SUPREME COURT
STATE OF FLORIDA

DAYSPRING HEALTH, LLC, a Florida Limited Liability Company,

Petitioner,

Case No.: SC20-1203
L.T. Case No.: 1D18-4059

v.

OKEFENOKE RURAL ELECTRIC MEMBERSHIP CORPORATION,

Respondent.

JURISDICTIONAL ANSWER BRIEF

On Petition for Discretionary Review
From a Decision of the First District Court of Appeals

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PREFACE

Petitioner, Dayspring Health, LLC, will be referred to as "Petitioner" or "Dayspring."

Respondent, Okefenoke Rural Electric Membership Corporation, will be referred to as "Respondent" or "OREMC."

STATEMENT OF THE CASE AND FACTS

The case and facts are summarized in the first two pages of the First District's opinion in this case, which is found in the Appendix to Petitioner's Amended Brief on Jurisdiction ("Appx"). These are the only facts relevant to a determination on discretionary conflict jurisdiction. *See Reaves v. State*, 485 So.2d 829, 830 n. 3 (Fla. 1986) ("The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. … Thus, it is pointless and misleading to include a recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here.") Nonetheless, the Petitioner's Amended Brief on Jurisdiction contains several record citations and factual assertions beyond the four corners of the First District decision.

SUMMARY OF ARGUMENT

Dayspring argues that OREMC had the burden to prove the existence of a prescriptive easement, including the element of adversity; but according to

Dayspring, the First District improperly placed a burden on Dayspring to prove the use of the property was permissive, and not adverse. That is simply not the case.

The First District correctly recognized that "[a]ll evidence presented at trial, including from all of OREMC's witnesses," indicated that the poles had been "inadvertently placed" outside of the public right-of-way on private property, "but both OREMC and all of the property owners mistakenly believed that the poles were on the right-of-way until over fifty years after their placement." (Appx. p. 2) Despite the property owners being unaware the poles were on their property, Dayspring argued that the poles were there with permission; thus, according to Dayspring, OREMC's use of the property was not adverse.

The First District rejected Dayspring's argument, explaining that "[t]he suggestion that these owners consented to the presence of power poles – that they did not believe were on their land – is not supported by any evidence and contrary to logic." (Appx. p. 3-4) "Landowners cannot be unaware that their property is being used and simultaneously be consenting to this use." (Appx. p. 4)

The rejection of this argument does not place a burden on Dayspring. Petitioner would have this Court read into the First District's decision a ruling on a question of law that simply is not there and cannot be inferred. The First District correctly applied the law to the facts and arguments presented, and there is no conflict with any existing precedent.

ARGUMENT

I. DISCRETIONARY CONFLICT JURISDICTION IS LIMITED.

It has long been recognized that "the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed." *Jenkins v. State*, 385 So.2d 1356, 1357 (Fla. 1980). "It was never intended that the district courts of appeal should be intermediate courts." *Id.*

This Court "may" (but is not required to) review a district court decision "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." Art. V, § 3(b)(3), Fla. Const. "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." *Reaves*, 485 So.2d at 830.

With regard to the requirement of "express" conflict, this Court has noted "[t]he dictionary definitions of the term 'express' include: 'to represent in words'; 'to give expression to.'" *Jenkins*, 385 So.2d at 1359. Thus, "inherent" or "implied" conflict is not a basis for conflict jurisdiction. *Dept. of Health and Rehab. Services v. Nat'l Adoption Counseling Service, Inc.*, 498 So.2d 888, 889 (Fla. 1986).

There must also be "direct" conflict with another decision. "Article V uses the words 'direct conflict' to manifest a 'concern with decisions as precedents as opposed to adjudication of the rights of particular litigants.'" *Mystan Marine, Inc. v. Harrington*, 339 So.2d 200, 201 (Fla. 1976) (quoting *Ansin v. Thurston*, 101

So.2d 808, 811 (Fla. 1958)). Conflict jurisdiction does not turn upon the correctness of the district court's decision, or whether this Court would have made the same factual determinations or ultimate decision, but rather whether the decision creates conflicting precedent. *Mancini v. State*, 312 So.2d 732, 733 (Fla. 1975); *Kyle v. Kyle*, 139 So.2d 885, 887 (Fla. 1962).

The conflict must also be "on the same question of law." This Court has said "the district court decision under review 'must contain a statement or citation effectively establishing a point of law upon which the decision rests.'" *Tippens v. State*, 897 So.2d 1278, 1280 (Fla. 2005) (quoting *Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988)). The "conflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter. If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise." *Kyle*, 139 So.2d at 887 (internal citation omitted).

II. THERE IS NO CONFLICT WITH *DOWNING V. BIRD*.

As an initial matter, it should be noted that *Downing v. Bird*, 100 So.2d 57 (Fla. 1958) is distinguishable from this case. It involved the paving of a disputed roadway, not electric utility lines and poles. It also involved a claim of adverse possession, not a prescriptive easement; and while the concepts are similar, they are not identical. *See Hunt Land Holding Co. v. Schramm*, 121 So.2d 697, 700

(Fla. 2d DCA 1960) (citing *Downing v. Bird* and explaining that acquiring title by adverse possession requires actual and exclusive possession, while a prescriptive easement only requires use of property, which "may be in common with the owner or the public.")[1]

With regard to the element of adversity, *Downing v. Bird* states that:

> the use must be adverse under a claim of right and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner. In both rights the use or possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use, for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment.

Downing, 100 So.2d at 64.

Nothing in the First District's decision conflicts with this. To the contrary, the First District's decision cites to and is entirely consistent with *Downing v. Bird*, as well as subsequent cases that have applied the principles articulated in it.

One such case with operative facts very similar to this case is *Gay Bros. Const. Co. v. Florida Power & Light Co.*, 427 So.2d 318 (Fla. 5th DCA 1983). There, an electric utility had acquired an express easement and erected poles and lines across property in the 1920's, but mistakenly located poles outside of the easement area. Like Dayspring, the property owner sued the utility decades later

[1] Dayspring's argument that adversity is negated by "dual use" of the property by landowners and OREMC is inaccurate, and in any event, it does not demonstrate conflict jurisdiction. Dayspring also makes this argument with reference to factual assertions and issues that are not found in the First District's decision.

and argued that the element of adversity was missing because the poles were placed on its property by mistake. The Fifth District rejected this argument, and after quoting the language from *Downing v. Bird* quoted above, explained:

> Assuming that [the utility] initially intended to place its power line within its easement, it is clear from the record before us that the utility intended to put the poles where they were placed and continuously maintained them where they were. Thus, there was an intention to claim the easement where the lines were placed, notwithstanding their placement by mistake.
>
> Prescriptive rights are acquired under the same principles as are rights acquired by adverse possession. Where lands are occupied under the mistaken belief that the occupier has title, so that the occupation is under a claim of right, the holding is adverse.

Gay Bros., 427 So.2d at 320 (emphasis added).

That is precisely the situation in this case, as "[a]ll evidence presented at trial, including from all of OREMC's witnesses," indicated that the poles had been "inadvertently placed" outside of the public right-of-way on private property, but "both OREMC and all of the property owners mistakenly believed that the poles were on the right-of-way until over fifty years after their placement." (Appx. p. 2)

Dayspring relies on the presumption of permissive use, but the presumption is rebuttable. In *Hunt Land Holding Co. v. Schramm*, the Second District cited *Downing v. Bird*, and then explained:

> However, the presumption of permissive use or possession is not conclusive and is ineffectual in the face of facts which cause its dissipation.

> Declarations or assertions by a claimant are not essential to possession or use under claim of right; rather, the adverse character of use is a question discoverable and determinable from all the circumstances of the case.
>
> Thus we see that the presumption of permissive use may be overcome by knowledge imputed to the owner of adverse use by the party claiming the prescriptive right, that it is not necessary that this be done by declarations or assertions but it may be effectuated by use inconsistent with the owner's use and enjoyment of his lands, and, further, that the use need not be exclusive but may be in common with the owner or the public.

Schramm, 121 So.2d at 700-01 (emphasis added).

Again, "[a]ll evidence presented at trial, including from all of OREMC's witnesses," demonstrated how the poles came to be on Dayspring's property – without permission from, and adverse to the interests of, the property owners.[2] The the presumption of permissive use was rebutted and rendered ineffectual.

The First District did not shift a burden to Dayspring. It reviewed the record, considered the arguments made by the parties, and rejected Dayspring's argument as "not supported by any evidence and contrary to logic." That decision was correct and it does not create any sort of conflict with *Downing v. Bird*.

III. THERE IS NO CONFLICT WITH DISTRICT COURT CASES.

Dayspring next argues that the First District's decision in this case conflicts

[2] Dayspring's assertion that OREMC "lacked evidence to establish adversity" is not accurate, and in any event, a review of the record or reweighing of evidence is not proper in evaluating conflict jurisdiction. *See, e.g. Reaves*, 485 So.2d at 830; *Withlacoochee River Elec. Co-op, Inc. v. Tampa Elec. Co.*, 158 So.2d 136, 137 (Fla. 1963).

with decisions of other district courts on the issue of adversity. Dayspring relies primarily on *Crigger v. Florida Power Corp.*, 436 So.2d 937 (Fla. 5th DCA 1983), and attempts to cast the facts in *Crigger* as similar to this case. But Dayspring omits a key aspect of *Crigger* that is pivotal to the decision.

In *Crigger* the utility's use of property was not adverse because it received express permission from one co-owner of the property. Because the utility was on the property with permission, even if from only one of the owners, its use was not adverse and could not ripen into a prescriptive easement. The court said:

> The non-exclusive use of land by one cotenant is consistent with and is not adverse to the ownership rights of the other cotenants. Likewise the non-exclusive use of land by a non-owner, such as the power company, claiming under permission and consent given by one cotenant is consistent, and is not adverse to, the ownership rights of the other cotenants. A cotenant does not have a cause of action against another cotenant, or against one using the land under permission given by a cotenant, for a non-exclusive use of the land.

Crigger, 436 So. 2d at 948.

This is a glaring omission from Dayspring's analysis of *Crigger*, which is clearly distinguishable on this basis. No property owner gave OREMC permission to be on their land, and there is no conflict with *Crigger*.

Dayspring also suggests that *Crigger* overruled *Gay Brothers*, and cites to the dissent in *Crigger* to support its argument. But conflict jurisdiction cannot be established through a dissenting opinion (*Reaves*, 485 So.2d at 830), or from conflicting decisions by the same district court (*Little v. State*, 206 So.2d 9 (Fla.

1968)), or from conflict in decisions cited as authority (*Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980)). Furthermore, *Crigger* did not overrule *Gay Brother*s; it was decided differently based on different facts. In *Crigger* there was permission to use the property; in *Gay Brothers* there was not.

The other district court cases cited by Dayspring are easily distinguishable and do not present any sort of conflict. None of them involved overhead power lines and poles like this case,[3] and that is a critical distinction. Overhead power lines and poles are "so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner." *Downing v. Bird*, 100 So.2d at 64. *See also*, *Fla. Power & Light Co. v. Rader*, 306 So. 2d 565, 567 (Fla. 4th DCA 1975) ("It is true that at the time appellee [landowner] inspected the premises and observed the presence of the electric power transmission lines he was uncertain as to the boundary line of the property and, therefore, did not then know that the transmission lines were on the property. . . . The fact remains, however, that the electric power transmission lines were on the property and were open, obvious and visible. Appellee [landowner] was charged with notice of that which was there to be seen, irrespective of whether he actually knew of such possession."); *Sarasota Welfare Home, Inc. v. City of Sarasota*, No. 92-1434

[3] *Dana v. Eilers* involved the use of a portion of a driveway. *Stackman v. Pope* involved a boat ramp. *Suwanee River Water Mgmt. Dist. v. Price* does not explain the nature of the disputed property. *Phelps v. Griffith* was a dispute over an unpaved road. None of these cases involved facts similar to this case.

CA01, 1997 WL 374688, at *12 (Fla. Cir. Ct. Feb. 10, 1997) ("[P]ower poles, transformers, and power lines, whose conspicuous presence above ground is a constant statement of an adverse claim.").

Finally, Dayspring's argument that OREMC "admitted" that there is no evidence to demonstrate adversity is untrue, and regardless, it does not demonstrate conflict. "All evidence presented at trial, including from all of OREMC's witnesses," demonstrated how the poles came to be on Dayspring's property – without permission from, and adverse to the interests of, the property owners. But because the poles were placed on the property several decades ago, direct evidence was limited. However, "direct evidence from a witness with personal knowledge of the events sixty years ago is not required." (Appx. p. 4 (citing *Schramm*, 121 So.2d at 700).) *See also Nielsen v. City of Sarasota*, 117 So.2d 731, 733 (Fla. 1960) ("a fact may be established by circumstantial evidence as effectively and as conclusively as it may be proved by direct positive evidence.")

CONCLUSION

The First District did not place a burden on Dayspring and its decision in this case does not conflict with any of the cases cited by Petitioner. The decision does not create conflicting precedent; it adjudicated the rights of the litigants in the case. There is no basis for the invocation of discretionary conflict jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy was served electronically through the Florida e-Portal Filing System to the following on September 23, 2020.

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CERTIFICATE OF TYPE SIZE AND STYLE

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