, cost and expense reasonably incurred by him in connection with any action, suit or proceeding to which he may be made a party by reason of his being or having been a Director . . . of the Association, except to matters wherein he shall be finally adjudged in such action, suit or proceeding, to be liable for or guilty of gross negligence or willful misconduct. . . (A:2)

grounds that DIRECTORS had failed to state causes of action for indemnification. (A:2) DIRECTORS sought reversal of the trial court's order which dismissed all three counts of their initial complaint *with prejudice* in the appeal below. (A:2) The Fourth District affirmed the order on appeal in all respects and 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. (A:3-5)

SUMMARY OF THE ARGUMENT

The Decision holds that Florida law does not recognize a cause of action for statutory or contractual indemnification in connection with actions between a corporation and its directors. (A:4) This Court has jurisdiction because, as certified by the Fourth District, the Decision expressly and directly conflicts with *Turkey Creek Master Owners Ass'n, Inc. v. Hope*, 766 So.2d 1245, 1247 (Fla. 1st DCA 2000), holding §607.0850, *Fla. Stat.* "provides for indemnification in a case such as this one where a corporation has sued its own agent". This Court also has jurisdiction because the Decision conflicts with *Myakka Valley Ranches Imp. Ass'n, Inc. v. Bieschke*, 610 So.2d 3 (Fla. 2nd DCA 1992) holding former directors of a non profit corporation were entitled to attorneys fees incurred in connection with an action which they had brought against the indemnitor corporation under a prior statute with identical language.

There is a compelling reason to exercise jurisdiction because these interdistrict conflicts must be resolved to ensure consistent application of §607.0850, *Fla. Stat.* It is respectfully submitted that the Decision nullifies vital rights afforded by §§607.0850(2), 607.0850(3), 607.0850(7) and 607.0850(9), *Fla. Stat.* The Decision is contrary to legislative intent and public policy because the preclusion of indemnification in connection with actions between a corporation and its directors discourages corporate service by qualified persons.

ARGUMENT

THE DECISION CREATES A REAL AND DIRECT CONFLICT WITH OTHER DECISIONS THAT RECOGNIZE THE PLAIN LANGUAGE OF §§607.0850(2), 607.0850(3), 607.0850(7) AND 607.0850(9), FLA. STAT. PROVIDES FOR INDEMNIFICATION IN ACTIONS BETWEEN A CORPORATION AND ITS DIRECTORS

This Court has discretionary jurisdiction pursuant to *Art. V*, §§3(b)(3) and 3(b)(4), *Fla. Const.* and *Fla. R. App. P.* 9.030(a)(2)(A)(iv) and 9.030(a)(2)(A)(vi) because the Decision conflicts with a decision of the First District as certified by the Fourth District and also conflicts with a decision of the Second District on the same question of law.

The Decision holds DIRECTORS did not and cannot state a cause of action for statutory or contractual indemnification because Florida law does not recognize a right to indemnification in connection with the defense of actions between a corporation and its directors when there is no basis for entitlement to common law indemnity. (A:3)

This Court has jurisdiction based upon conflict with *Turkey Creek Master Owners Ass'n, Inc. v. Hope*, 766 So.2d 1245, 1247 (Fla. 1st DCA 2000) as certified by the Fourth District. (A:4) In that case, a homeowners association appealed an order determining former directors who were sued by that indemnitor corporation for breach of fiduciary duty were entitled to indemnification under §607.0850(9)(c), *Fla. Stat.* based solely on the pleadings. The First District held:

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.

Id. at 1246. The First District reversed the order but remanded the matter for the trial court "to consider the relevant circumstances" as required by §607.0850(9)(c), *Fla. Stat.* and authorized the trial court to "again enter such an order for indemnification" upon finding the fair and reasonable entitlement contemplated by that subsection of the statute. *Id.* at 1246-1247. The First District concluded by reiterating that §607.0850, *Fla. Stat.* "provides for indemnification in a case such as this one where a corporation has sued its own agent" and that a corporation "faces the possibility of being required to pay the legal expenses of the very party it is suing". *Id.* at 1247.

This Decision also conflicts with *Myakka Valley Ranches Imp. Ass'n, Inc. v. Bieschke*, 610 So.2d 3 (Fla. 2nd DCA 1992) where the Second District affirmed a determination that former directors of a non profit corporation were entitled to attorneys fees, under a prior statute containing language identical to §607.0850(9)(c), *Fla. Stat.*, which the directors had incurred in connection with an action they brought against the indemnitor corporation to compel production of its books.²

² It is respectfully submitted the Decision also creates intradistrict conflict with *O'Brien v. Precision Response Corp.*, 942 So.2d 1030 (Fla. 4th DCA 2006) and erroneously concludes *O'Brien* does not "recognize a right to indemnification in actions between a corporation and its directors". (A:4) That decision discloses a third

JURISDICTION SHOULD BE EXERCISED TO ENSURE CONSISTENT APPLICATION OF §607.0850, FLA. STAT. AND RESOLVE THE INTERDISTRICT CONFLICTS

This Court should exercise jurisdiction to ensure consistent application of §607.0850, *Fla. Stat.* throughout the state by resolving these interdistrict conflicts.

PNR, Inc. v. Beacon Property Management, Inc., 842 So.2d 773, 777 (Fla. 2003)

Florida law has explicitly permitted corporations to indemnify directors for fees and expenses in connection with actions "by or in the right of the corporation" since the 1963 enactment of former §608.13(14)(b), *Fla. Stat.* The statute was expanded to mandate indemnification after a defense that is "successful on the merits or otherwise" by the 1971 enactment of former §608.13(14)(c), *Fla. Stat.* The current provisions of §§607.0850(2) and 607.0850(3), *Fla. Stat.* explicitly impose a mandatory indemnification obligation on corporations for expenses incurred by officers and directors in "any proceeding by or in the right of the corporation" after a defense that is

party initiated an arbitration proceeding but it was the corporate indemnitor that "disputed the claim, and alleged its own contract and tort claims, including fraud, against . . . O'Brien." *Id.* at 1032-1033 The Fourth District held there was entitlement to indemnification in connection with tort claims, including fraud, made against him by the corporate indemnitor based upon a contractual agreement and §607.0850(3), *Fla. Stat.* stating "when an indemnification agreement and statute provide for the recovery of attorneys fees in favor of a corporate officer who has successfully defended a claim on the merits or otherwise, we now hold that attorneys fees should be awarded by the court unless the officer has expressly waived that right". *Id.* at 1032

wholly or partially "successful on the merits or otherwise".³

The Decision contravenes the plain language of §§607.0850(2), 607.0850(3), 607.0850(7) and 607.0850(9), *Fla. Stat.* and eviscerates contractual protection specifically authorized by §607.0850(7), *Fla. Stat.* and afforded by virtually all corporate documents.⁴ The Decision is of exceptional importance because it has adverse implications for all officers, directors, employees and agents of every Florida

³ §607.0850(7), *Fla. Stat.* expressly empowers a corporation to make further contractual provision for indemnification "under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise" and delineates certain misconduct which precludes indemnification as a matter of law. §607.0850(9), *Fla. Stat.* authorizes application for indemnification "to the court conducting the proceeding, to the circuit court, or to another court of competent jurisdiction" upon "the failure of a corporation to provide indemnification" and is procedural in nature.

⁴ §617.0831, *Fla. Stat.* reflects an express legislative intent to encourage corporate service through protection from undue financial hardship:

[t]he service of qualified persons on the governing boards of nonprofit corporations and associations is critical to the efficient and effective conduct of such organizations in the provision of services and other benefits to the citizens of the state . . . [W]ithin reasonable limits, persons offering their services as directors of such nonprofit organizations should be permitted to perform without undue concern for the possibility of litigation arising from the discharge of their duties as policy makers . . . [T]he service of qualified persons on the governing boards of corporations, credit unions, and self-insurance trust funds is in the public interest and . . . Within reasonable limitations, such persons should be permitted to perform without undue concern for the possibility of litigation arising from the discharge of their duties as policy makers . . .

corporation who depend upon protection from undue financial responsibility in the form of corporate indemnification.⁵

Ch. 87-245, §1, *Laws of Fla.*

⁵ The provisions of §607.0850, *Fla. Stat.* are rendered applicable to not for profit corporations organized pursuant to *Chap. 617* and rural electric cooperatives organized pursuant to *Chap. 425* by §617.0831, *Fla. Stat.*

CONCLUSION

DIRECTORS respectfully request the Court exercise its discretionary jurisdiction pursuant to *Art. V, §§3(b)(3) and 3(b)(4), Fla. Const.* and *Fla. R. App. P. 9.030(a)(2)(A)(iv) and 9.030(a)(2)(A)(vi)* and grant a review of this matter on the merits.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 8th day of October 2009 to: SCOTT M. ZASLAV and MICHAEL W. MOSKOWITZ, ESQ., Moskowitz, Mandell, Salim & Simowitz, P.A. 800 Corporate Drive, Suite 510, Fort Lauderdale, FL 33334.

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CERTIFICATE OF FONT COMPLIANCE

Counsel for Petitioners hereby certifies that this brief was typed in Times New Roman 14- point font in compliance with Fla. R. App. P. 9.210(a)(2).

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