IN THE SUPREME COURT OF FLORIDA

JOY CHATLOS D'ARATA, etc., Petitioner, vs. THE CHATLOS FOUNDATION, INC., et al. Respondents.	Case No. SC04-2097 DCA Cases Nos. 5D02-3330 & 5D02-3590 (Consolidated Appeals)

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner Joy Chatlos D'Arata, as a director of the Respondent Chatlos Foundation, Inc., attempted to stop its violation of numerous federal and state laws from within. When her voice was ignored, she "blew the whistle" by filing this suit. Due to the Foundation's serious and flagrant violations of applicable laws, it faces exposure to over $14 million of IRS excise taxes, in addition to state taxes, for its *annual* payment of an undisclosed $188,640 to William Chatlos, and for its *annual* payment of $143,750 and $152,000 per year to his sisters for not working (plus another undisclosed $29,400), and for providing "discretionary funds" of $100,000 to William and $50,000 each to his sisters, etc. (R-12-108.)

Ms. D'Arata was then wrongfully terminated. The Foundation without explanation cut off her salary in October 2001, and later cut off her medical insurance as well as that of her diabetic husband and child. It then threatened her with prosecution for extortion, (R-153), and attempted to intimidate her with numerous pleadings filed the very day the complaint was filed, (R-70, 86). The Foundation has done everything possible to try to keep her from bringing this suit, and has spent over a ***half-million dollars*** in legal fees on behalf of Respondents. As the trial court noted, Respondents are doing all they can, using Foundation funds, to "smother" the whistle-blower. (R-1314.)

The trial court awarded indemnification to Ms. D'Arata for her legal fees

and expenses, holding that the result was the same under both Florida and New York law.[1] (R-1319.) Respondents appealed that decision to the Fifth District in two consolidated appeals. Ultimately, two of the three-judge Fifth District panel held that New York law applied because indemnification fit under the "internal affairs" exception to the general Florida rule that qualified foreign corporations must abide by Florida law. *See D'Arata v. Chatlos*, 29 Fla. L. Weekly D1791. The decision was handed down on August 6, 2004. The motion for rehearing was denied, and the decision was therefore rendered, on October 1, 2004. Petitioner timely filed her Notice to Invoke Discretionary Jurisdiction, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), on October 26, 2004.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review a district court's decision which expressly and directly conflicts with a decision of another district court or this Court on the same issue of law. Fla. Const. Art. V., §3(b)(3). The decision herein is sufficient to invoke subject matter jurisdiction because the "opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests," *The Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988), and that point expressly and directly conflicts with the Fifth District's decision in *De*

[1] The Foundation was incorporated in New York in 1953, though its offices, its business, and almost all its directors and employees live in Florida (none in New York).

Saad v. Banco Industrial de Venezuela, 843 So. 2d 953 (Fla. 3d DCA). As a result of this conflict, and because an important principle of corporate law is involved, this Court should exercise its discretion to decide this case.

Both *D'Arata* and *De Saad* involve foreign corporations attempting to avoid the indemnification provision found in § 607.0850, Fla. Stat. Both foreign corporations were qualified to do business in Florida, resulting in identical requirements that both play by the same rules as Florida corporations—the "level playing field" statutes of § 607.1505 (for-profit) and § 617.1505 (nonprofit). The Third District told the corporation in *De Saad* that its indemnification responsibilities were determined by Florida law just like domestic corporations. The Fifth District told the corporation in *D'Arata* that it did not have to play by the Florida rules, but could instead avoid indemnification under New York law.

A conflict is readily evident, and this Court should decide once and for all the scope of this "internal affairs" loophole before it becomes a superhighway by which foreign corporations enjoy the benefits of Florida domicile without having to play by the same rules and on a level playing field.

ARGUMENT

I. THIS COURT CLEARLY HAS SUBJECT MATTER JURISDICTION OVER THE DECISION APPEALED HEREIN UNDER ARTICLE V., §3(B)(3) OF THE FLORIDA CONSTITUTION.

This Court has discretionary jurisdiction to review a district court's decision which expressly and directly conflicts with a decision of another district court on

the same issue of law. Fla. Const. Art. V., §3(b)(3). Such jurisdiction is based on a conflict in district court decisions regarding legal principles appearing on the face of the decision. *See Rosen v. Fla. Ins. Guar. Ass'n*, 802 So. 2d 291 (Fla. 2001).

This Court recognizes that "[i]t 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." *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981). In fact, "it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result." *The Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988). Instead, for subject matter jurisdiction to exist, the "opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests." *The Florida Star*, 530 So. 2d at 288.

In this case, Mrs. D'Arata seeks further review, based on the express, direct conflict between the Fifth District's decision herein and the Third District's decision in *De Saad v. Banco Industrial de Venezuela*, 843 So.2d 953 (Fla. 3d DCA 2003), as explained below. The Fifth District's decision involved the trial court's indemnification award to Ms. D'Arata against respondent, a foreign corporation, pursuant to § 607.0850, Fla. Stat. The Fifth District then stated that "[r]eview of the lower court's order requires us to consider the standard of review

of that order, whether Florida or New York law applies, and the requirements of the law of the appropriate state." *D'Arata*, 13 Fla. L. Weekly D1791.

In reaching its conclusion on the conflict of laws issue, the Fifth District cited § 617.1505, which governs the extent to which Florida law applies to qualified foreign corporations. Subsection (2) of that statute generally establishes a "level playing field" for domestic and foreign corporations, which means foreign corporations have "the same but no greater" rights, duties, restrictions, etc., as domestic corporations have under Florida law. Subsection (3) essentially acts as an exception of the general principle that this Act does not regulate the "internal affairs" of a foreign corporation. It is this subsection that the Fifth District quoted in full and relied on to allow respondent to escape the provisions of Florida indemnification duties. The result is that the Fifth District has created an "internal affairs" loophole regarding indemnification requirements, while the Third District allows no such loophole, and instead applies and enforces Florida indemnification law on qualified foreign corporations. Thus, the conflict sufficient to provide jurisdiction is clearly met. Indeed, this Court's exercise of jurisdiction is both permitted and desperately needed to resolve the conflict between these decisions.

II. THE THIRD DISTRICT HELD IN *DE SAAD* THAT QUALIFIED FOREIGN CORPORATIONS DO NOT ESCAPE INDEMNIFICATION WHICH FLORIDA REQUIRES OF DOMESTIC CORPORATIONS BECAUSE OF THE "LEVEL PLAYING FIELD" PROVISION IN SECTION 607.1505(2), FLA. STAT.

In a substantially similar case involving a foreign corporation qualified to do business in Florida, the Third District reached the opposite conclusion of the Fifth District. In *De Saad v. Banco Industrial de Venezuela*, 843 So. 2d 953 (Fla. 3d DCA 2003), the Third District decided that the scope and extent of a foreign corporation's obligation to indemnify its directors was governed by Florida's indemnification provision, § 607.850, Fla. Stat. By virtue of the foreign multinational corporation's presence within Florida and its qualification to do business in Florida, the Third District held that "pursuant to Section 607.1505(2), [the foreign corporation] assumes the same liabilities imposed upon a domestic corporation." *De Saad*, 843 So.2d at 954.

Section 607.1505 governs the responsibilities of foreign, for-profit corporations and states as follows:

> **Effect of certificate of authority**—
> (1) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the Department of State to suspend or revoke the certificate as provided in this act.
> (2) A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by this act is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.
> (3) This act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.

Despite the foreign corporation's myriad arguments to the contrary, the Third

District clearly held that indemnification of directors and officers is and must be governed by § 607.0850 since, as a foreign corporation qualified to do business, it has "the same but no greater privileges as, and…is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character," pursuant to subsection 607.1505(2).

Ultimately, the Third District reversed the judgment dismissing de Saad's indemnification claim and "remanded for entry of judgment on the pleadings in de Saad's favor on the limited basis that Section 607.0850 is applicable to BIV Miami as a foreign corporation operating under a valid certificate of authority pursuant to Section 607.1505(2), Florida Statutes, and for further proceedings consistent herewith." *De Saad*, 843 So.2d at 955.

III. IN *D'ARATA*, THE FIFTH CIRCUIT HELD UNDER A VIRTUALLY IDENTICAL STATUTE THAT A QUALIFIED FOREIGN CORPORATION ESCAPES INDEMNIFICATION WHICH FLORIDA REQUIRES OF DOMESTIC CORPORATIONS BECAUSE THE "LEVEL PLAYING FIELD" PROVISION IN SUBSECTION 617.1505(2) IS SUPPOSEDLY TRUMPED BY SUBSECTION 617.1505(3), WHICH EXEMPTS CERTAIN "INTERNAL AFFAIRS" FROM THE STATUTE'S PURVIEW.

The Fifth District in this case considered virtually identical relevant statutes, the only difference being that this case involved a nonprofit corporation rather than a for-profit corporation. The text of Section 617.1505, Fla. Stat., states:

> **Effect of certificate of authority—**
> (1) A certificate of authority authorizes the foreign corporation to which it is issued to conduct its affairs in this state subject, however, to the right of the

> Department of State to suspend or revoke the certificate as provided in this act.
> (2) A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by this act is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.
> (3) This act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to conduct its affairs in this state.

As is readily apparent, § 617.1505 is identical to § 607.1505, with only the for-profit term "transact business" having been replaced in two places by its nonprofit counterpart, "conduct its affairs." Examining this virtually identical statute's impact on precisely the same issue and operative statute, Section 607.0850[2], two of the three Fifth District judges in this case came to a decision that expressly and directly conflicts with the Third District in *De Saad*.

The Fifth District was well aware of the Third District's holding in *De Saad* that subsection (2) of the "level playing field" statutes controlled indemnification disputes, as is evident from the dissent, which raised the very conflict petitioner presents here. However, rather than rebutting the dissent's or *De Saad*'s logic, the Fifth District simply quoted subsection (3), quoted a Ninth Circuit (federal) case[3], and stated, "Because the Foundation was incorporated in New York, we find that based upon section 617.1505(3) and the federal case law interpreting 'internal

[2] The operative statute governing indemnification is precisely the same for for-profit and nonprofit corporations, § 607.0850, by virtue of § 617.0831.

affairs,' New York law would apply in the instant case." *D'Arata*, 29 Fla. L. Weekly D1791 (emphasis added).

IV. AS JUDGE SHARP'S DISSENT BELOW RECOGNIZED, THE APPLICATION OF THE "LEVEL PLAYING FIELD" PROVISION IN *D'ARATA* AND *DE SAAD* SHOULD BE INTERPRETED CONSISTENTLY, AND RESOLUTION OF THIS CONFLICT IS NECESSARY TO PROPERLY GUIDE FLORIDA CORPORATE LAW.

The serious conflict between *De Saad* and *D'Arata* is both straightforward and compelling. Identical statutes must not reach opposite conclusions.

A. Respondents' arguments over the circumstances under which indemnification should be awarded are presently irrelevant because they address the merits of this case (indemnification under section 607.0850), but petitioner's claim of express and direct conflict merely involves the "level playing field" provision's application to foreign corporations where indemnification is at issue.

Respondents have argued that the conflict with *De Saad* is illusory because the indemnification claims of that officer arose only as a criminal defendant. Such arguments do not affect this Court's jurisdiction, but instead address the merits of the underlying indemnification claim itself. More to the point, *De Saad* did not involve any award of indemnification to appellant. Rather, *De Saad* squarely addressed whether the Florida indemnification statute applied to and governed appellant's claims. The Third District ruled that it did, and its reason was that the level playing field provision required qualified foreign corporations to play by Florida's rules—per §607.1505. The Fifth District herein addressed both the

[3] Incidentally, this Ninth Circuit case has long been abrogated by Cal. Corp. Code

interpretation of the level playing field requirement and the award of indemnification, but it is only the former that impacts the jurisdiction of this Court.

B. Arguing that no conflict exists because subsection 607.1505(3) was not addressed in *De Saad* is a classic example of missing the forest for the trees.

Respondent has also argued that the court in *De Saad* "had no occasion to address Section 607.1505(3)," and hence the decisions do not conflict. Such arguments miss the point, which is that the law should be a consistent guide for a diligent jurist attempting to apply the law. There is no question that a jurist reviewing *De Saad* or *D'Arata* for guidance concerning the application of Florida indemnification provisions to qualified foreign corporations would reach opposite conclusions. If the judge read only *De Saad*, he should rule that the foreign corporation must indemnify an officer or director to the extent required under § 607.0850. If the judge read only *D'Arata*, he should rule that qualified foreign corporations are not required to abide by the Florida indemnification provision in § 607.0850 because indemnification is an "internal affair" of the corporation.

CONCLUSION

Respondent prays that this court will exercise its discretionary review and hear the merits of this dispute.

Respectfully submitted this 4th day of November, 2004.

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§ 2115, and is no longer good law.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served upon counsel for all parties at interest in this case by transmitting a true and exact copy of said this pleading by facsimile, and also by placing a true and exact copy of said this pleading in Federal U.S. Express Mail to said counsel prepaid at the following addresses:.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

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APPENDIX