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.

PETITIONERS' BRIEF ON JURISDICTION

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

James D. Wing
HOLLAND & KNIGHT LLP
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
305-374-8500

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

TABLE OF AUTHORITIES (continued)

OTHER AUTHORITIES **Page**

INTRODUCTION

Once in a great while a district court is called upon to apply a recent decision of this Court, and in doing so writes an opinion that shows that it has fundamentally misunderstood what this Court said and did. The result here is confusion in not just one, but two difficult areas of the law. This case requires this Court to intervene.

STATEMENT OF THE CASE AND FACTS

In this case, 89-year-old Franklin Denison, Sr., individually and as president of Broward Marine, claimed that he had been fraudulently induced into signing and closing a barter contract with Palm Beach Polo Holdings, Inc. ("Polo"). Pursuant to the contract, he and Broward Marine received $8 million in cash, a $7 million mortgage on a sailing yacht, an assumption of certain Broward Marine liabilities up to $2 million and approximately 66 acres of land in Wellington, Florida. Mr. Denison and others testified that the seller had repeatedly represented the 66 acres to be worth $348,000 per acre, or $23 million at the time of sale. If so, this would have resulted in a total contract value to Broward Marine *over time* of $40 million. In exchange, for this represented value, Mr. Denison gave up all the assets of the Broward Marine entities and his interest in his Fort Lauderdale home. Trial testimony put the *immediate* value of these assets at more than $30 million.

Mr. Denison never had the 66 acres appraised because, he testified, he relied on Palm Beach Polo's representations of value and because he thought that that value was insured by his title insurance policy (!). Uncontradicted appraisal testimony at trial put the value of the 66 acres on the date of sale at only $4.125 million, not $23 million.

Neither the $23 million nor any other value of the non-cash assets exchanged was included as a term of the contract or any exhibit to it. Nor were any representations of value or even an allocation of the value of the separate items of consideration contained in the contract itself. The contract was therefore totally silent as to value, other than the $8 million in cash and the stated limit of the liability assumption.

After the nearly $19 million value disparity was discovered,[1] Mr. Denison and Broward Marine sued to rescind the transaction or, alternatively, for damages. They sued on the theory that they were induced into signing the contract and closing the transaction by fraudulent misrepresentations of value by Polo and by Mr. Denison's son, acting as broker, on Polo's behalf.

The trial judge ruled that he could not rescind and reverse the transaction because he felt he could not restore the status quo. A jury, in an opaque verdict, rejected Mr. Denison's fraud claim in the face of arguments that Polo's owner

[1] $23 million represented value of 66 acres - $4.125 million actual value = $18.875 million.

intended within seven years to cause Polo to exercise an option Polo received in the deal to buy back the 66 acres for the $23 million previously represented. Hence, Polo argued, Polo had no fraudulent intent. Judgment was entered on the jury verdict, and the Fourth District Court of Appeal affirmed without opinion.

Polo also sought attorney's fees under the contract's provision giving a prevailing party attorney's fees in a suit "arising out of the contract." After initially denying fees, the trial court reversed itself as a result of this Court's decision in *Caufield v. Cantele*, 837 So. 2d 371 (Fla. 2002). The trial court awarded Polo over $600,000 in attorney's fees and costs. The Fourth District affirmed this ruling in the opinion under review and has remanded the matter for further hearings which might increase Polo's award.

The district court's decision directly and expressly conflicts with this Court's decisions in *Caufield* and *Katz v. Van Der Noord*, 546 So. 2d 1047 (Fla. 1989). It is this conflict that gives this Court jurisdiction and demands its intervention.

SUMMARY OF ARGUMENT

Caufield and *Katz* together stand only for the principle that suits, be they in tort or contract and regardless of whether they seek damages or rescission, still "arise out of [a] contract" for attorney's fees purposes, *if* the misconduct complained of can be "correctly characterized as . . . stemming from or arising out

of the failure of one party to carry out" a *contractual* duty to disclose. *Caufield*, 837 So. 2d at 379. Contrary to the facts in these cases, the misrepresentations sued upon here implicated no express or implied contractual duty. The district court focused its analysis on the bare timing of the alleged misrepresentation in relation to the contract's signing, while ignoring the real issue: the total absence of a *contractual* claim or defense. Review should be granted.

ARGUMENT

In *Katz v. Van Der Noord*, this Court gave prevailing party attorney's fees to a *plaintiff* who proved a breach of an *express contractual* representation and thereby obtained a judgment *rescinding* the contract. This unsurprising result was applied by the Fourth District in *Kelly v. Tworoger*, 705 So. 2d 670, 672-73 (Fla. 4th DCA 1998). In *Kelly* the Fourth District granted attorney's fees to a successful *defendant* in a suit for *damages* for non-disclosure of a material fact incident to a sale of residential real property. The court held that the theory of the plaintiff's case was the breach of the *implied contractual* duty to disclose defects in residential property as mandated by *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985). *Kelly*, 705 So. 2d at 671-72. This result, too, is unsurprising.

In the course of its decision in *Kelly*, the district court, in admitted dicta, *see Broward Marine*, slip op. at 3, pointed to the "moral[] . . . repugnan[cy]" of fraudulently deceptive conduct as justifying an expansive reading of the phrase

"arising under the contract" to include successful plaintiffs suing in *tort* for breach of a *contractual* duty to disclose.[2] *Caufield* cited *Kelly* with approval, but only for the proposition that the mere election to bring a fraudulent inducement claim in tort

[2] "Moral repugnancy" aside, the *Kelly* dictum sought to expand the narrow reach of the phrase "arising out of the contract" to include tort claims for fraudulent inducement of the contract by relying on three cases decided under California law, *3250 Wilshire Blvd. Bldg. v. W.R. Grace & Co.*, 990 F.2d 487 (9th Cir. 1993); *Childers v. Edwards*, 56 Cal. Rptr. 2d 328 (Cal. Ct. App. 1996); *Xuereb v. Marcus & Milllichap, Inc.*, 5 Cal. Rptr. 2d 154 (Cal. Ct. App. 1992), and a Colorado case, *Sperry v. Bolas*, 786 P.2d 517 (Colo. Ct. App. 1989). *Kelly*, 705 So. 2d at 673 n.1. The California decisions are strongly influenced by specific California statutes, and the Colorado case seems to decide the issue based on whether the plaintiff sued to affirm or disaffirm the contract, the very distinction that *Katz* repudiated.

In *Caufield this* Court adopted the narrower rule announced by the Eleventh Circuit in *Telecom Italia, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109 (11th Cir. 2001), that interpreted comparable language in an arbitration clause. This Court endorsed *Telecom Italia's* reasoning that an "arising out of or related to" arbitration clause will support arbitral jurisdiction over tort claims between parties to a contract *only* if the alleged fraud relates to matters of contract *performance.* Otherwise the tort cannot be said to "arise out of the contract." Accordingly, *Caufield* holds that only *post-contract* fraud claims are caught by an "arising out of" clause while *pre-contract* torts are not, because only *post-contract* torts can be based on the performance of an *existing* contract. The Fourth District stands *Caufield* on its head by ignoring *Telecom Italia*, deciding that this Court's opinion in *Caufield* was wrong in its statement of the facts, and then reaching a result based on the dangerous and extra-legal concept of "moral repugnancy" first set out in its opinion in *Kelly*, which concept this Court did *not* approve. For the sake of completeness we note our belief that *Caufield* was correctly decided but for a different reason: the opinion of this Court and the Fifth District disclose that the Canteles voluntarily dismissed their case after the defendant sellers filed pleadings citing a contractual provision forbidding the Canteles from relying (an element of the tort) on any pre-contract representations. In that sense, the Caufields did prevail under the contract. Such facts are absent here.

for breach of a contractual duty to disclose[3] is not itself determinative of whether the prevailing party should recover legal fees. *Caufield*, 837 So. 2d at 379.

In this case the district court seized on this Court's limited approval of *Kelly* to go much further. Its opinion effectively adopts this "moral repugnancy" theory to allow fees in cases seeking recovery for fraudulent inducement in tort even in the absence of any express or implied *contractual* duty to disclose. This signals a radical change in Florida law and a misapprehension of what this Court said and did in *Caufield*.

On its face, *Caufield* requires that no attorney's fees can be awarded to the prevailing party on a tort claim based on an "arising out of the contract" attorney's fee provision unless the tort is based on a duty to disclose arising out of a contract that exists at the time the tort was committed.[4] The district court's decision, which

---

[3] This Court's ruling in *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999), permits tort suits for breaches of duty created by contract. *Moransais* re-aligned Florida law with centuries of Anglo-American jurisprudence by reducing the scope of the economic loss rule to restore this option to plaintiffs. *See*, John Leycester Adolphus, *The Circuiteers, An Eclogue* (1839): "Thoughts much too deep for tears subdue the Court [w]hen I *assumpsit* bring, and god-like waive a tort."

[4] This explains why in *Caufield* this Court did not, as the district court assumes in its decision, overrule two other Fourth District decisions, *Fleischer v. Hi-Rise Homes, Inc.*, 536 So. 2d 1105 (Fla. 4th DCA 1988), and *Location 100, Inc. v. Gould S.E.L. Computer Sys., Inc.*, 517 So. 2d 700 (Fla. 4th DCA 1987). *See* slip op at 3 n.1. This Court did not expressly overrule these decisions, which the district court described as "two decisions of this court which held that attorney's fees cannot be awarded under a contract where the contract is fraudulently induced," slip op. at 3 n.1, because they are correct. Neither case involved a

ignores the total absence here of a contractual claim or defense, decided that this Court misapprehended the facts in *Caufield* and then reached a result completely at odds with *Caufield* and with *Katz*. The Fourth District's disregard of this Court's endorsement of *Telecom Italia* (*see* fn. 2 above) throws into confusion not only the law on attorney's fees but also the law of arbitrability. This express and direct conflict vests jurisdiction in this Court and demands its intervention.

CONCLUSION

For the reasons stated, upon the authorities cited and for the manifest benefit of the Bar and the public, we ask the Court to exercise its conflict jurisdiction and review the district court's decision.

Respectfully submitted,

HOLLAND & KNIGHT LLP
Counsel for Petitioners
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
305-374-8500

By _____
James D. Wing, FBN 195537

---

fraudulent misrepresentation based on an express or implied contractual representation or duty to disclose. In both cases the alleged fraudulent statement was completely outside of any contractual provision and, as here, involved commercial transactions in which no implied duty to disclose material facts existed.

CERTIFICATE OF SERVICE

I certify that on July ____, 2005, we have mailed a copy of Petitioners' Brief on Jurisdiction to John M. Mullin, Esq. and Amy J. Galloway of Duke, Mullin & Galloway, P.A. (counsel for respondents), 1700 East Las Olas Boulevard, Ph-1, Fort Lauderdale, FL 33301.

_____
James D. Wing

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. It has been prepared in Times New Roman 14-point font.

_____
James D. Wing

3094054_v1