IN THE SUPREME COURT OF FLORIDA

Case No. SC05-1294

BROWARD MARINE, INC., BROWARD MARINE EAST, INC. and DENNIS DeLONG, as Personal Representative of the Estate of Franklin a. Denison, Sr., Deceased

Petitioners,

v.

PALM BEACH POLO HOLDINGS, INC., BROWARD YACHTS, INC. and DOUBLE EAGLE YACHTS, INC.,

Respondents.

RESPONDENTS' AMENDED JURISDICTIONAL ANSWER BRIEF

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF
APPEAL OF FLORIDA OF FLORIDA, FOURTH DISTRICT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The instant litigation matter involved a commercial business dispute regarding the sale of the Broward Marine shipbuilding business, in exchange for millions of dollars in cash, a note secured by a preferred ship mortgage, and sixty-six acres of land in Wellington, Florida. Although Plaintiff, in retrospect to avoid a fee award, likes to use the term "fraudulent inducement," the Amended Complaint contained only three counts, for rescission, negligent misrepresentation and fraud. No claim for "fraud in the inducement" was raised below.

After a trial of over five weeks, the jury found in favor of Respondents on all claims, and awarded Respondent damages under a breach of contract counterclaim. Respondents sought attorneys' fees as prevailing party pursuant to the applicable Asset Purchase Agreement, and the trial court initially denied fees, expressing uncertainty about the status of the law in light of conflicting decisions from the district courts of appeal as to whether attorneys' fees were recoverable, in a fraud action, pursuant to a prevailing party attorneys' fee clause.

While the matter was still before the trial court, this Court decided *Caufield v. Cantele*, 837 So.2d 371 (Fla. 2002), which resolved any doubt concerning Respondents' entitlement to attorneys' fees in the instant case. The trial court,

Honorable Allen Komblum, granted rehearing and awarded Polo their attorneys' fees, which order was recently affirmed on appeal. At the Fourth District Court of Appeal level, the court determined that *Caufield* is "indistinguishable from this case and requires an award of attorneys' fees." Petitioners sought rehearing and certification from the Fourth District Court of Appeal, which were summarily denied. Then, as a last resort, Petitioners filed the instant appeal, seeking discretionary review from the Florida Supreme Court.

SUMMARY OF ARGUMENT

Discretionary review is clearly not proper in the instant case, as Petitioners have ignored the relevant standard, and failed to demonstrate that the Fourth District's opinion, on its face, conflicts with the decision of the Florida Supreme Court. Under the Florida Constitution, review is available only where the opinion expressly and directly conflicts with the decision of another district court of appeal, or of the Supreme Court in the same question of law. No conflict is established in the four corners of the Fourth District Court of Appeal's decision in the instant case, and instead Petitioners rely upon facts to create a conflict that are not discussed within the opinion. As such, they have not demonstrated any point of law which makes the subject order in conflict with *Caufield* and *Katz v. Van Der Noord*, 546 So.2d 1047 (Fla. 1989).

Moreover, it is clear from reviewing the instant order, that the decision of the Fourth District is entirely consistent with, and mandated by, this Court's opinion in *Caufield v. Cantele*. In *Caufield*, this Court resolved the conflict among the circuits, and approved the reasoning of the Fourth District in *Kelly v. Tworoger*, 705 So.2d 670 (Fla. 4th DCA 1998). In *Kelly*, the court recognized that a misrepresentation, even when it induces a contract, does in fact "arise" from the parties' contractual dealings. The trial court and the appellate court carefully studied the record, and both determined that the claims raised by Petitioners below did in fact arise from the subject transaction, and from the parties' contractual dealings. Petitioners, in their Jurisdictional Brief, have shown no conflict between the four corners of the instant order, and this Court's decision in *Caufield*. As a result, discretionary review must be denied.

ARGUMENT

I. THE ORDER ON APPEAL ESTABLISHES NO POINT OF LAW CONTRARY TO A DECISION OF THE FLORIDA SUPREME COURT OR ANOTHER DISTRICT COURT WHICH WOULD AUTHORIZE SUPREME COURT REVIEW .

Petitioners seek to obtain Supreme Court review of the Fourth District Court of Appeal's decision by asking this Court to exercise its conflict jurisdiction. Petitioners, however, have ignored the relevant standard, and failed to demonstrate that conflict jurisdiction is available to review the subject order. The Supreme Court's conflict jurisdiction is authorized by the Florida Constitution which states that the Supreme Court:

> may review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or 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.

Florida Constitution, Article V. §3 (b)(3). Review is not available under this provision of the Florida Constitution where the opinion below establishes no point of law contrary to a decision of the Florida Supreme Court or another District Court. *First Union National Bank v. Turney*, 832 So.2d 768, 770 (Fla. 1st DCA 2002).

In seeking review under the Court's conflict jurisdiction, Petitioners have ignored a long line of cases which establish that conflict jurisdiction is not proper in this instance. As discussed below, no conflict is established in the four corners of the Fourth District Court of Appeal's decision. Petitioners rely upon facts to create a conflict, that are not discussed within the opinion. As such, Petitioners have not properly demonstrated any point of law which makes the subject order in conflict with *Caufield* and *Katz*.

Referring to the use of the term "direct conflict" in the Florida Constitution, this Court has stated, "Article V uses the words 'direct conflict' to manifest a concern with decisions as precedents as opposed to adjudications of the rights of

particular litigants." *Mystan Marine, Inc., v. Harrington*, 339 So.2d 200 (Fla. 1976); *citing, Ansin v. Thurston* 101 So.2d 808, 811 (Fla. 1958). Also, this Court has stated, "'[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.' In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." *Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888, 889 (Fla. 1986); *citing, Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986).

The term "direct conflict" is defined so narrowly because the sole purpose of conflict jurisdiction is to insure uniform precedents. Conflict jurisdiction is not designed to simply give access to this Court to an appellant who does not like the decision below and for whom no other theories of jurisdiction exist. In *Kincaid v. World Insurance Company v. Security Life and Trust Company*, 157 So.2d 517, 518 (Fla. 1963), this Court held, "The measure of our appellate jurisdiction on the so-called 'conflict theory' is not whether we would necessarily have arrived at a conclusion differing from that reached by the District Court. The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents."

Merely stating that a conflict exists is not sufficient to invoke conflict jurisdiction. A petitioner must allege with specificity the nature of the conflict, and petitioner must be able to cite to a rule of law stated within the four corners of the opinion which creates the conflict. *Seaboard Air Line Railroad Company v. Branham*, 104 So.2d 356, 358 (Fla. 1958). In *Seaboard*, this Court noted that the petitioners' petition was procedurally deficient in so much as petitioners failed to point to a direct conflict between the District Court and the Supreme Court. Rather, petitioners merely opined that the District Court's opinion is "'in conflict with and, by implication, seeks to overrule' [the Supreme Court's] prior decision." *Id.* Because no conflict existed on the face of the opinion, this Court found that jurisdiction was not authorized by the Florida Constitution.

The Petitioners in the instant case do not cite to any rule of law directly established in the opinion on appeal which is in conflict with *Caufield*. Rather, the Petitioners, like the petitioners in *Seaboard*, merely allege generally that the opinion is in conflict with a prior decision of this Court. Petitioners are unable to cite to a particular inconsistency, because there is none. Rather than pointing to particular conflicts within the Fourth District's opinion, Petitioners are forced to complain about issues that the Fourth District Court of Appeal **did not** address in their opinion. Specifically, Petitioners state the District Court's decision, "ignores the

total absence here of a contractual claim or defense" (Petitioner's Brief on Jurisdiction, P. 7). Rather than claiming a true conflict, Petitioners are essentially claiming that the *Caufield* decision should have been inapplicable. Petitioners' entire argument here is based upon the supposed absence of a contractual claim or defense, a matter not addressed by the Fourth District in this case. The fact that the District Court chose not to discuss this aspect of Petitioners' argument in its decision precludes conflict jurisdiction from vesting in this case.

II. THE FOURTH DISTRICT'S OPINION IS ENTIRELY CONSISTENT WITH THIS COURT'S OPINION IN *CAUFIELD V. CANTELE*.

Contrary to the assertions in Petitioners' Brief on Jurisdiction, the Fourth District's opinion in this case is entirely consistent with this Court's opinion in *Caufield.* This Court, in deciding *Caufield*, resolved a conflict that had existed in Florida jurisprudence relating to whether tort and rescission claims could arise out of a contract, sufficient to permit the award of prevailing party attorneys fees under a contractual fee provision. The Fifth District Court of Appeal, in *Caufield v. Cantele,* 745 So.2d 431, 437 (Fla. 5th DCA 1999) *rev'd* 837 So.2d 371 (Fla. 2002), initially held that fees were not recoverable in a case of fraudulent misrepresentation "made orally or external to a contract, concerning property purchased pursuant to the contract", relying upon cases such as *Dickson v. Dunn,* 399 So.2d 447 (Fla. 5th

DCA 1981), and *Location 100, Inc. v. Gould S.E.L. Computer Systems, Inc.*, 517 So.2d 700 (Fla. 4th DCA 1987). The Caufields, on the other hand, urged this Court to reverse on the authority of *Katz v. Van Der Noord*, 546 So.2d 1047 (Fla. 1989) and *Kelly v. Tworoger*, 705 So.2d 670 (Fla. 4th DCA 1998).

In this Court's decision in *Caufield*, the Court resolved the conflict and approved the *Kelly v. Tworoger* approach, recognizing that a misrepresentation, even one that induces a contract, does in fact arise from the parties' contractual dealings. This Court specifically cited *Kelly* and the Eleventh Circuit's opinion in *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109 (11th Cir. 2001), and held as follows:

> [T]he fraudulent misrepresentation complained of in this case could be correctly characterized as a tort stemming from or arising out of the failure of one party to carry out its contractual duty to reveal defects in the property. Had there been no contract, the ensuing misrepresentation would not have occurred. Therefore, the existence of the contract and the subsequent misrepresentation in this case are inextricably intertwined such that the tort complained of necessarily arose out of the underlying contract. As a result, the contractual

provisions, including the prevailing party clause, should be given effect.

837 So.2d at 379.

Once this Court's opinion in *Caufield* was issued, it was clear that Respondent was entitled to fees under *Caufield* and *Katz* for successfully defeating Petitioners' claims of fraudulent misrepresentation, negligent misrepresentation and rescission, all of which obviously arose from, and were intertwined with, the parties' commercial Asset Purchase Agreement. Just like in *Caufield*, the Petitioners' claims in the instant case arose from alleged breaches of duties and alleged fraudulent concealment of facts relating to the transaction. These supposed torts (or grounds for rescission) including allegations that grossly inflated "comparables" were provided to Petitioners prior to the closing but **after** execution of the contract, to support allegedly inflated values for a realty exchange, and allegations that Respondent concealed a wetlands problem in violation of a specific contractual representation. Petitioners also sought to rescind the transaction for gross disparity of consideration, and because Franklin Denison was 89 years old and supposedly unable to comprehend what he was doing when he signed the Asset Purchase Agreement. To suggest that these claims did not arise or relate to the parties' contractual dealing is preposterous. Moreover, the Fourth District

reasoned in the instant case that the claim in *Caufield* was based on a misrepresentation which occurred **prior** to the making of a contract, and thus *Caufield* was recognized as being "indistinguishable from this case."

Essentially, Petitioners have raised a distinction without a difference, trying to couch the instant case as on of "fraud in the inducement", contrary to their Amended Complaint and to the evidence presented at trial, even though fees would be awarded anyway. This Court clearly approved the reasoning of the Fourth District in *Kelly v. Tworoger*, which called for an award of attorneys fees to a successful litigant who prevailed in a case of fraud in the inducement. Nothing in Petitioners' Brief on Jurisdiction demonstrates the slightest inconsistency between this Court's prior decision in *Caufield*, and the Fourth District's opinion at issue herein. Petitioners are simply unhappy with the result, and seek one more bite at the apple in an effort to avoid a fee award for years of unsuccessful litigation. Their Petition for Discretionary Review should be summarily denied.

CONCLUSION

Because the Petitioners have failed to demonstrate any conflict between this Court's decision in *Caufield* and the four corners of the Fourth District's opinion in the instant case, Petitioners have failed to meet their Constitutional burden for establishing jurisdiction. Moreover, as established above, the Fourth District's opinion here is entirely consistent with, and mandated by, this Court's opinions in *Caufield* and *Katz.* As a result, the Petition for Discretionary Review should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 30, 2005, a true copy of the foregoing was furnished via U.S. mail to: James D. Wing, Esq., Holland & Knight LLP, Counsel for Petitioners, 701 Brickell Avenue, Suite 3000, Miami, Florida 33131.

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CERTIFICATE OF COMPLIANCE

The foregoing brief satisfies the requirements of Fla. R. App. P. 9.100(l) and 9.210(a)(2), (b), (c).

_____
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