

IN THE SUPREME COURT OF FLORIDA

JBE ASSOCIATES, a general
partnership,

CASE NO. SC03-227

Petitioner/Defendant,

vs.

BAL BAY REALTY, LTD., a Florida
limited partnership,

Respondent/Cross-defendant.

PETITIONER'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL
CASE NO. 4D01-2781

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PREFACE

Petitioner, JBE Associates, who was a defendant in the trial court and Appellee in the Fourth District Court of Appeal, will be referred to in this proceeding as "JBE."

Respondent, Bal Bay Realty, Ltd., who was a defendant in the trial court and Appellant in the Fourth District Court of Appeal will be referred to in this proceeding as "BAL BAY."

STATEMENT OF THE CASE AND OF THE FACTS

This case arises from a Broward County Circuit Judge's order awarding attorneys' fees to JBE as the prevailing party in a declaratory judgment/breach of contract case. On appeal, BAL BAY argued that the trial court's order should be reversed because of "unreasonable delay" in the filing of JBE's Motion for Attorney's Fees. That same argument had been made to, and rejected by the trial judge, who, after a full evidentiary hearing, made findings of fact that "there was a reasonable basis and explanation for the time delay in the filing of JBE's motion for attorney's fees," and "there was no prejudice nor surprise to BAL BAY that JBE's attorneys' fees were being sought." *Bal Bay Realty, Ltd. v. Pepsomers Corporation, et. al.*, 833 So.2d 320, 323 (Fla. 4th DCA 2003).

A divided court reversed the attorneys' fee award, holding that the trial judge had abused her discretion in rejecting BAL BAY'S claim of unreasonable delay. The decision, filed January 8, 2003, replaced a September 25, 2002, non-final opinion that was withdrawn after consideration of JBE's motions for rehearing, rehearing *en banc* and certification. In the withdrawn opinion, the court had held that JBE's delay was unreasonable *as a matter of law*, notwithstanding the trial court's factual findings that JBE's explanation for the delay was reasonable and that BAL BAY was neither prejudiced nor surprised as a result.

In withdrawing its September 25, 2002 opinion, the court explained:

We write on rehearing only to clarify that this court has not announced any bright-line time requirement as to when a post-judgment motion for attorney's fees should be considered untimely. In this, we agree with *Shipley v. Belleair Group, Inc.*, 729 So.2d 28, 30 (Fla. 2d DCA 2000), that a determination of whether a post-judgment motion for attorney's fees has been made in a reasonable time must be made based upon "all the facts and circumstances of a particular case." *Bal Bay Realty, Ltd.*, 833 So.2d at 320, fnte 1.

Although the court receded from its holding that the delay was unreasonable "as a matter of law," it nevertheless reversed the trial court's attorney's fees award, holding (with a written dissent) that "under the facts and circumstances of this case. . . the trial court abused its discretion in finding that an eight-month delay was reasonable." In his dissent, Shahood, J., opined:

I would affirm the trial court's award of attorney's fees and costs. Even though the litigation was final as to Bal Bay and JBE on their cross-claims, it was still pending as to JBE and other parties. Because this was a highly complex and lengthy case, I agree with the trial court's conclusion that, "there was a reasonable basis and explanation for the time delay in the filing of JBE'S motion for attorney's fees." *Bal Bay Realty, Ltd.* , 833 So.2d at 324.

It is in this posture – a divided court expressing differing opinions as to the propriety of the trial court's discretionary ruling – that JBE seeks review based upon express and direct conflict with decisions of this Court and other district courts of appeal.

SUMMARY OF THE ARGUMENT

The Court should grant discretionary review because the district court's holding

created express and direct conflict with *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980) and *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976), among other cases, by substituting its judgment for that of the trial court on a matter committed to the trial court's sound discretion, and in misapplying the abuse of discretion standard of review. The conflict is evident within the four corners of the opinion, in that notwithstanding the express disagreement between the majority and dissenting judge as to the propriety of the trial judge's discretionary ruling, the court reversed the trial court's order as an "abuse of discretion." In so holding, the divided court failed to apply the "reasonableness test" established by this Court in *Canakaris* (if reasonable persons could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion).

Furthermore, the court's discussion of the basis upon which it reversed the trial court's order reflects that it simply took a different view of the evidence presented to the trial court and substituted its judgment for that of the trial judge. In re-evaluating the evidence, the court disregarded the fact that the trial court's findings were supported by competent evidence, thereby creating conflict with *Shaw* (it is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test. . .is whether the judgment of the trial court is supported by competent evidence).

ARGUMENT

The Court should grant discretionary review under Art. V., § 3(b)(3), Fla. Const., because the Fourth District Court of Appeal's decision in *Bal Bay Realty, Ltd. v. Pepsomers Corporation, et. al.*, 833 So.2d 320 (Fla. 4th DCA 2003), directly and expressly conflicts with this Court's decisions in *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980) and *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976), among other cases.

This Court has discretionary jurisdiction to review a district court decision that expressly and directly conflicts with a decision of this Court or another district court of appeal on the same point of law. *Art. V., § 3(b)(3), Fla. Const.* Such conflict exists in this case because the court's opinion expressly and directly conflicts with *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980) and *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976), among other cases. In reversing the trial court's order awarding JBE attorney's fees in the trial and appellate courts,¹ the district court misapplied the abuse of discretion standard of review, and substituted its judgment for that of the trial judge on a matter committed to the trial judge's sound discretion. The conflict is evident within the four corners of the opinion, in that, despite the express disagreement between the majority and dissenting judge as to the propriety of the trial judge's discretionary ruling, the court reversed the trial court's order as an abuse of discretion.

¹Appellate attorney's fees were awarded to JBE by another panel of the Fourth District Court of Appeal for the successful defense of an earlier appeal, upon JBE's *timely* filed motion.

In concluding that the trial judge abused her discretion, the court failed to apply the "reasonableness test" established in *Canakaris*, in which this Court held:

Judicial discretion is defined as: the power exercised by courts to determine questions to which no strict rule of law is applicable, but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court. . . We cite with favor the following statement of the test for review of a judge's discretionary power:

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Delno v. Market Street Railway Co.*, 124 F2d 965,967 (9th Cir. 1942). In reviewing true a discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge, and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this

test of reasonableness. *Canakaris v. Canakaris*, 382 So.2d 1197, 1202.

In light of the fact that there was *no evidence* of surprise or prejudice to BAL BAY, the trial court cannot be said to have been "arbitrary, fanciful, or unreasonable" in finding, as a matter of fact, that there was no surprise or prejudice to BAL BAY.² Neither can it be said that the trial court's acceptance of counsel's explanation of the delay fails to "satisfy the test of reasonableness," if correctly evaluated in recognition of the trial judge's "superior vantage point" as trier of fact in this complicated and protracted litigation. The standard established by this Court in *Canakaris* is that discretion is abused only "when no reasonable man would take the view adopted by the trial court." *Canakaris, Id.*, at 1203. The fact that a dissenting judge on the district court stated that he agreed with the reasonableness of the trial court's conclusion, demonstrates that reasonable persons could (and did) differ as to the propriety of the trial judge's determination in this case. Accordingly, the court's holding that the trial court abused its discretion is expressly and directly in conflict with *Canakaris*, because the opinion, on its face, establishes that reasonable persons could differ as to the propriety of the trial judge's ruling.

This Court has accepted jurisdiction to resolve similar conflicts in the past. In

²The district court conceded this fact, stating, "[i]n the instant case, JBE had raised the issue of prevailing party attorney's fees throughout the lower court." *Bal Bay Realty, Ltd.*, 833 So.2d at 323.

Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980), this Court found conflict between the First District Court of Appeal's decision reversing a trial court's discretionary ruling on a motion for new trial and the decisions in *Castlewood Int'l Corp. v. LaFleur*, 322 So.2d 520 (Fla. 1975) and *Cloud v. Fallis*, 110 So.2d 669 (Fla. 1959). In quashing the district court's decision and reinstating the trial court's order, this court held:

The discretionary power to grant or deny a motion for new trial is given to the trial judge because of his direct and superior vantage point. . . In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980). As we stated in *Cloud* the ruling should not be disturbed in the absence of a clear showing that it has been abused, and there has been no such showing in the instant case. From this record the action of the trial judge was reasonable although reasonable men may differ.

In *Ford Motor Company v. Kikis*, 401 So.2d 1341 (Fla. 1981), this Court accepted jurisdiction to review a decision of the Fifth District Court of Appeal based on express and direct conflict with prior appellate decisions. The district court had reversed a trial court's discretionary ruling on a motion for new trial. In quashing the court's decision, this Court stated:

We have stated and restated the appropriate standard for district courts on review of a trial court's motion granting a new trial. The test is whether the trial court abused its "broad discretion." If reasonable men could differ as to the propriety of the action taken by the trial

court, then there is no abuse of discretion. See, *Baptist Memorial Hospital, Inc. v. Bell*, 384 So.2d 145 (Fla. 1980); *Cloud v. Fallis*, 110 So.2d 669 (Fla. 1959); *Rivera v. White*, 386 So2d 1233 (Fla. 3d DCA 1980). The district court's apparent failure to apply this standard requires that we quash the decision and remand. . .

Although the district court did not explicitly identify conflicting district court or supreme court decisions in its opinion in this case, the court's discussion of the basis upon which it reversed the trial court's order provides a sufficient basis for conflict review. See, *Ford Motor Company v. Kikis*, 401 So.2d 1341, 1342 (Fla.1981) (It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an "express" conflict under section 3(b)(3)). The district court's discussion of its reasoning in this case reflects that the court simply substituted its judgment for that of the trial judge through a *de novo* review and re-evaluation of the evidence, notwithstanding the fact that the trial court's express factual findings were supported by competent evidence. Thus, the district court concedes that "some minimal delay in filing the attorney's fees motions under the circumstances in this case may have been necessary," but nevertheless concludes, without elaboration, that "the trial court abused its discretion in finding that an eight-month delay was reasonable." *Bal Bay Realty, Ltd.*, 833 So.2d at 324. In so holding, the court created conflict with *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976), in which this Court held:

It is not the function of the appellate court to substitute its judgment

for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test as pointed out in (*Westerman v. Shell's City, Inc.*, 265 So.2d 43 (Fla. 1972)), is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject 'inherently incredible and improbable testimony or evidence,' it is not the prerogative of an appellate court, upon a *de novo* consideration of the record, to substitute its judgment for that of the trial court.

This Court has previously accepted jurisdiction pursuant to *Art. V, § 3(b)(3)*, Fla. Const., based on conflict with *Shaw*. See, *e.g.*, *Conner v. Conner*, 439 So.2d 887 (Fla.1983), wherein this Court held:

The district court of appeal created express and direct conflict with *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976) when it substituted its judgment for that of the chancellor on a matter clearly falling within the area for exercise of the chancellor's sound discretion. Because the trial judge's exercise of discretion was not clearly erroneous or inequitable, it should have been affirmed. . . In substituting its judgment for his, the district court exceeded the proper scope of appellate review. There is nothing about the circuit court judgment that called for such a disturbance by the district court. The decision of the district court should be quashed . . .

This limitation on the scope of appellate review is a firmly entrenched principle of Florida law, so that the court's opinion in *Bal Bay Realty, Ltd.* creates express and direct conflict with numerous other Florida appellate court decisions. See, *e.g.*, *Mesick v. Loeser*, 311 So. 2d 132 (Fla. 2d DCA 1975), *cert. den'd*, 328 So.2d 843 (Fla. 1976) (Where there is substantial competent evidence to sustain the actions of the trial court, a district court of appeal cannot substitute its opinion on the evidence, but must indulge every fact and inference in support of judgment), and *Florida Eastcoast*

Railway Co. v. Beaver Street Fisheries, Inc., 537 So.2d 1065 (Fla. 1st DCA 1989)

(We note the well settled principle that a trial court's findings of fact come to an appellate court clothed with a presumption of correctness, and will not be disturbed unless clearly erroneous or without any support in the record).

The Fourth District's conspicuous disregard of the limitation on the scope of appellate review of matters within the discretion of Florida's trial judges is of no small significance. Writing of the importance of the trial court's discretion remaining free from appellate interference, this Court in *Diffenderfer v. Diffenderfer*, 491 So.2d 265, 267 (Fla. 1986) said:

Our seminal decision of *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980), illustrates the vigilance with which this court has endeavored to safeguard that discretion.

See, also, *Castlewood Int'l Corp. v. LaFleur*, 322 So.2d 520, 522 (Fla. 1975) in which this Court said:

The judicial discretion of a trial judge is necessary to ensure the effective operation of our court system and the fair administration of justice. . . The trial judge is given this discretionary power because it is impossible to have a strict rule of law for every conceivable situation that might occur in the course of a judicial proceeding. A trial judge, in carrying out this discretionary authority, has the responsibility to see that justice prevails.

CONCLUSION

Based upon the foregoing, the Court should grant discretionary review under *Art. V, § 3(b)(3)*, Fla. Const., to resolve the express and direct conflict between the Fourth District Court's decision and *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980) and *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976), among other cases. To do otherwise will result in confusion over the proper scope of appellate review of trial court discretionary rulings, erode the discretionary authority of Florida's trial judges, and thereby undermine the effective operation of the court system and the fair administration of justice.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: E. COLE FITZGERALD, III, ESQ., 515 North Flagler Drive, Suite 900, P. O. Box 3795, West Palm Beach, Florida 33402, CARYN CARVO, ESQ., Carvo & Emery, One Financial Plaza, Suite 2020, Fort Lauderdale, FL 33394, RICHARD HOFFMAN, ESQ., Leeds Colby & Paris, P.A., 2950 SW 27th Avenue, Suite 300, Miami, FL 33133, ROBERT KLEIN, ESQ., Stephens, Lynn, Klein & McNicholas, P.A., Two Datan Center, PH-I & PH-II, 9130 South Dadeland Boulevard, Miami, Florida 33156, ANDREW T. LAVIN, ESQ., 2699 Stirling Road, Suite B-100, Fort Lauderdale, FL 33312, and DAVID S. ROMANIK, ESQ., P. O. Box 13350, Hialeah, FL 33013-3500, this February 21, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this, Petitioner's Brief on Jurisdiction, complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Appendix to Petitioner's Brief on Jurisdiction has been furnished by U.S. Mail to: E. COLE FITZGERALD, III, ESQ., 515 North Flagler Drive, Suite 900, P. O. Box 3795, West Palm Beach, Florida 33402, CARYN CARVO, ESQ., Carvo & Emery, One Financial Plaza, Suite 2020, Fort Lauderdale, FL 33394, RICHARD HOFFMAN, ESQ., Leeds Colby & Paris, P.A., 2950 SW 27th Avenue, Suite 300, Miami, FL 33133, ROBERT KLEIN, ESQ., Stephens, Lynn, Klein & McNicholas, P.A., Two Datan Center, PH-I & PH-II, 9130 South Dadeland Boulevard, Miami, Florida 33156, ANDREW T. LAVIN, ESQ., 2699 Stirling Road, Suite B-100, Fort Lauderdale, FL 33312, and DAVID S. ROMANIK, ESQ., P. O. Box 13350, Hialeah, FL 33013-3500, this February 21, 2003.

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