IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC12-549

DIANE KROCK,

Petitioner,

v.

ROBIN KAHAN and STEVE ROZINSKY, PERSONAL REPRESENTATIVES OF THE ANCILLARY ESTATE OF IRWIN ROZINSKY, DECEASED, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondents.

ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL FOURTH DISTRICT

BRIEF ON JURISDICTION OF RESPONDENT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Nancy W. Gregoire, Esq.
Florida Bar No. 475688
nwg@kblglaw.com
KIRSCHBAUM, BIRNBAUM, LIPPMAN & GREGOIRE, PLLC
1301 East Broward Boulevard
Suite 230
Fort Lauderdale, Florida 33301
Tel: 954.617.2300; Fax: 954.617.2308

888 S.E. 3rd Avenue
Suite 301
Fort Lauderdale, Florida 33316
Tel: 954.463.3008; Fax: 954.463.3010

Patrick Shawn Spellacy, Esq.
Florida Bar No. 796166
spellacy@kirwanspellacy.com
KIRWAN & SPELLACY, P.A.

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PREFACE

Petitioner Diane Krock seeks the Court's discretionary review of a January 11, 2012 Opinion of the District Court of Appeal of the State of Florida, Fourth District, based on her contention that the Opinion conflicts with decisions of this Court and other district courts of appeal.

Petitioner Diane Krock will be referred to as "Ms. Krock."

Respondent State Farm Mutual Automobile Insurance Company will be referred to as "State Farm."

Ms. Krock's Jurisdictional Brief will be cited as "IB___."

STATEMENT OF THE CASE AND OF THE FACTS

State Farm will rely on the facts contained in *Krock v. Rozinsky*, 78 So. 3d 38 (Fla. 4th DCA 2012).

SUMMARY OF ARGUMENT

The Court does not have conflict jurisdiction. The Opinion correctly recognizes that the trial court did not abuse its discretion in finding that Ms. Krock's motion for extension of time based on her medical condition given the timing of her request, the history of her earlier requests, the length of the case, and her failure to show that she had made any effort to prepare for the soon upcoming attorney fee hearing.

Nor is there a conflict between the Opinion and any decision of this Court or any other district court on either the abuse of discretion issue or any other issue raised by Ms. Krock. There was no default or fraud on the court in this case; there was no ex parte hearing because the attorney fee issue was properly noticed and scheduled; and the Opinion correctly recognizes that many of Ms. Krock's other arguments were neither preserved nor supported by the record.

ARGUMENT

I. THE COURT IS WITHOUT CONFLICT JURISDICTION BECAUSE THE FOURTH DISTRICT'S OPINION DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH ANY OTHER CASE ON THE ISSUE RAISED BY MS. KROCK.

A. The requirements of "express and direct conflict."

The Court's jurisdiction is governed by section 3(b)(3) of article V of the Florida Constitution, which provides the Court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The term "expressly" is defined as "in an express manner," and "express" is defined as "to represent in words" or "to give expression to." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). A "conflict" is the "announcement of a *rule of law* which conflicts with a rule previously announced" or the "application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case." *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960). Under the first test the facts are immaterial, but under the second the facts are vital. *Id.*

B. The Opinion does not satisfy the requirements.

Ms. Krock claims that the Opinion conflicts with a number of cases addressing defaults and default judgments. Not one of the cases announces a "rule of law" with which the Opinion conflicts, and the Opinion does not apply a "rule of law to produce a different result" than that reached in any case on which she relies.

Most of the cases that she cites follow the guidelines established by this Court in *North Shore Hospital, Inc. v. Barber*, 143 So. 2d 849 (Fla. 1962). In that case, which involved a default, the Court explained that the purpose of entry of default is to prevent a "dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim" but it was not to deprive a litigant of a fair opportunity to defend because of "pure mistake and misunderstanding of counsel . . . ." *Id.* at 852-53.

Following *North Shore*, Florida's district courts have applied its guidelines to set aside clerk's defaults and default judgments entered without notice to a party who has made an appearance, in the face of excusable neglect, mistake, inadvertence, and clerical error, after representations by another party that no such action would be taken, and a host of other scenarios in which it was unquestionable that fair play and due process were not afforded. Those are the cases on which Ms. Krock relies (IB5, 7). *See, e.g., Weeks Cartage, Inc. v. CSX*

Transp., 547 So. 2d 237, 238 (Fla. 1st DCA 1989) (setting aside a default judgment entered after a representation made by the opposing counsel that no further action was required by the defaulted party).

There is no "rule of law" announced in any of the cases cited in Ms. Krock's Jurisdictional Brief with which the Opinion conflicts, because here, as the Opinion shows, Ms. Krock was not misled, or defaulted without notice, or deprived of any due process right. She was well aware that the hearing, which had been continued earlier at her request, was taking place. She waited until the last minute to ask for yet another continuance, and she knew that the trial court had denied it yet did not appear. She also did not submit any expert evidence or testimony on the issue before the trial court even though she was aware that the hearing was on State Farm's request for attorney fees. The default cases simply do not apply here.

Nor does the Opinion apply a rule of law to produce a different result than that in any of the cited cases. The cases stand for the proposition that a litigant who is subject to a default or default judgment because of excusable mistake or overreaching by an opponent will be afforded an opportunity to explain the circumstances and have the default or default judgment set aside. Here, however, there was no excusable neglect or overreaching. Ms. Krock was properly noticed

and well aware of the hearing and her obligation to appear or take appropriate and timely steps in her own defense. She simply failed to do so. And, as the Opinion explains, her accusations regarding State Farm's counsel, her own counsel, her family connections, and the trial court's judicial assistant are without record support and should be disregarded because, again, the facts in those cases are completely distinguishable.

CONCLUSION

For the foregoing reasons, the Court should find that it is without conflict jurisdiction.

CERTIFICATE OF SERVICE

We certify that a correct copy of this document was furnished by U.S. Mail to the persons on the attached Service List this ____ day of May 2012.

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

Nancy W. Gregoire, Esq.
Florida Bar No. 475688
nwg@kblglaw.com
KIRSCHBAUM, BIRNBAUM, LIPPMAN & GREGOIRE, PLLC
1301 East Broward Boulevard, Suite 230
Fort Lauderdale, Florida 33301
Telephone: 954.617.2300; Facsimile: 954.617.2308

SERVICE LIST

Diane Krock
8025 N.W. 120th Street
Reddick, Florida 32686
Tel: 352.895.5687

Dorothy Sims, Esq.
dcs@ocalaw.com
Sims & Stakenborg, P.A.
Post Office Box 3188
Ocala, Florida 34478
Tel: 352.629.0480; Fax: 352.629.0421