IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC17-829

2D DCA Case No.: 2D15-304; 2D15-677
Lower Tribunal Case No.: 10-16698-CI-21

D.H. and L.H., minor children, by and through their next friends and permanent guardians, RICHARD HARKINS and SUELLEN HARKINS

Petitioners/Appellants,

v.

ADEPT COMMUNITY SERVICES, INC., and B.E.A.R.R., INC.,

Respondents/Appellees.

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF THE ARGUMENT

The Petitioners have incorrectly alleged the Second District Court of Appeal's opinion in this instant matter is in express and direct conflict with particular opinions in the First, Third, and Fourth district courts. Contrary to Petitioners' argument, the opinion at issue not only is in harmony with the other districts, but the controlling facts in those cases are not substantially similar to those in the present matter. When the controlling facts are not substantially similar in separate district court opinions, the holdings in the respective opinions do not expressly and directly conflict within the meaning of Art. V, Section 3(b)(3) of Florida's Constitution, and do not give rise to the Florida Supreme Court's discretionary jurisdiction pursuant to same.

The Petitioners' cited opinions each involve allegations of sexual abuse of a minor, the presence of which affects the computation of accrual of the cause of action. Because the present matter involves ordinary negligence rather than negligence arising from sexual abuse, the Petitioners' cited decisions from the First, Third, and Fourth district courts are not substantially similar and, therefore, do not expressly and directly conflict with the Second DCA opinion at issue.

ARGUMENT ON APPEAL

The supreme court may exercise discretionary jurisdiction to review decisions of district courts of appeal, which "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, Section 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

A conflict warranting supreme court jurisdiction pursuant to Art. V, Section 3(b)(3), Fla. Const., results when two or more district courts of appeal reach opposite results on controlling facts, which are virtually identical. *Crossley v. State*, 596 So.2d 447, 449 (Fla. 1992) (citing *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla.1960)). The district court decision must "actually 'expressly and directly [conflict] with the decision of another court.'" *State v. Vickery*, 961 So.2d 309, 312 (Fla.2007) (quoting Art. V, § 3(b)(3), Fla. Const.).

In the instant matter, there is no actual direct or express conflict with any other district court of appeal opinion listed by the Petitioner. Here, the issue on appeal was whether the trial court properly granted final summary judgment in favor of Respondent based on expiration of the statute of limitations when the cause of action accrued outside the limitations period and when there was no applicable tolling provision.

Notably, the controlling facts of the underlying matter do not include allegations of sexual abuse. Instead, the twins' alleged B.E.A.R.R. was negligent in rendering in-home support for the twins' mother, including life coaching and the assistance of a live-in aid. B.E.A.R.R. filed a motion for summary judgment arguing the twins' cause of action was time-barred by the four-year statute of limitations because the twins' grandparents at all times had the capacity to bring suit as next friend, and the grandparents were both aware of the alleged injuries more than four years before suit was filed but failed to bring an action within the limitation period.

In its opinion on this matter, the Second DCA affirmed the trial court's granting of summary judgment and held (1) the existence of a person who can bring a claim on a minor's behalf is not relevant to the question of accrual of a cause of action for ordinary negligence, and (2) the tolling for a minor's claims provided in § 95.051(1)(h), Fla. Stat., is inapplicable in this case. (Appendix, page 2).

The Petitioner's jurisdictional brief incorrectly asserted the controlling facts in the present case are substantially similar to those in particular opinions from the First, Third, and Fourth District Courts of Appeal because "they all focus on the issue of when a cause of action accrues for a minor child." This argument considers the controlling facts in these opinions too broadly and does not account

for the fundamental difference between the cited cases and instant opinion—the Petitioners' cases involve allegations of sexual abuse, which alters the way courts determine when a cause of action accrues.

When cases involve allegations of sexual abuse of a minor (prior to the 2010 revision of § 95.11, Fla. Stat., to include an unlimited time period for victims to bring an action on such abuse) or other cases where the defendant's actions cause the delay in discovery, accrual of the cause of action depends on the knowledge of an adult with the capacity to bring suit. *Davis v. Monahan*, 832 So.2d 708 (Fla.2002). In *Davis*, the supreme court held,

> While we applied the delayed discovery doctrine to causes of action arising out of childhood sexual abuse and repressed memory in *Hearndon*, we did so only after considering the unique and sinister nature of childhood sexual abuse, as well as the fact that the doctrine is applicable to similar cases where the tortious acts cause the delay in discovery.

Davis v. Monahan, 832 So.2d 708, 712 (Fla.2002) (discussing *Hearndon v. Graham*, 767 So.2d 1179 (Fla.2000)). The court in *Davis* further stated the delayed discovery doctrine does not apply unless the Florida Legislature has specifically stated that it does. *Id.* at 709-710. Enumerated exceptions include actions for fraud,

products liability, professional malpractice, medical malpractice, and intentional torts based on abuse. *Id.*

> Aside from the provisions stated above for the delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, **there is no other statutory basis for the delayed discovery rule**.

Id. at 710.

In the present matter, the Second DCA stated the "knew or should know" rule for *accrual* of a negligence cause of action is an expression of the delayed discovery doctrine. When the Second DCA stated, "The problem with those arguments is that the premise upon which they are based has been invalidated by the supreme court," the court was referring to the counsels' arguments imposing the premise from *Drake* and *S.A.P.* onto the facts at issue in the present case—the "premise" being the knew-or-should-know rule applies to the accrual of a cause of action. (Appendix, page 8). Notably, the court did not state the **law and opinions** in *Drake* and *S.A.P.* **themselves** were invalidated.

In *S.A.P.*, the plaintiff alleged she was sexually abused by the defendants and "had little or no actual memory of the incident which serves as the basis of this complaint." 704 So.2d at 586. The First DCA reversed the trial court's dismissal of the plaintiff's complaint, holding the face of the complaint alleged a sufficient

factual basis, and the knew-or-should-know rule applied because the minor allegedly was subjected to sexual abuse. *Id.* Similarly, in *Drake*, the Third DCA found the complaint alleged a cause of action for fraudulent concealment of sexual abuse sufficient to survive a motion to dismiss based on statute of limitations because the defendant caused the delay in discovery, thereby invoking the knew-or-should-know rule. 462 So.2d at 1143-1144.

The Petitioners' also incorrectly claim the Fourth DCA decision in *Doe No. 3 v. Nur-UI-Islam Academy, Inc.*, 2017 WL 1076928 (Fla. 4th DCA 2017) conflicts with the instant opinion. In *Doe*, the plaintiff argued Rule 1.210(b), Fla. R. Civ. P., in conjunction with the statute of limitations, delayed the accrual of her cause of action because Rule 1.210(b) does not allow a minor to sue on his or her own behalf. *Id.* at *3 (citing *Drake*, 462 So.2d at 1143). In response, the defendant claimed *Drake* was no longer good law because the Legislature amended § 95.051(1)(h) (currently § 95.051(1)(i)), which provided for the tolling of the statute of limitations in specific scenarios. *Id.* at *3-4. The court found the defendant's argument unpersuasive because it failed to realize the statute dealt with **tolling** while the plaintiff's argument based on Drake dealt with **accrual**. *Id.*

No matter the court's discussion of the parties' arguments, the ultimate issue in *Doe* was that the plaintiff did not put her birthdate or age in her complaint for

negligence based on sexual abuse, so the time at which her cause of action accrued could not be determined. 2017 WL 1076928 at *5.

Because *Drake*, *S.A.P.*, and *Doe* all involve sexual abuse allegations and repressed memories, the date of accrual is computed differently than in cases of ordinary negligence. The supreme court decision in *Davis* effectively limited the holdings in *Drake* and *S.A.P.* to cases of alleged sexual abuse. The Second DCA's decision recognizes the *Davis* opinion's limitation of those cases and properly acknowledged the application of the delayed discovery doctrine to the accrual of an ordinary negligence cause of action would be improper.

There is no actual express or direct conflict between the Second DCA's decision in this matter and the decisions in *Drake*, *S.A.P.*, and *Doe* because the controlling facts are so different as to require different computations for accrual of the causes of action.

CONCLUSION

The Second District's opinion currently at issue does not conflict with the Petitioners' cases from the First, Third, and Fourth districts. The particular cases Petitioners analogized have controlling facts, which are so different from the instant matter that they cannot be held to conflict with same. The Second District's opinion recognizes a more recent supreme court decision which limits the premise

as discussed in *S.A.P.*, *Drake*, and *Doe* to the specific circumstances in those cases involving allegations of sexual abuse as opposed to all tort claims, generally.

Because there is no express or direct conflict between the Second District's opinion at issue and those of any other district, this Court is unable to exercise its discretionary jurisdiction based on conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondent's Jurisdictional Brief was furnished via Electronic Service to all parties on the attached Service List on this June 1, 2017.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I hereby certify that this brief was composed and printed in 14-point Times New Roman font in compliance with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

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