

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-34

HERB PHILLIPS, an individual,)
and STRIKER YACHT CORP., a)
New York corporation authorized)
and doing business in Florida,)
)
Petitioners,)
)
v.)
)
EDWARD ENNIS, JR., an)
individual; GEORGE PURVIS, JR.,)
an individual, HERB PHILLIPS)
YACHT SALES, INC., a Florida)
corp., and STRIKER YACHT)
BROKER CORP., a Florida corp.,)
)
Respondents.)
_____)

Discretionary Proceedings to Review a Decision by the
Fourth District Court of Appeal, State of Florida
Case No.: 4D03-2682

JURISDICTIONAL BRIEF OF RESPONDENTS

NANCY LITTLE HOFFMANN, P.A
440 East Sample Road, Suite 200
Pompano Beach, Florida 33064
954-771-0606; and

JACK P. LAMARR, P.A.
2601 East Oakland Park Blvd.
Fort Lauderdale, Florida 33306
954-568-5156

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	-ii-
QUESTION PRESENTED	-iii-
PREFACE	1
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
THE CASES RELIED UPON BY PETITIONERS DO NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE OPINION SOUGHT TO BE REVIEWED.....	3
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	9
CERTIFICATE OF COMPLIANCE	10
APPENDIX	A.1-2

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<u>Ansin v. Thurston</u> , 101 So. 2d 802 (Fla. 1958).....	4
<u>Ennis v. Phillips</u> , 2004 WL 2823239 (Fla. 4th DCA December 8, 2004).....	2, 3
<u>Etheredge v. Barrow</u> , 102 So. 2d 660 (Fla. 2nd DCA 1958)	3, 7
<u>Niemann v. Niemann</u> , 312 So. 2d 733 (Fla. 1975).....	5
<u>Pelican Automotive, Inc. v. Rutigliano</u> , 729 So. 2d 488 (Fla. 2nd DCA 1999)	3, 5, 6
<u>Times Publishing Company v. Russell</u> , 615 So. 2d 158 (Fla. 1993).....	4
<u>Zinger v. Gattis</u> , 382 So. 2d 379 (Fla. 5th DCA 1980)	3, 6, 7
 <u>Other</u>	
Art. V, §3(b)(3), Fla.Const.....	3
§678.313(1), Fla.Stats. (1997)	2, 4

QUESTION PRESENTED

WHETHER THE CASES RELIED UPON BY PETITIONERS EXPRESSLY AND DIRECTLY CONFLICT WITH THE OPINION SOUGHT TO BE REVIEWED.

PREFACE

This brief is submitted on behalf of the Respondents, EDWARD ENNIS, JR., et al., in response to the jurisdictional brief of Petitioners, HERB PHILLIPS, et al. It is Respondents' position that this Court lacks jurisdiction to consider the petition for discretionary review, since the decision of the Fourth District Court of Appeal does not expressly and directly conflict with any of the decisions suggested by Petitioners.

The abbreviation "IB" refers to Petitioners' brief, and "A." refers to the copy of the Fourth District's opinion included in the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The facts of this case as recited by the Fourth District in its opinion are as follows:

In the instant appeal, we determine whether the trial court erred in denying Appellants' motion for a directed verdict which sought to establish that Appellant Edward Ennis and George Purvis purchased 100% ownership interest in two corporations despite a letter, written and signed by the sellers of such ownership interest prior to the sale, that pledged a certain percentage in each corporation to Appellee Herbert Phillips.

Appellant, Edward Ennis, Jr., along with George Purvis, purchased all of the interest owned by two brothers, Eric and Michael Petosa, in two corporations, Herb Phillips Yacht Sales,

Inc. and Striker Yacht Corporation. Herb Phillips operated the two corporations which the Petosa brothers financially supported. In 1997, prior to the execution of the sale, the Petosa brothers wrote a letter to Phillips pledging to give him a certain percentage ownership interest in both corporations for his involvement in the business. No shares of said corporation were issued prior to the letter's execution, nor were any shares distributed after the letter was executed and prior to the sale between the Petosa brothers, Ennis and Purvis. Ennis and Purvis were unaware of the letter at the time of the sale.

After the sale was completed, Phillips continued to be involved in the operation of the two corporations with Ennis and Purvis. However, the parties began to disagree about the operation of the business. The disagreements ultimately resulted in litigation in which there was a dispute over ownership of the two corporations. Ennis and Purvis claimed a one hundred percent ownership interest and Phillips asserted that he owned a certain percentage in each corporation pursuant to the letter given to him from the Petosa brothers. The parties went to trial and a verdict was returned in favor of Phillips. The final judgment adjudged Phillips's ownership interest in accordance with the letter written by the Petosa brothers.

Ennis v. Phillips, 2004 WL 2823239 (Fla. 4th DCA December 8, 2004) (A.1).

The Fourth District reversed that judgment and held that an intention to transfer securities, "even with extrinsic evidence of such intention," did not satisfy the requirement of the Uniform Commercial Code to effectuate such transfer, citing section 678.313(1), Florida Statutes (1997) (A.2). Accordingly, the court held, the letter "pledging" to give Phillips a percentage ownership in the corporations was insufficient as a matter of law to support a finding that any

ownership interest in the corporations was transferred to Phillips. The Fourth District thus remanded with directions that a final judgment be entered in favor of Respondents, Ennis, et al., as to their ownership interest in the two corporations.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal in Ennis v. Phillips does not expressly and directly conflict with Pelican Automotive, Inc. v. Rutigliano, 729 So. 2d 488 (Fla. 2nd DCA 1999), with Zinger v. Gattis, 382 So. 2d 379 (Fla. 5th DCA 1980), or with Etheredge v. Barrow, 102 So. 2d 660 (Fla. 2nd DCA 1958). Accordingly, this Court lacks jurisdiction to review the Fourth District's decision based on article V, section 3(b)(3) of the Florida Constitution.

ARGUMENT

THE CASES RELIED UPON BY PETITIONERS DO NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE OPINION SOUGHT TO BE REVIEWED.

Petitioners cite three decisions which they contend conflict with the decision of the Fourth District Court of Appeal: Pelican Automotive, Inc. v. Rutigliano, 729 So. 2d 488 (Fla. 2nd DCA 1999); Zinger v. Gattis, 382 So. 2d

379 (Fla. 5th DCA 1980); and Etheredge v. Barrow, 102 So. 2d 660 (Fla. 2nd DCA 1958). None of those cases, however, provides the requisite conflict to vest this Court with jurisdiction.

In order for there to be a conflict of decisions sufficient to require this Court's resolution, the conflict must be a "real and embarrassing conflict, such that one decision would overrule the other if both were rendered by the same court." Ansin v. Thurston, 101 So. 2d 802, 811 (Fla. 1958). Without such conflict on the same point of law, the constitutional prerequisite for jurisdiction is absent. Times Publishing Company v. Russell, 615 So. 2d 158, 159 (Fla. 1993).

The Fourth District in the present case decided only one issue, namely whether a letter written by the owners of two corporations pledging to give the Petitioner a certain percentage ownership interest, without more, was sufficient to actually convey an ownership interest. The Fourth District held that a mere "intention" to transfer securities, even with extrinsic evidence of such intention, did not satisfy the requirement of the Uniform Commercial Code, specifically section 678.313 (1), Florida Statutes (1997), or the common law (A.2). That issue was not addressed in any of the decisions relied upon by Petitioners in their jurisdictional brief; indeed, none of them even mentions the Uniform

Commercial Code or the requirements for delivery of stock. Thus, there can be no conflict sufficient to vest discretionary jurisdiction in this Court. Ansin, 101 So. 2d at 811.

Petitioners essentially predicate their claim of conflict on generalized discussion in several of the opinions as to the degree of formality required for the transaction of business by closed corporations (IB at 5-7). However, jurisdictional conflict does not arise unless there is a conflict in the *decision* rather than a conflict in the *opinion*. Niemann v. Niemann, 312 So. 2d 733, 734-735 (Fla. 1975). The Fourth District expressed the statutory basis for its ruling and did not reach any decision as to how a closed corporation may conduct its business; hence there is no conflict. Nonetheless, we will discuss each of the cases relied upon by Petitioners.

The Pelican Automotive case does not conflict with the Fourth District's decision because it does not address the issue of how stock may be transferred. In Pelican, an authorized corporate representative wrote a letter to Mr. Rutigliano promising him a 10% interest in the business in exchange for transferring a lease to the corporation. After transferring the lease, Rutigliano became the sales manager at the car dealership but did not receive any indicia of an ownership interest in the business as promised in the letter. After his

employment was terminated, he sued the corporation for money damages. The jury awarded him an amount equal to approximately 10% of what the corporation paid to purchase the dealership. Id. at 490.

On appeal, the Second District affirmed, holding that

Although far from a picture perfect business transaction, we agree with the trial court that Rutigliano established a prima facie case of an agreement with Pelican for a 10% interest in the Sarasota Mitsubishi dealership and that the record is adequate to support the amount the jury awarded.

Pelican, 729 So. 2d at 490-491.

The Pelican decision would no doubt have assisted Petitioner Phillips in any lawsuit by him against the Petosas seeking to enforce their promise to “pledge” shares of stock in accordance with their December 9, 1997 letter. However, Pelican did not address the issue on appeal in the present case, i.e. the efficacy of such a letter to actually transfer ownership. The Pelican court simply held that the letter promising to give Rutigliano a 10% interest in the business was sufficient to allow him to present his breach of contract claim to a jury. Id. at 491. Inherent in the court’s affirmance of the damages award is the fact that the letter did not operate in and of itself to transfer the claimed ownership interest – otherwise Rutigliano would not have been entitled to damages for the failure to transfer ownership.

Similarly, Zinger v. Gattis does not conflict with the Fourth District's decision. Unlike the present case, the dispute in Zinger was between parties who jointly consulted an attorney about forming a corporation. Both parties signed signature cards on the corporate account, the appellant paid the attorney to form the corporation, the attorney's notes indicated both parties were to have a one half interest in the corporation, and both individuals signed a corporate resolution. The appellant advanced \$52,000.00 to the corporation. Under those circumstances, the Fifth District found sufficient evidence to support appellant's claim that he was intended to have a stockholder interest. The court concluded that the trial court had erred in holding that a corporate officer could have no interest in the corporation as a stockholder merely because a first meeting of the board had never been held to authorize the issuance of any stock, noting that "...directors' meetings, irregularly convened or conducted, may be cured by acquiescence or subsequent ratification." Zinger, 382 So. 2d at 380.

Finally, Etheredge v. Barrow also dealt with the issue of the formalities required of a meeting of a board of directors, and not with the transfer of ownership. The court there held that where a meeting was attended by all of the directors and the holders of all stock of the corporation, the business conducted at that meeting should be considered as the action of the corporation, and the

directors could not later deny their knowledge or consent merely because the meeting was not conducted with the formalities of a board of directors meeting. Etheredge, 102 So. 2d at 663.

From the above, it may be seen that the petition for review is not well founded. The issue decided by the Fourth District was not even similar to the issue in any of the decisions which Petitioners assert as providing this Court with the discretionary authority to review the Fourth District's decision.

CONCLUSION

Since there is no express and direct conflict between the decision of the Fourth District Court of Appeal and the cases relied upon by Petitioners, the petition for discretionary review should be denied.

Respectfully submitted,

Nancy Little Hoffmann
NANCY LITTLE HOFFMANN, P.A.
440 East Sample Road
Suite 200
Pompano Beach, Florida 33064
954-771-0606; and

Jack P. Lamarr
JACK P. LAMARR, P.A.
2601 East Oakland Park Boulevard
Suite 501

Fort Lauderdale, Florida 33306
954-568-5156

By _____
Nancy Little Hoffmann
Fla. Bar #181238

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing and attached has been served by U.S. Mail this 14th day of January, 2005, to: **MICHAEL R. SEWARD, ESQUIRE**, 9200 South Dadeland Boulevard, Suite 700, Miami, Florida 33156, Co-Counsel for Petosa; **A. P. WALTER, JR., ESQUIRE**, 300 Aragon Avenue, Suite 370, Coral Gables, Florida 33134, Co-Counsel for Petosa; **GORDON J. EVANS, ESQUIRE**, 1570 Madruga Avenue, Suite 200, Coral Gables, Florida 33146, Counsel for Petitioners, Phillips, et al.; **RICHARD A. SHERMAN, ESQUIRE**, Richard A. Sherman, P.A., 1777 South Andrews Avenue, Fort Lauderdale, Florida 33316, Co-Counsel for Petitioners Phillips, et al.; and **JACK P. LAMARR, ESQUIRE**, 2601 East Oakland Park Boulevard, Suite 501, Fort Lauderdale, Florida 33306, Co-Counsel for Respondents.

By _____
Nancy Little Hoffmann
Fla. Bar #181238

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing was prepared using Times New Roman 14, in compliance with the font requirements set forth in rule 9.210(a)(2).

By _____
Nancy Little Hoffmann
Fla. Bar #181238