

IN THE SUPREME COURT OF FLORIDA

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Case Number: SC04-441  
3D DCA CASE NO. 3D03-2490  
L.T. CASE NO. 02-15536C A(05)  
11<sup>th</sup> Judicial Circuit in and for Miami-Dade County

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VERYSSELL-HOLDING, LLC, etc. et. al.,

PETITIONERS,

vs.

SERGEI TSUKANOV, etc. et. al.,

RESPONDENTS,

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APPEAL FROM THE THIRD DISTRICT COURT OF APPEALS

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**JURISDICTIONAL BRIEF OF RESPONDENTS**

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**CASES**

*Florida Greyhound v. West Flagler Association*,  
347 So.2d 408 (Fla. 1977) . . . . . 5

*Kyle v. Kyle*, 139 So.2d 885 (Fla. 1962) . . . . . 5

**RULES**

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Florida Rule of Civil Procedure 1.061(g) . . . . . 4, 6

## I. INTRODUCTION

On March 2, 2004, the Third District Court of Appeals affirmed the decision of the Circuit Court for Miami-Dade County dismissing this lawsuit under the doctrine of *forum non conveniens*. Despite the fact that two lower courts have already considered and adjudicated this issue, Petitioners now seek discretionary review of the dismissal from this Court. Petitioners, however, fail to offer a valid jurisdictional basis for their request; they do not even claim in their brief that any one of the six grounds authorizing Supreme Court review is present in this case. Accordingly, Respondents ask that the Court deny Petitioner's request to exercise discretionary jurisdiction over this case.

## **II. SUMMARY OF ARGUMENT**

The discretionary jurisdiction of this Court may be invoked as to a court of appeals decisions only when one of the grounds set forth in Florida Rule of Appellate Procedure 9.030 is present. Because Petitioners do not even allege the existence of any such ground in this case, and because none is present, this Court should decline jurisdiction over the instant case.

### III. ARGUMENT

Florida Rule of Appellate Procedure 9.030, which defines the discretionary jurisdiction of this Court, provides in pertinent part as follows:

- (2) **Discretionary Jurisdiction.** The discretionary jurisdiction of the supreme court may be sought to review
  - (A) decisions of district courts of appeal that
    - (I) expressly declare valid a state statute;
    - (ii) expressly construe a provision of the state or federal constitution;
    - (iii) expressly affect a class of constitutional or state officers;
    - (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;
    - (v) pass upon a question certified to be of great public importance;
    - (vi) are certified to be in direct conflict with decisions of other district courts of appeal.

Petitioners claim that jurisdiction is appropriate under subdivision (a)(2)(A)(iv) of this Rule, which applies to District Court of Appeals decisions that "expressly and directly conflict

with a decision of another district court of appeal or of the supreme court . . . ." Petitioners' Jurisdiction Brief, p.4.<sup>1</sup>

Petitioners, however, fail to identify any "decision of another district court of appeal or of the supreme court" with which the challenged Decision conflicts.

Their request for jurisdiction instead appears to be based on what they describe as a "direct conflict between the Third District's ruling and the language and intent of Rule 1.061(g) . . . ."

Under Petitioners' novel construction of Rule 9.030, this Court's discretionary jurisdiction may ostensibly be invoked any time a party claims that a lower court misinterpreted or misapplied a rule of civil procedure. Surely this is not among the limited avenues contemplated for discretionary review by this state's highest Court.

This Court has previously noted that a court of appeals decision is "not reviewable as a matter of 'conflict'

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<sup>1</sup> Respondent notes that the remaining five bases for discretionary jurisdiction are not at issue: The Third DCA Opinion at issue did not (I) declare a state statute invalid; expressly construe a provision of the state or federal constitution; or (iii) expressly affect a class of constitutional or state officers. Furthermore, Petitioners failed to avail themselves of the certification procedure required for jurisdiction under grounds (v) and (vi).

jurisdiction unless . . . a direct conflict appear(s) on the face of the opinion." *Florida Greyhound v. West Flagler Association*, 347 So.2d 408 (Fla. 1977). In further elaborating on this basis for 'conflict' jurisdiction, this Court has held that:

The test of our jurisdiction in such situations is not measured simply by our view regarding the correctness of the Court of Appeal decision. On the contrary, jurisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony **with a prior decision of this Court or another Court of Appeal** on the same point, thereby generating confusion and instability among the precedents. We have said that 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.**

(Emphasis added). *Kyle v. Kyle*, 139 So.2d 885 (Fla. 1962).

Such pronouncements by this Court illustrate the futility of Petitioner's argument. They unquestionably contemplate a conflict between two appellate opinions, rather than a claim that the appealed decision misapplied a rule of civil procedure. Because no conflict exists between the instant case and another decision from a court of appeals or this Court, discretionary jurisdiction cannot lie.

Respondents further state that after a thorough review of case law in this state, they are unable to locate any decision in

which discretionary jurisdiction was exercised based on a conflict between the appealed decision and the "spirit and intent" of a rule of civil procedure. Petitioners have cited no such case in their brief.

Finally, Florida Rule of Appellate Procedure 9.120(d) provides that jurisdictional briefs shall be "limited solely to the issue of the supreme court's jurisdiction." As discussed above, Petitioners have failed to present a conflict between two cases.<sup>2</sup>

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<sup>2</sup>

Lacking any conceivable basis to invoke this Court's discretionary jurisdiction, Petitioners devote the entire "Argument" section of their brief to a recitation of their unsuccessful presentations to the courts below. In response, Respondent would simply note that as determined by both lower courts, adoption of Petitioners' interpretation of Civil Rule 1.061(g) would produce the obviously unintended and absurd result of eviscerating a court's power to consider the question of *forum non conveniens* on a *sua sponte* basis. Even assuming *arguendo* that a conflict between a Rule of Civil Procedure and a decision of an appellate court would be a basis for the exercise of this Court's discretionary jurisdiction, no such conflict exists in this case. In this case, the Third District Court of Appeal merely held that Rule 1.061(g) applied only to motions filed by the parties and such Rule does not impair or restrict a trial court's inherent power to control its own docket. This ruling does not conflict with any other Rule of civil procedure or published decision.

#### IV. CONCLUSION

For the foregoing reasons, this Court's exercise of discretionary jurisdiction over the instant case would violate the clear language of the appellate rules as well as its own precedent. Respondent therefore requests that jurisdiction be declined by the Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Darin A. DiBello, Esquire, Seidman, Prewitt & DiBello, P.A., Attorneys for Petitioners, 1550 Madruga Avenue, Suite 504, Coral Gables, Florida 33146 and Mark Katsman, Esquire, Co-Counsel for Defendants, 1111 Kane Concourse, Suite 607, Bay Harbor Islands, Florida 33154 on this 9 day of April, 2004.

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CHARLES O. FARRAR, JR.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements (Courier New 12-point font) of Fla. R. App. P.9.210(a)(2) this 9 day of 2004.

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CHARLES O. FARRAR, JR.