

IN THE SUPREME COURT OF  
FLORIDA

CASE NO. 68,732

BLUE CROSS AND BLUE SHIELD  
OF FLORIDA, INC.,

Petitioner,

vs.

CITY OF MIAMI, a political  
subdivision of the State of  
Florida, HERMAN JOHNSON, RINKER  
MATERIALS CORPORATION, a Florida  
corporation, ORIENTE URQUIOLA, FOUR  
WHEEL AUTO COMPANY, INC., and  
CONCRETE EQUIPMENT, INC.,

Respondents.

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ON PETITION FOR DISCRETIONARY REVIEW TO THE  
SUPREME COURT OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

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## INTRODUCTION

Petitioner was the Appellant in the Third District Court of Appeal and the the plaintiff in the trial court. Respondents were the Appellees in the Third District Court of Appeal and were the defendants in the trial court. In this Brief, Petitioner will be referred to as it stands before this Court and, alternatively, as "Blue Cross". Appellees will be collectively referred to as Respondents or as "MIAMI". The symbol "A" stands for Petitioner's Appendix which accompanies this Brief.

## STATEMENT OF THE CASE AND FACTS

This is a Petition for Discretionary Review of the decision of the Third District Court of Appeal affirming the trial court's dismissal of Blue Cross' Complaint for common-law indemnification. The facts and the argument in this matter are identical to those previously made by this same Petitioner in the case of BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC. VS. RYDER TRUCK RENTAL, INC., presently pending before this Supreme Court as Case No. 67,591, being an appeal from the Third District Court of Appeal, Case No. 84-2053. This Supreme Court accepted jurisdiction of Ryder in its order entered February 25, 1986 (A-17), and oral argument is set for June 4, 1986.

In the instant Miami case, the facts were that Blue Cross' subscriber Rafael Alfonso, Jr., was an occupant of an automobile involved in a collision with several vehicles variously owned and/or driven and/or maintained and/or

manufactured by Respondents. Rafael Alfonso, Jr. sustained personal injuries necessitating hospitalization and physicians' services. On or about September of 1981 Rafael Alfonso, father and guardian of Rafael Alfonso, Jr. filed suit in the Circuit Court of Dade County, Florida against all defendants for the injuries his son sustained. The case was tried by jury, resulting in a verdict in excess of TEN MILLION DOLLARS in favor of the plaintiffs.

Prior to the ten million dollar verdict, Blue Cross commenced a separate common-law indemnification action in the Circuit Court of Dade County, Florida, seeking recovery against all Respondents herein (who were the defendants in the suit brought by Rafael Alfonso, Jr. and his father). The Amended Complaint (A. 1-5) sought common-law indemnification from defendants for the payment by Blue Cross of \$117,872.96 to or on behalf of Rafael Alfonso, Jr. for the injuries he sustained as a result of the negligence of the defendants. Said payments were required of Blue Cross pursuant to a group health insurance contract issued by Blue Cross covering Rafael Alfonso, Jr., and had no connection whatsoever with automobile coverage.

The defendants below filed Motions to Dismiss the Amended Complaint (A. 6-7 and A.8-9) based on authority of Blue Cross and Blue Shield of Florida, Inc. vs. Ryder Truck Rental, Inc., 472 So. 2d. 1373 (Fla. 3rd DCA 1985). The

trial court subsequently entered its Order dismissing the Amended Complaint (A. 10) and this Petitioner filed a timely Notice of Appeal. The Third District Court entered its opinion (A. 11) affirming the dismissal based solely on the authority in its decision of Blue Cross and Blue Shield of Florida, Inc. vs. Ryder Truck Rental, Inc., supra. (A. 12-16).

In that Ryder decision the Third District Court expressly declared that §627.7372 Fla. Stat. (1977) was valid, that it operated to preclude a health insurer such as Blue Cross from seeking subrogation against the tortfeasor, and that Blue Cross was not possessed of a common-law right of indemnity against the tortfeasor. Finally, the court expressly construed a provision of the Florida Constitution by holding that a dismissal of Blue Cross' indemnification claim did not violate the right of access to the courts as guaranteed by Art. I, §21 Fla. Const. Timely petition for discretionary review in this court was thereupon filed.

#### SUMMARY OF ARGUMENT

The Third District Court's per curiam affirmance, making specific reference to Ryder and the fact that Ryder has been accepted for review by this court, creates a prima facie express conflict and allows this Supreme Court to exercise jurisdiction over this matter.

This Court and the Florida District Courts of Appeal

have uniformly recognized that equity furnishes a basis for indemnity where one discharges a duty owed by him but which, as between himself and another, should have been discharged by the other. Thus the Third District Court of Appeal's decision in this case, based on Ryder, expressly and directly conflicts with this Court's and the other District Courts' decisions, such conflict being sufficient to invoke jurisdiction of this court.

The Third District Court's application of the Collateral Source Statute precluding Blue Cross' claim for recovery from Respondents was an expressed declaration of the validity of that statute sufficient to invoke this Court's discretionary jurisdiction.

The Third District Court's opinion unconstitutionally deprived Blue Cross of its right to access to the courts of this State by expressly construing a provision of the Florida Constitution in holding that Blue Cross had no right to indemnification from Respondents, such express construction being sufficient to invoke the discretionary jurisdiction of this court.

#### ARGUMENT

- I. THE PER CURIAM OPINION OF THE DISTRICT COURT OF APPEAL CONSTITUTES PRIMA FACIE EXPRESS CONFLICT AND ALLOWS THE SUPREME COURT TO EXERCISE ITS JURISDICTION.

All parties hereto should concede that the facts of this Miami case are substantially the same and nearly identical with the facts of the Ryder case presently pending before this Supreme Court. Certainly the legal argument and legal issues are identical. However, the opinion of the Third

District Court of appeal rendered April 8, 1986 in this Miami case (A. 11) was a per curiam affirmance. Normally such opinion might not be reviewable by this Supreme Court. However, the Third District Court's per curiam affirmance was specifically stated to be on the authority of the Ryder case, and the fact that this Supreme Court had granted review was specifically set forth in the per curiam affirmance (together with an indication of the date set for oral argument).

When a District Court of Appeal renders a per curiam affirmance decision based upon a cited case pending review in the Supreme Court, a prima facie express conflict exists and allows the Supreme Court to exercise jurisdiction. Jollie vs. State, 405 So. 2d. 418 (Fla. 1981). As the Ryder decision was cited by the Third District Court of Appeal, and as the Ryder decision is presently pending review in this Supreme Court, express conflict exists and this Supreme Court should issue its order herein accepting jurisdiction of this case.

II. THE THIRD DISTRICT COURT OF APPEAL'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL, THAT THE RIGHT OF INDEMNITY ACCRUES TO ONE WHO HAS DISCHARGED THE DUTY WHICH IS OWED BY HIM BUT WHICH, AS BETWEEN HIMSELF AND ANOTHER SHOULD HAVE BEEN DISCHARGED BY THE OTHER, SUCH CONFLICT BEING SUFFICIENT TO INVOKE THE JURISDICTION OF THIS COURT.

The following arguments are made alternatively to Argument I above for the purpose of establishing the necessary conflict. Arguments II and III are basically the same arguments made by this Petitioner in Ryder.

With respect to entitlement to indemnification where one has discharged the duty owed by him, but which between himself and another should have been discharged by the other, the Third District Court's opinion citing Ryder applies a general principle of law contained in several prior decisions in a way which completely and erroneously changes the underlying basis for the general principle of law, and then applies that changed principle to a factual setting totally different from those set forth in the cases cited by the Third District Court of Appeal in Ryder. Such express and direct conflict is more than sufficient to provide this court with conflict jurisdiction over this matter. Sacks vs. Sacks, 267 So. 2d 73 (Fla. 1972); McBurnette v. Playground Equipment Corp., 137 So. 2d. 563 (Fla. 1962).

The Third District Court in its Ryder based opinion clearly relied on four earlier cases: Houdaille Industries vs. Edwards, 374 So. 2d 490 (Fla. 1979); Stuart vs. Hertz Corporation, 351 So. 2d, 703 (Fla. 1977); Allstate Insurance Company vs. Metropolitan Dade County, 436 So. 2d. 975 (Fla. 3d DCA 1983); and Mims Crane Service vs. Insley Manufacturing Corporation, 226 So. 2d. 836 (Fla. 2 DCA 1969). These four cases stand for the principle of law that the right to indemnity inures to one who discharges a duty owed by him but which, as between himself and another, should have been discharged by the other, regardless of whether or not an express contract of indemnification between the two existed. Such has long been the rule in equity, as a means of doing complete justice between conflicting interest and claims. In fact, the

court in Mims Crane Service, citing the rule in 41 Am. Jur. 2d. Indemnity, §2, recognized "that principles of equity furnish a more satisfactory basis for indemnity."

This rule on indemnity goes on to state that:

"A right of indemnity has been said to exist whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join," [Emphasis supplied] Mims Crane Service at 839; see also Stuart, 351 So. 2d. at 705.

The Third District Court, in affirming the dismissal of Blue Cross' indemnification claim based on Ryder, reasoned that no "special relationship" existed between Blue Cross and Miami rendering the latter liable to indemnify the former. The Third District held that "the party seeking indemnity must have been vicariously, constructively, or technically liable for the wrongful acts of the party against whom indemnity was sought". However, the "vicarious, constructive, and technical liability" referred to by the Third District Court was never defined in the Houdaille; Stuart; Allstate; and Mims Crane Service decisions. Instead, those decisions expressed the rule that equity can form a satisfactory basis for indemnity. Given the aforecited general rule with regard to indemnification, and given that Blue Cross discharged the duty to pay the injured person's medical bills which otherwise would have been paid by Miami, the "special relationship" required for an indemnity claim should have been found in equity by both the trial court and the Third District Court.

The four cases cited above never denied a claim for indemnity in the type of case as here pends before this court, but instead (and in direct conflict with the decision of the Third District Court in this case) appear to approve a claim for indemnity in cases such as this. Clearly the requirement of Blue Cross' paying medical benefits for injuries caused by the negligent acts of Miami creates a "special relationship" as surely as occurs when one party is liable because another negligently operated a rental car, or where one negligently operated a leased crane. An "equitable obligation" to indemnity within the context of the rule enunciated in Mims Crane Service at 839 and Stuart at 705 has arisen between Blue Cross and Miami. Therefore the Third District Court, in denying the equitable obligation of Miami to indemnify Blue Cross, has created an express and direct conflict with the decisions previously enunciated by Houdaille, Stuart and Mims Crane Service over which is warranted this court's exercise of its discretion to review pursuant to Fla. R. App. P. 9.030 (a)(2)(A)(iv).

III. THE THIRD DISTRICT COURT OF APPEAL'S DENIAL AND OVERRULING OF BLUE CROSS' ARGUMENT RELATING TO DENIAL OF ITS RIGHT OF ACCESS TO THE COURTS WAS AN EXPRESS CONSTRUCTION OF ART. I, §21, FLA. CONST., SUFFICIENT TO INVOKE THIS COURT'S JURISDICTION.

Blue Cross also seeks jurisdiction of this court under Fla. R. App. P. 9.030 (a)(2)(A)(ii) as when the Third District Court's decision adopted Ryder it expressly construed a provision of the Florida Constitution. Blue Cross argued that if §627.7372 operates to bar both Blue Cross'

subrogation and indemnification rights, then Blue Cross' guarantee of access to the courts for redress of injury pursuant to Art. I, §21, Fla. Const., was unconsitutionally violated. In its Ryder based opinion, the Third District held that there was no merit to Blue Cross' claim that \$627.7372 was unconstitutionally applied to violation of Art. I, §21, Fla. Const.

The Third District Court held that no right of indemnity existed at common law. However, our courts have long held that even if no contractual subrogation or indemnification exists at law, such rights certainly originate in and are recognized in equity, and "A Court may emphasize either or both of the doctrines when necessary to bring about equitable adjustment of a claim founded on right and natural justice." Rebozo v. Royal Indemnity Co., 369 So. 2d. 644, (Fla. 3d DCA) cert den. 379 So. 2d. 209 (Fla. 1979). . ." as cited in Allstate, supra. There could never be a more clear example of a claim "founded on right and natural justice" than one for reimbursement of monies required to be paid as a direct result of the negligence of another. Thus the claims of Blue Cross herein are clearly "founded on right and natural justice," as stem from the Florida common law, and should be enforceable as a matter of right in the courts of this State.

But the Third District Court effectively sanctioned the destruction of Blue Cross' claims, and in effect held that no reasonable alternative had to be provided by the legislature to protect the rights and claims abolished, and

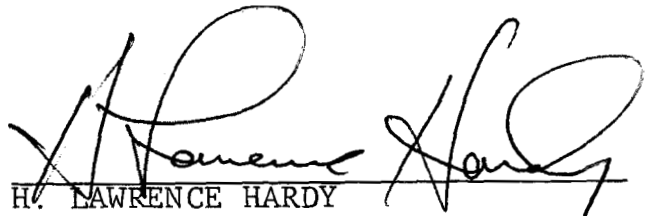
further held that no overpowering public necessity for abolition of the right had to be shown. Kluger v. White, 281 So. 2d. 1 (Fla. 1973). Such is clearly erroneous for the reasons stated in Section II of the Argument in this Brief with regard to Blue Cross' claim for indemnification, and it is submitted that the trial court and Third District Court have improperly construed Art. I, §21, Fla. Const., thus unconstitutionally denying Blue Cross' access to the courts of this State. Such express construction of a provision of this State's constitution should cause this court to exercise its discretionary jurisdiction pursuant to Fla. R. App. P. 9.030(a)(A)(ii).

#### CONCLUSION

It is respectfully submitted that the erroneous opinion of the Third District Court must be reversed, that jurisdiction in this court exists under Fla. R. App. P. 9.030 (a)(2)(A)(ii), and (iv), and that the exercise of this court's discretionary jurisdiction to consider the merits of this case is appropriate and necessary.

#### CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing was mailed to Pete L. De Mahy, Esq., 2950 S. W. 27th Avenue, St. 200, Miami, FL 33133; Richard M. Davis, Esq., Dixon, Dixon, Hurst & Nicklaus, 100 North Biscayne Blvd., St. 1500, Miami, Fl 33132 and to Gisela Cardonne, Esq., City of Miami Law Department, 169 E. Flagler Street, St. 1101, Miami, FL 33131 this 28<sup>th</sup> day of May, 1986.



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