IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-2416
Florida Bar No. 184170

SHANDALYN SANDERS, as Personal Representative of the Estate of CIARA SANDERS, deceased, and CHAUNCEY SANDERS, deceased,

Petitioner,

vs.

ERP OPERATING LIMITED PARTNERSHIP, a foreign limited partnership, d/b/a GATEHOUSE ON THE GREEN APARTMENTS,

Respondent.

FILED
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ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

ERP OPERATING LIMITED PARTNERSHIP,
a foreign limited partnership, d/b/a
GATEHOUSE ON THE GREEN APARTMENTS

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Sr., Esquire
James W. Sherman, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
PH: (954) 525-5885
FAX: 954) 764-7807

and

Joel R. Wolpe, Esquire
WOLPE & LEIBOWITZ, L.L.P.
Miami, FL

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LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

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POINT ON APPEAL

THERE IS NO CONFLICT JURISDICTION. THE PETITIONER IS MERELY SEEKING A SECOND APPEAL ON THE MERITS.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

STATEMENT OF THE FACTS AND CASE

The cases the Plaintiff cites to seek to argue express and direct conflict are **not even negligent security cases**. He cites numerous cases which are medical malpractice cases, slip-and-fall cases, trip-and-fall cases, a railroad crossing accident, negligent manufacturing, etc..

The fact that the Petitioner can not even find any negligent security cases to use to argue conflict, underscores that there is no express and direct conflict.

The holding of the Fourth District was that the Plaintiff did not establish a nexus between any breach and an injury. There is nothing groundbreaking or contrary in Florida law about this holding, and in fact, it is on all fours with the holding of the Fourth District in Brown v. Motel 6 Operating, L.P., Ltd., 989 So. 2d 658 (Fla. 4th DCA 2008), rev. denied, 1 So. 3d 171 (Fla. 2009).

The decedents, Ciara Sanders and her brother Chauncey, were living in an apartment at Gatehouse on the Green. As the Fourth District's Opinion explains, at 11:00 o'clock on the night of the murders, Ciara was speaking with her boyfriend on the phone when she told him that two people whom she had identified by name and were known to her, were at the door. The call ended and when the boyfriend called back no one answered. Ciara and Chauncey were found shot to death in their apartment from multiple gunshots with no signs of forcible entry.

The Plaintiff proceeded on the theory of negligent security.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

At trial, as the Fourth District noted, "the [Plaintiff's] expert acknowledged there was no way of knowing precisely how the murders took place." ERP Operating Limited Partnership v. Sanders, 96 So. 3d 929, 931 (Fla. 4th DCA 2012).

The Fourth District correctly held that the Defendant could not be held liable where the Plaintiff was unable to establish a nexus between the alleged breach in failing to provide adequate security and the murders, because there was no proof of how the assailants gained entry into the apartment. This is completely consistent with Florida law. Therefore, the Petition should be denied.

SUMMARY OF ARGUMENT

There is no express and direct conflict; the Plaintiff merely disagrees with the Fourth District's ruling so there is no basis for the extraordinary remedy of discretionary review.

The Plaintiff does not even cite negligent security cases to allege express and direct conflict, but only argues cases involving other theories of liability. Therefore, it is clear there is no express and direct conflict in this case.

The holding of the Fourth District is in accord with all Florida law on point, that the plaintiff did not establish a causal nexus between breach and injury as is necessary to recover for negligent security. The court held that the defendant could not be held liable since there was absolutely no evidence of forcible entry, since it was apparent from the evidence that the Plaintiff opened the door to her assailants. This is not a

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

groundbreaking ruling but is consistent with longstanding principles of negligence law.

This is simply an unwarranted attempt to create conflict jurisdiction when there is none, since the holding is simply that the Plaintiff failed to establish a causal nexus between breach and injury, which holding is in accord with all Florida law.

ARGUMENT

THERE IS NO CONFLICT JURISDICTION. THE PETITIONER IS MERELY SEEKING A SECOND APPEAL ON THE MERITS.

Standard of Review

Because this is a request by the Petitioner for Discretionary Review, the Standard of Review is "express and direct conflict," which is not present in this situation. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). The ruling is consistent with Florida law that a plaintiff has the burden of proving a nexus in negligent security cases between breach and injury. The Plaintiff is simply seeking a second appeal on the merits.

The Petitioner goes into a discussion of the facts which are favorable to it, and additionally, it ignores the facts which are unfavorable to it. Nowhere is there a crisp discussion of issues of law. It is, therefore, apparent the Petitioner is seeking a second appeal on the merits which the Florida Supreme Court has repeatedly said it will not do.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

The jurisdiction of the Supreme Court derives from Art. 5 § 3(b)(3) of the Florida Constitution, which states that the Supreme Court:

> "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..." (Emphasis supplied).

The function of the Supreme Court in regard to conflict jurisdiction has long been to resolve conflicting points of law, and not to function as a second appeal on the merits. Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958); Karlin v. City of Miami, 113 So. 2d 551 (Fla. 1959); and Jenkins v. State, 385 So. 2d 1356 (fa. 1980).

As previously stated, the Opinion is consistent with long-standing principles of Florida law which require that the Plaintiff establish a nexus between breach and injury, and also cases which hold that the Plaintiff cannot prove his case by a stacking of inferences and conjectures.

The Petitioner has not fulfilled its appellate burden of showing express and direct conflict.

Petitioner's Cases Are Not on Point And Cannot Serve as the Basis for Conflict Jurisdiction

The Petitioner cites several cases for broad propositions of law but none of them are on point with the present case. There is no conflict between the present case and any of the cases cited by the Appellant because they were simply based upon

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

different facts and issues. Most notably, the Petitioner does not cite to a single Florida case which imposes liability upon a landowner for an attack by a third party, where there are no signs of forcible entry and it appears the injured party knew the assailants and opened the door to them.

The first case cited is Cox v. St. Josephs Hospital, 71 So. 3d 795 (Fla. 2011) which is not on point, and holds that in a **medical malpractice action** a District Court erred in re-weighing the evidence and determining a lack of causation, and granting a Directed Verdict. It is not remotely on point, and therefore, does not serve as the basis for conflict jurisdiction.

Moreover, the Florida Supreme Court in Cox did note that a plaintiff cannot prove proximate cause by relying on pure speculation:

> In turning to this case, the Second District correctly recognized that, in order to establish a negligence action, Florida follows the "more likely than not" standard in proving causation, i.e., that the negligence "probably caused" the plaintiff's injury. *St. Joseph's Hosp.*, 14 So.3d at 1127. Further, a plaintiff cannot sustain this burden of proof by relying on pure speculation - - a rule that also applies to medical experts.
>
> Cox, 799-800.

Further, the Court held in Cox that a Directed Verdict is appropriate where the plaintiff fails to prove causation was more likely than not caused by the defendant's negligence:

> As our review of the caselaw illuminates, while a directed verdict is

> appropriate in cases where the plaintiff has *failed* to provide evidence that the negligent act more likely than not caused the injury, it is not appropriate in cases where there is conflicting evidence as to the causation or the likelihood of causation.
>
> Cox, 801.

Cox, therefore, supports the Fourth District's Opinion, because the Petitioner cannot prove that it was more likely than not that the Plaintiff's injuries were the direct result of the defendant's alleged breach. There is no conflict between that holding and the present case.

Similarly, Etheredge v. Walt Disney World Co., 999 So. 2d 669 (Fla. 5th DCA 2009) is equally not on point, because that case involved a **trip-and-fall** at Walt Disney World where a guest was directed to step off a curb near a storm drain, which caused her to sustain injury. There, the court held that an issue of fact existed as to whether the Plaintiff's injuries were proximately caused by the park employee's directions to guests to cross the street over the storm drain, thereby placing the patrons in harms way. No conflict exists between Etheredge and the present case because there are different facts and considerations.

In Nunez v. Lee County, 777 So. 2d 1016 (Fla. 2nd DCA 2000), a visitor to a county park brought suit against the county for injuries she received while at the park as a result of the county's **failure to maintain** the premises in a safe condition. Unlike Nunez, the Fourth District's holding does not concern

whether the Defendant failed to maintain the premises in a reasonably safe condition, but rather whether the Plaintiff can support a case for negligent security based only on speculation as to who the assailant was, and whether or not the Plaintiff opened the door to her assailants.

The remainder of the Plaintiff's cases are equally not on point. See, Regency Lake Apartments Associates, Ltd. v. French, 590 So. 2d 970 (Fla. 1st DCA 1991)(involving a **trip-and-fall** over tree roots in an area which was not owned by the landowner, but which the landowner encouraged tenants to use); Department of Transportation v. Anglin, 502 So. 2d 896 (Fla. 1987)(concerning suit against the Florida D.O.T. for **allowing water to pool on a roadway** thereby causing a vehicle accident and injuries to the plaintiff); Helman v. Seaboard Coast Line Railroad Company, 349 So. 2d 1187 (Fla. 1977)(concerning an injury caused by an accident at **a railroad crossing** which did not have any alarm warning of impending trains); Pamperin v. Interlake Companies, Inc., 634 So. 2d 1137 (Fla. 1st DCA 1994)(addressing an injury for **negligent manufacturing and installation** of a storage rack system that fell and injured the plaintiff); Sawyer v. Allied International Holdings, Inc., 707 So. 2d 761 (Fla. 2nd DCA 1998)(addressing the liability of a building owner for maintaining a darkened stairway in a dangerous condition, after an **invitee fell** and was injured); and Stahl v. Metropolitan Dade County, 438 So. 2d 14 (Fla. 3rd DCA 1983)(regarding a county's

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

negligence in failing to **maintain a bike path** resulting in the death of a 13 year-old who was forced off the path by a spill, and into oncoming traffic).

In none of these cases did the courts address a situation such as this, in which a plaintiff is attempting to hold a landowner liable for negligent security, where there was no evidence of forcible entry and nothing to show that the murders could have been prevented had additional security measures been taken. This is especially true where it was more likely than not that the Plaintiff opened the door to her own assailants because she knew them.

The Petitioner has failed to present any Florida cases which are in express and direct conflict with the present case, and has failed to distinguish Brown v. Motel 6 which is on all fours. There is clearly no express and direct conflict, and therefore, the review should be denied.

The Fourth District's Opinion is not in conflict with any Florida law, and in fact it is completely in line with Brown v. Motel 6, 989 So. 2d 658 (Fla. 4th DCA 2008); rev. denied, 1 So. 3d 171 (Fla. 2009).

A case on point which holds this case was decided correctly is Brown v. Motel 6, a case handled by the undersigned. A guest staying at a Motel 6 was shot in his room between midnight and the following afternoon. There were no signs of forced entry, and the door was secured by a self-latching door. There was evidence of significant criminal history on the property, even

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885

more so than the present case. The plaintiff's estate brought suit against the hotel for negligent security. The trial court granted Summary Judgment based upon the fact that the plaintiff was unable to prove whether he was killed by an intruder or an invited guest, and the Fourth District Court of Appeal affirmed, holding that the plaintiff must establish a nexus between the breach and the injury in order to successfully bring suit:

> Although there was additional information about other incidents, there is no need to describe them, because we acknowledge that a jury could find that the motel breached its duty to provide adequate security. The problem is that, in addition to showing a breach of duty, plaintiff must demonstrate that the injury resulted from the breach of duty. *Kayfetz v. A.M. Best Roofing, Inc.*, 832 So.2d 784 (Fla. 3d DCA 2002). That is what distinguishes this case from the cases on which the estate relies.
>
> * * *
>
> In this case, although the estate had four years from the time it filed this action to develop evidence from which a jury could find that the breach of duty to provide adequate security resulted in the shooting, it was unable to do so. We accordingly agree with the trial court that there were no issues of material fact and affirm the summary judgement.
>
> Brown, 659-660.

Similarly, in the present case, the Plaintiff could not show whether the murders were committed by a friend, an invited guest or an unknown assailant, or a known assailant to whom the Plaintiff opened the door. Contrary to what the Petitioner argues in her Brief, given the testimony concerning the phone

call between Ciara and her boyfriend in which she identified the two people at the door immediately prior to her murder, it is apparent she opened the door. The murders could not have been prevented with security measures if Ciara opened the door to her assailant(s) because she knew them. Therefore, the ruling below was correct and in line with Florida law, and the Petition must be denied.

CONCLUSION

There is no express and direct conflict as is necessary for the extraordinary remedy of Discretionary Review. The Petitioner is simply seeking a second appeal on the merits, which this Court has repeatedly said it will not do.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Sr., Esquire
James W. Sherman, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
PH: (954) 525-5885
FAX: (954) 764-7807

and

Joel R. Wolpe, Esquire
WOLPE & LEIBOWITZ, L.L.P.
Miami, FL

By: _____
Richard A. Sherman, Sr.

Email: Rsherman@appealsherman.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was emailed this 4th day of March, 2013 to:

Joel R. Wolpe, Esquire
WOLPE & LEIBOWITZ, L.L.P.
28 W. Flagler Street
11th Floor
Miami, FL 33130
E-mail: jwolpe@wlaf-law.com

Thaddeus Hamilton, Esquire
4330 West Broward Boulevard
Suite J
Plantation, FL 33317
E-mail: Hamilton0588@yahoo.com

Jeffrey L. Allen, Esquire
19 W. Flagler Street
Suite 209
Miami, FL 33130-4406
E-mail: mattlevy@metnickandlevy.com

Matthew D. Levy, Esquire
METRICK LEVY & LONG, P.A.
15300 Jog Road, Suite 103
Delray Beach, FL 33446
E-mail: matthew_levy@bellsouth.net

Philip M. Burlington, Esquire
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 430
444 West Railroad Avenue
West Palm Beach, FL 33401
E-mail: pmb@flappellatelaw.com

CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

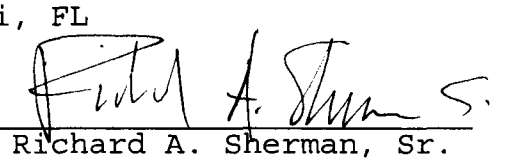
CERTIFICATE OF EMAIL TO COURT

It is hereby certified that a copy of the Brief has been emailed to the Court.

Law Offices of
RICHARD A. SHERMAN, P.A.
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
PH: (954) 525-5885 - Broward
FAX: (954) 764-7807

and

Joel R. Wolpe, Esquire
WOLPE & LEIBOWITZ, L.L.P.
Miami, FL

By: 
Richard A. Sherman, Sr.

Email: Rsherman@appealsherman.com

JWS/mn