

IN THE SUPREME COURT OF FLORIDA

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Case Nos. SC05-0855 & SC05-0856

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IFRAIN MONTE DE OCA,  
Petitioner,  
v.  
STATE FARM FIRE AND CASUALTY COMPANY,  
Respondent.

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RICHARD SNELL,  
Petitioner,  
v.  
ALLSTATE INDEMNITY COMPANY  
and ALLSTATE INSURANCE COMPANY,  
Respondents.

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On Petition for Review of a Decision of the Third District Court of Appeal.

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**RESPONDENTS' JOINT JURISDICTIONAL ANSWER BRIEF**

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## I. INTRODUCTION

The Court should decline to exercise its discretionary jurisdiction in this consolidated appeal because the underlying Third District opinion neither directly nor expressly conflicts with any Florida appellate ruling. *See Monte de Oca v. State Farm Fire & Cas. Co.*, 897 So. 2d 471 (Fla. 3d DCA 2004). As acknowledged by both petitioners Ifrain Monte de Oca (“Monte de Oca”) and Richard Snell (“Snell”), this case involves an issue of first impression – namely, the interaction of comparative negligence principles and the common law “made-whole” rule. Because no Florida appellate court had spoken previously on this precise issue, there can be no conflict and thus no basis for jurisdiction. Moreover, the Third District’s ruling in favor of respondents State Farm Fire and Casualty Company (“State Farm”) and Allstate Indemnity Company and Allstate Insurance Company (collectively, “Allstate”) accords with and is supported by the only other Florida appellate decision involving similar class action subrogation claims. *See Schonau v. GEICO Gen. Ins. Co.*, 903 So. 2d 285 (Fla. 4th DCA 2005).

## II. STATEMENT OF THE CASE AND OF THE FACTS

These cases arise from automobile accidents involving plaintiffs Monte de Oca, a State Farm insured, and Snell, an Allstate insured. *See Monte de Oca*, 897 So. 2d at 472. In each case: (a) the insured had a \$500 deductible under

his auto insurance policy; (b) the defendant carrier paid collision benefits to its insured minus the deductible and pursued a subrogation claim against the other driver/carrier; (c) during the subrogation process, it was determined that the insured was comparatively negligent so the insurer recovered only a portion of its subrogation demand; and (d) the insurer, therefore, refunded (or offered to refund) to the insured the portion of his deductible actually recovered from the other driver/carrier – \$250 to Monte de Oca (based on his 50% comparative negligence) and \$375 to Snell (based on his 25% comparative negligence). *See id.* at 472 & 472 n.3.

In 2001, Monte de Oca and Snell filed proposed class action suits attacking the subrogation refund policies of their respective insurers. *See Monte de Oca*, 897 So. 2d at 472 (noting that Monte de Oca sought a nationwide class). Both plaintiffs asserted claims for deductible refunds and both insurer defendants moved to dismiss the Complaints on various grounds, including that the suits would not be appropriate class actions. *See id.*

The circuit courts dismissed the class claims with prejudice. *See Monte de Oca*, 897 So. 2d at 472-73. Monte de Oca and Snell then sought appellate review. In December 2004, in a consolidated proceeding, the Third District issued an *en banc* opinion affirming the two dismissal orders. The Court

found that the Complaints did not state valid causes of action under the “made whole” rule. *See id.* at 473 (noting that it was not necessary for the Court to address the class issue). In its ruling, the Third District observed that the Fourth District had “recently reached the same conclusion” in Schonau. *Id.* at 473 n.5.<sup>1</sup>

### III. SUMMARY OF THE ARGUMENT

As Petitioners concede, this appeal involves an issue of first impression among Florida appellate courts. In a futile effort to create a conflict, Monte de Oca and Snell rely on a handful of cases setting forth general “made-whole” principles. Those cases do not involve comparative negligence principles and thus do not directly and expressly conflict with the Third District’s opinion. Schonau – the only other appellate decision involving similar subrogation class claims – supports the Third DCA’s ruling. Accordingly, there is no basis for the Court to assert conflict jurisdiction in this consolidated proceeding.

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<sup>1</sup> The Third DCA cited to the original Schonau opinion (issued in Dec. 2004), which was later withdrawn and slightly amended. The amended Schonau opinion (issued in June 2005) also affirmed the dismissal of the plaintiff’s subrogation class claims. Plaintiff Schonau is seeking discretionary review of the Fourth District opinion in this Court (in Case No. SC05-1152).

## IV. ARGUMENT

### A. STANDARD OF REVIEW.

This Court does not have jurisdiction to review the Third District’s opinion because the opinion does not “expressly and directly” conflict with a decision of this Court or another district court on the same question of law.<sup>2</sup> Fla. Const. art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv); Persaud v. State, 838 So. 2d 529, 532-33 (Fla. 2003); Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). No such conflict appears “within the four corners” of the district court’s decision. Persaud, 838 at 532-33; Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

### B. THE THIRD DISTRICT OPINION DOES NOT CONFLICT WITH ANY OTHER FLORIDA APPELLATE DECISION.

In their jurisdictional briefs, Petitioners fail to cite any Florida cases that “expressly and directly” conflict with the Third District’s ruling in Monte de Oca. Petitioners’ efforts to create conflict jurisdiction fail for at least three reasons. First, Petitioners concede that this appeal involves a question of first impression.

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<sup>2</sup> The other bases for Supreme Court discretionary jurisdiction are inapplicable in this proceeding.

As such, Monte de Oca cannot furnish a basis for conflict jurisdiction. Second, there is no conflict based on the facts cited in the Third DCA opinion and Petitioners err by trying to rely on claims and arguments outside the “four corners” of the opinion. Third, the holding in Monte de Oca is supported by the Fourth District’s recent ruling in Schonau. Accordingly, there is no basis for this Court to exercise discretionary jurisdiction in this consolidated appeal.

**1. This Appeal, Which Involves an Issue of First Impression, Cannot Give Rise to Conflict Jurisdiction.**

Both Monte de Oca and Snell acknowledge that the Third DCA decision involves an issue of first impression in this state – namely the interaction of comparative negligence principles and the “made-whole” doctrine. *See Monte de Oca* Brief at 2 (The Third District’s *en banc* decision . . . was the *first time* a Florida court has applied comparative negligence to the definition of the ‘made whole’ rule to a Florida insured.”) (emphasis added); Snell Third Am. Brief at 3-4 (same). This fact alone forecloses any discretionary review by this Court.

As this Court and other commentators have noted recently, “**a question of first impression by definition does not conflict with other decisions**” and thus cannot provide a basis for the Court’s conflict jurisdiction. Bunkley v. State, 882 So. 2d 890, 904 n.14 (Fla. 2004) (Wells, J., concurring) (quoting Gerald B. Cope, Jr., Discretionary Review of the Decisions of

Intermediate Appellate Courts: A comparison of Florida’s System with Those of the Other States and the Federal System, 45 Fla. L. Rev. 21, 37-38 (1993) (emphasis in original)); accord The Florida Bar v. Rubin, 549 So. 2d 1000, 1003 n.1 (Fla. 1989) (“a case of first impression . . . [cannot] provide conflict jurisdiction to this Court”) (Shaw, J., dissenting).

Petitioners mistakenly argue that Monte de Oca conflicts with the following cases: Whyel v. Smith, 134 So. 552 (Fla. 1931); Centex-Rodgers Constr. Co. v. Herrera, 761 So. 2d 1215 (Fla. 4th DCA 2000); Collins v. Wilcott, 578 So. 2d 742 (Fla. 5th DCA 1991); Rubio v. Rubio, 452 So. 2d 130 (Fla. 2d DCA 1984); Fla. Farm Bureau Ins. Co. v. Martin, 377 So. 2d 827 (Fla. 1st DCA 1979); and Magispoc v. Larsen, 639 So. 2d 1038 (Fla. 5th DCA 1994). See Monte de Oca Brief at 3 & 5-6; Snell Brief at 4-5.<sup>3</sup>

Those six cases do not “expressly and directly” conflict with the Third District’s ruling of first impression. Rather, those cases contain general subrogation principles – which the Monte de Oca court acknowledged – but they do not address any of the particular issues that led to the ruling in our case. See

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<sup>3</sup> Petitioners also cite Nat’l Surety Corp. v. Bimonte, 153 So. 2d 709 (Fla. 3d DCA 1962), but that *Third District* decision cannot give rise to discretionary jurisdiction here. Conflict jurisdiction arises when a district court opinion conflicts with a decision from *another* district or from this Court. See Fla. Const. art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv).

897 So. 2d at 472-73 (citing Martin and other cases involving the made-whole rule). Specifically, none of these cases involves comparative negligence issues. Nor do any of these cases involve insurance policy provisions about deductibles and/or deductible refunds. Notably, the Collins court – which authorized an insurer to pursue subrogation from a tortfeasor – held that an agreement between an insurer and an insured may override the general made-whole doctrine. Collins, therefore, supports rather than conflicts with Monte de Oca.

**2. Petitioners Improperly Base Their Argument on Claims Outside the Four Corners of the Third District’s Opinion.**

In trying to create a conflict, Monte de Oca and Snell repeatedly ignore the limits of this Court’s discretionary jurisdiction either by going beyond the “four corners” of the Third District opinion or by arguing the merits of their claims. The Court should disregard those portions of Petitioners’ briefs.

First, Petitioners wrongly go beyond the “four corners” of the district court opinion by citing to Judge Wells’ dissent. *See* Monte de Oca Brief at 4. Petitioners further err by discussing certain allegations that do not appear in the majority opinion or even in the record. Specifically, they complain that State Farm and Allstate made unilateral determinations of the insureds’ negligence. *See, e.g.*, Monte de Oca Brief at 2 (“the subrogated insurer’s unilateral assessment of the insured’s comparative fault”) & 5 (“State Farm unilaterally determined that Monte

de Oca was 50% negligent.”); Snell Brief at 2 (“This action challenged Allstate’s general business practice of imposing comparative negligence determination in all subrogation recoveries.”). These claims are misleading at best.<sup>4</sup>

On this point, the majority opinion contains only one sentence: “The subrogation claim was resolved on the basis that both drivers were 50% negligent, consequently each insurer recovered only half of its subrogation demand.” 897 So. 2d at 472.<sup>5</sup> The Third District thus said nothing about how the subrogation claims were resolved or about who made the negligence determinations. This Court should not go beyond this simple sentence and, specifically, should not consider any (gratuitous) discussion of this point in the dissent. *See Persaud*, 838 So. 2d at 533 (noting that conflict issues must appear within the majority decision); *Reaves*, 485 So. 2d at 830 (“Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.”).

Second, Petitioners improperly argue the merits of their claims. *See Fla. R. App. P. 9.120(d)* (stating that the petitioner’s brief on jurisdiction is to be

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<sup>4</sup> Snell’s claim is particularly egregious. Not only does he go beyond the four corners of the district court opinion, but he mischaracterizes his own Complaint, which contains no such allegation.

<sup>5</sup> In a footnote, the Court noted that Allstate recovered 75% of its subrogation demand and, therefore, offered Snell a 75% deductible refund. *See* 897 So. 2d at 472 n.3.

“limited solely to the issue of the supreme court’s jurisdiction”). Monte de Oca and Snell go so far as to argue that their cases are proper class actions – an issue that the Third District specifically declined to address. *See* Monte de Oca Brief at 7-8; Snell Brief at 7.

**3. The Third District and the Fourth District Are in Agreement, So There Is No Conflict.**

Finally, as noted in the Third DCA’s opinion, the Fourth District “reached the same conclusion” in Schonau, a case involving similar subrogation class claims. 897 So. 2d at 473 n.5. Although Schonau did not involve comparative negligence, its reasoning applies with equal force to our case. The Fourth District affirmed the dismissal of Schonau’s class action Complaint and found that GEICO could pursue subrogation because: (a) there was a specific provision in Schonau’s insurance policy authorizing subrogation; and (b) Schonau had the right to seek recovery of her uninsured losses directly from the other driver or his/her carrier. *See* 903 So. 2d at 287 (holding that “the ‘made whole’ concept is intended to protect recoveries by the insured in limited fund scenarios”) & 288 (“In sum, we can find no Florida authority applying the ‘made whole’ rule so as to preclude GEICO from pursuing subrogation in accordance with the unambiguous subrogation provisions in the insurance contract.”). This ruling supports the Third

District's holding – as the Monte de Oca Court observed by citing to Schonau with approval.<sup>6</sup>

## V. CONCLUSION

For these reasons, State Farm and Allstate requests that this Court decline to exercise jurisdiction in this consolidated proceeding.

Respectfully submitted,

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<sup>6</sup> In the Third District proceeding, State Farm and Allstate raised the same “limited fund” argument that formed the basis for the Fourth District’s holding in Schonau.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 27th day of September 2005 to: Leo Bueno, Esq., Lidsky, Vaccaro & Montes, P.A., 145 East 49th Street, Hialeah, Florida 33013; Diane H. Tutt, Esq., Diane H. Tutt, P.A., 8211 West Broward Boulevard, Suite 420, Plantation, Florida 33324; and Steven W. Davis, Esq., Boies, Schiller & Flexner LLP, Bank of America Tower, 28th Floor, 100 S.E. Second Street, Miami, Florida 33131.

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font, and thus complies with the font requirements of Florida Rule of Appellate Procedure 9.100(1).

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Nancy A. Copperthwaite