IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC03-1631

Underlying Case No.: 2000-CA-000483
Escambia County Circuit Court
Appeal Case No.: 1D02-2918
First District Court of Appeal

DOTTY SMITH and RAY SMITH,)

Petitioners-Appellants,)

vs.)

ROBERT G. MAYES, JR.,)

Respondent-Appellee.)

RESPONDENT'S AMENDED BRIEF IN OPPOSITION TO PETITION TO INVOKE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT

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Comes now Robert G. Mayes, Jr., Respondent/Appellee, pursuant to Rule 9.120(d) of the Florida Rules of Appellate Procedure, and files this Brief in Opposition to the Petition to Invoke Discretionary Jurisdiction previously submitted by the Petitioners in this matter. Since discretionary jurisdiction has been improperly invoked, this Court should dismiss this appeal.

SUMMARY OF THE ARGUMENT

The Petitioners have failed to satisfy this Court's procedural requirements for the invocation of discretionary jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv), and therefore, this appeal should be dismissed. There is no conflict between the opinion issued by the First District Court of Appeal and prior decisions of this Court, and accordingly, this appeal should be dismissed.

ARGUMENT

I. THIS COURT SHOULD NOT ACCEPT JURISDICTION IN THIS CASE SINCE THERE IS NO CONFLICT BETWEEN TWO DISTRICT COURTS OF APPEAL AND THERE IS NO FAILURE BY THE FIRST DISTRICT COURT OF APPEAL TO FOLLOW PRIOR DECISIONS OF THIS COURT.

The Petitioners in this case have alleged, pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv), that this Court should accept its discretionary jurisdiction since the First District Court of Appeal failed to follow prior decisions of this Court. Such an argument is without merit and a closer analysis of the opinion issued by the First District Court of Appeal supports the entry of an Order by this Court denying the Petitioners' Petition to Invoke this Court's Discretionary Jurisdiction. In brief, Petitioners attempt to create a "conflict" where non exists.

The Petitioners argue in brief that "while the First

District Court of Appeal ruled that Mr. Wendolek was an independent contractor, it committed the jurisdictional error when it ruled that there was no non-delegable duty owed by Respondent to Petitioner, Dotty Smith." (Petitioners' brief at p. 7). However, the clear language of the opinion issued by the First District Court of Appeal states otherwise:

> We agree that Mayes did have a non-delegable duty to use reasonable care in maintaining his premises in a reasonably safe condition, and to give invitees warning of any latent and concealed perils on the premises. Nevertheless, Appellants did not present any evidence that the premises were unsafe. The purported negligence lay in Wendolek's act of opening the garage door to the home only partially, contrary to Dotty Smith's expectation that the door was fully raised which caused her to hit her head on the door.

(Appendix 1, pp. 4-5). (Emphasis added).

The Petitioners now seek to make an argument on this appeal that the location of the switch in the garage was somehow a defect in the premises that resulted in injuries to Mrs. Smith. However, it is clear that the Complaint never alleged a defect in the premises as the cause of the Plaintiffs' injuries. The trial court judge specifically asked Petitioners' counsel about the allegations contained in the Complaint and it was agreed that no defect had been alleged.

The trial court and the First District Court of Appeal both considered the arguments raised by Petitioners concerning the allegations made by the Petitioners that the cause of the

accident in this case was the unsafe operation of the garage door by Christian Wendolek, a real estate agent showing this home. There is nothing inconsistent with the facts of this case and the application of either the *Post v. Lunney*, 261 So. 2d 146 (Fla. 1972), or *Goldin v. Lipkind*, 49 So. 2d 539 (Fla. 1950) decisions.

The First District Court of Appeal in this case did not determine contrary to *Post* or *Goldin*, *supra*, that Dotty Smith enjoyed some status other than as a business invitee, and in fact, agreed that Mayes owed a non-delegable duty to keep the premises in a reasonably safe condition. Likewise, the First District Court of Appeal considered and even cited the *Goldin* decision for the proposition that while a person may hire an independent contractor to perform a non-delegable duty owed to third parties, such person escapes vicarious responsibility only if the duty is properly performed. (Appendix 1, p. 4). The First District Court of Appeal further cites *Mortgage Guaranty Ins. Corp. v. Stewart*, 427 So. 2d 776 (Fla. 3rd DCA 1983), for the same proposition. Clearly, the First District Court of Appeal agrees with those propositions of law, as stated in the last full paragraph of the opinion.

Quite simply, as the trial court and the First District Court of Appeal both determined, there was nothing about the

premises at the time of the accident that was unsafe. There is no allegation in the Complaint made by the Smiths that the premises were unsafe, defective, or containing an uncommon design of mode of construction sufficient to cause the incident complained of in this case. No expert testimony was presented to suggest such a defect, nor was there any evidence presented that the location of the garage door switch was improper. As the trial court and First District Court of Appeal both determined, if there was anything unsafe that occurred at the time of the accident, it was the manner in which Wendolek operated a perfectly functional non-defective garage door.

CONCLUSION

The Petitioners have failed to provide this Court with any conflict to justify this Court invoking its discretionary jurisdiction, and this appeal should be dismissed.

CERTIFICATE OF FONT SIZE AND SERVICE

By my signature below, I certify that I have complied with Florida Rule of Appellate Procedure 9.210(a), as amended, by using the Courier New 12-point font throughout the entirety of the foregoing brief. I also do hereby certify that a true copy of the foregoing pleading has been provided to Timothy M. O'Brien, Esquire, P. O. Box 12308, Pensacola, Florida, 32581,

and Michael S. Burtt, Esquire, P. O. Box 1830, Pensacola, Florida, 32591, by depositing same in the United States mail, properly addressed and first class postage prepaid on this the _____ day of December, 2003.

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