IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,732

CLERK, SUPREME COURT
By ________ Deputy Clerk

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Petitioner,

v.

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.

ON PETITION FOR DISCRETIONARY REVIEW TO THE
SUPREME COURT OF FLORIDA

RESPONDENT CITY OF MIAMI'S ANSWER BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND THE FACTS	2
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. THE PER CURIAM RULING OF THE THIRD DISTRICT BELOW IS NOT IN EXPRESS OR DIRECT CONFLICT WITH ANY OTHER FLORIDA APPELLATE DECISION AND THEREFORE THIS COURT LACKS JURISDICTION TO REVIEW THE RULING	3
II. THE DECISION BELOW DOES NOT CONFLICT, EITHER EXPRESSLY OR OTHERWISE, DIRECTLY OR INDIRECTLY, WITH ANY OTHER APPELLATE CASE LAW IN FLORIDA	5
III. THE RULING BELOW DID NOT MENTION MUCH LESS CONSTRUE THE FLORIDA CONSTITUTION	8
CONCLUSION	9
CERTIFICATE OF SERVICE	9

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TABLE OF CITATIONS

	PAGE
Allstate Insurance Co. v. Metropolitan Dade County, 436 So.2d 976 (Fla. 3d DCA 1983)	5, 7
Dept. of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983)	6
Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980)	3
Houdaille Industries v. Edwards, 374 So.2d 490 (Fla. 1979)	5, 6, 7
Jenkins v. State of Florida, 385 So.2d 1356 (Fla. 1980)	6
Jollie v. State, 405 So.2d 418 (Fla. 1981)	3, 4
Mims Crane Service v. Insley Manufacturing Corp., 226 So.2d 836 (Fla. 2d DCA 1969)	5, 7
Stewart v. Hertz Corporation, 351 So.2d 703 (Fla. 1977)	5, 6, 7

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INTRODUCTION

Petitioner Blue Cross and Blue Shield of Florida, Inc. will be identified as "Blue Cross." The City of Miami will be identified as "City" and the other Respondents simply as "Respondents."

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STATEMENT OF THE CASE AND THE FACTS

Blue Cross sued the City of Miami and five other Defendants to recover the cost of medical benefits it paid on behalf of one of its members (Rafael Alfonso, Jr.). Alfonso was insured under a Blue Cross group health insurance contract; he was injured in an automobile accident involving the City and the other Respondents and Blue Cross paid his medical bills in accordance with its contract. Blue Cross then sued the City and the other Respondents to recover its costs based on an "equitable indemnification" theory. In view of the Ryder decision by the Third District, the trial court dismissed and the Third District affirmed. Ryder is now under review by this Court (Case No. 67,591) and Blue Cross has petitioned this Court to accept jurisdiction over this case as well.

SUMMARY OF ARGUMENT

This Court should not accept jurisdiction in this case because the per curiam affirmance below is not in direct or express conflict with any other appellate decision; the "Jollie" exception to the express conflict doctrine does not apply absent an underlying conflict in appellate precedent, which does not exist here, and the ruling on its face does not construe any provision of the Florida Constitution.

ARGUMENT

I. THE PER CURIAM RULING OF THE THIRD DISTRICT BELOW IS NOT IN EXPRESS OR DIRECT CONFLICT WITH ANY OTHER FLORIDA APPELLATE DECISION AND THEREFORE THIS COURT LACKS JURISDICTION TO REVIEW THE RULING.

Petitioner concedes as it must that "normally" a per curiam affirmance, with or without a citation to another opinion, is not reviewable by the Florida Supreme Court under the 1980 amendment to Art. V, Sec. 3, Fla. Const. Petitioner asserts that the per curiam "citation affirmance" below merits a special exception because it cited the Ryder decision and Ryder is now pending before this Court. Jollie v. State, 405 So.2d 418 (Fla. 1981) would justify that special exception except that Jollie was not intended to govern and should not be extended to govern this situation. In Jollie a District Court addressed an issue on which the District Courts were expressly divided. As this Court noted in its opinion, at the time Jollie was decided by the District Court,

> "... disparate views were then held among the district courts of the state. ... We accepted jurisdiction in Murray [the case equivalent to Ryder here] on the basis of direct jurisdictional conflict. The Murray decision conflicted on its face with the First District's decision in Tascano" [Jollie, supra at 419; citations omitted].

This Court in Jollie reaffirmed that under the Dodi decision[1/] the Supreme Court lacked jurisdiction to review a "citation

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1/ Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980).

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P.C.A." to determine if the cited case -- in this case Ryder -- conflicted with another appellate decision. Thus in Jollie an underlying direct conflict existed and the only question was whether the "express" requirement was satisfied by a citation to a decision which was in expressly in conflict with another District Court's decision and was indeed later quashed as erroneous by the Supreme Court. Jollie consequently is no particular authority for accepting jurisdiction in this case, where an underlying appellate conflict does not exist. As shown in Argument II below, unless this Court quashes the Ryder decision no appellate conflict exists and therefore the Jollie exception does not apply.

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II. THE DECISION BELOW DOES NOT CONFLICT, EITHER EXPRESSLY OR OTHERWISE, DIRECTLY OR INDIRECTLY, WITH ANY OTHER APPELLATE CASE LAW IN FLORIDA.

The decision below announces no rule of law in conflict with any rule of law enunciated by any other appellate court in Florida, expressly or impliedly, directly or indirectly. The decision below is nothing but a per curiam affirmance citing another decision with which it is totally consistent (as all parties concede). The opinion below on its face is not in express or direct conflict with any other decision, and contains not a word which could be said to cause an embarrassing conflict in legal precedent.

Even if this Court were permitted to go beneath the per curiam affirmance to determine from the record the underlying issues and holding, the decision below still would not be in conflict with any other appellate cases. Petitioner cites not a single case claimed to be in conflict with the opinion below, but rather only argues that the prior case law on indemnification did not compel the ruling below. In other words, Petitioner asserts in its brief that the decisions in Houdaille, Stewart, Allstate and Mims[2/] did not require the Third District to affirm the Circuit Court's dismissal of the Blue Cross indemnification claim below, but Petitioner does not even attempt to show that the per curiam

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2/ Houdaille Industries v. Edwards, 374 So.2d 490 (Fla. 1979); Stewart v. Hertz Corporation, 351 So.2d 703 (Fla. 1977); Allstate Insurance Co. v. Metropolitan Dade County, 436 So.2d 976 (Fla. 3d DCA 1983); and Mims Crane Service v. Insley Manufacturing Corp., 226 So.2d 836 (Fla 2nd DCA 1969).

ruling below is in conflict with any of those four decisions. The facts and issues underlying the ruling below were analytically different from those in any prior decision on the question of "equitable indemnification," except for Ryder with which it was utterly consistent. Where analytically different issues and facts are presented to this Court, they should not supply a basis for the determination of express conflict jurisdiction. See e.g., Dept. of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

When a factual pattern of first impression arises, that can not independently supply "conflict" jurisdiction. As recognized by this Court in Jenkins v. State of Florida, 385 So.2d 1356 (Fla. 1980) the 1980 amendments to Art. 5, Sec. 3, of the Florida Constitution sought to narrow those classes of cases within which conflict would arise. The District Courts of Appeal are meant to have final appellate jurisdiction and to allow such courts to once again become intermediate courts of appeal can only frustrate the very purpose of the 1980 Constitutional amendment.

Blue Cross cannot demonstrate any express conflict justifying this Court in exercising its review jurisdiction because a right of indemnity under the peculiar circumstances of this case has never been recognized by any appellate court in the State of Florida. Even the dicta in Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979) and Stewart v. Hertz Corporation, 351 So.2d 703 (Fla. 1977) is consistent with the Third District's ruling below. As Petitioner admits, the four prior "indemnification" decisions all stand for the principle that the

party seeking indemnification must have been merely vicariously, constructively or technically liable for the wrongful act which caused the damage or injury. Obviously Blue Cross was neither "vicariously" nor "constructively" nor "technically" liable for Mr. Alfonso's medical expenses when its liability arose directly and exclusively from its contract with Mr. Alfonso to pay those expenses regardless of cause. Likewise, Blue Cross obviously did not pay those expenses because it was technically responsible or liable for the wrongful acts of the Respondents; rather, it paid Mr. Alonso's hospital bills because it gave Mr. Alonso a contractual commitment to pay those bills however the bills may have arisen. In this case Blue Cross had no relationship at all with Respondents giving rise to its liability, for its liability arose strictly from its contractual obligations to Mr. Alfonso. Consequently, the ruling below (which in fact does not even cite Houdaville, Stewart, Allstate or Mims) obviously is not even in "silent" conflict with any of those cases since the ruling below merely applied the principle enunciated in those cases in a slightly different factual setting, and if that were sufficient for conflict jurisdiction to arise then virtually every District Court ruling in Florida would be subject to this Court's review.

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III. THE RULING BELOW DID NOT MENTION MUCH LESS CONSTRUE THE FLORIDA CONSTITUTION.

Petitioner, apparently wishing to treat this case as a mere appendage to Ryder, states that when the Third District cited Ryder in its ruling below, it "expressly construed" a provision of the Florida Constitution. The City is at a loss how best to respond to this contention, since on its face the ruling below does not even refer to the Florida Constitution, not even eliptically. One would assume that if a ruling does not mention a legal authority it cannot have "expressly construed" that authority. Accordingly, the short and proper response to Petitioner's assertion that the Third District construed Art. I, Sec. 21 of the Florida Constitution, is that it did not.

Moreover, even in Ryder the Third District Court of Appeal did not reach the issue of the validity of Sec. 627.372, Fla. Stat. (1983), instead finding that such a claim lacked merit; nor did Ryder expressly construe Art. 1, Sec. 21 of the Florida Constitution:

> "We reject as without merit Blue Cross' contention that the collateral source rule, Sec. 627.7372, is unconstitutionally applied here ... Thus, it would be pointless to entertain the notion of a constitional denial of access where the asserted claim simply does not exist. [Ryder, supra].

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CONCLUSION

This Court should not accept jurisdiction in this case because the per curiam affirmance below is not in direct or express conflict with any other appellate decision; the "Jollie" exception to the express conflict doctrine does not apply absent an underlying conflict in appellate precedent, and the ruling on its face does not construe any provision of the Florida Constitution.

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By: ______________________
THOMAS M. PFLAUM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of May, 1986 to H. Lawrence Hardy, Milton R. Adkins, P.A., 2121 Ponce de Leon Blvd., Suite 650, Coral Gables, FL 33134, Lucia Allen Dougherty, City Attorney, City of Miami, 169 E. Flagler Street, Miami, FL 33131 and Attorney Ray Anderson, Assistant City Attorney, City Attorney's Office, 169 E. Flagler Street, Miami, FL 33131.

____
THOMAS M. PFLAUM

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