IN THE SUPREME COURT FOR THE STATE OF FLORIDA

RICHARD M. SACCOCIO, ET AL.,

Petitioners,

v.

CITY OF PLANTATION, ET AL.,

Respondents.
_____/

CASE NO.: SC05-1299

L.T. Case No.: 4D04-3728

JURISDICTIONAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATUTES AND RULES:

OTHER AUTHORITIES:

PREAMBLE

References to the Petitioners, Richard Saccocio and Jerilyn Saccocio, appear herein as "the Saccocios". References to the Respondents, City of Plantation, The Honorable Mayor Ray Carole Armstrong, and John Doe, collectively appear herein as "Plantation". References to the Saccocios' Brief of Petitioners (Appellants and Plaintiffs Below) in Support of Invoking Discretionary Jurisdiction of the Supreme Court of Florida appear herein as "Jurisdictional Brief".

SUMMARY OF ARGUMENT

This Appeal should be dismissed because there is no decisional conflict between the Fourth District Court of Appeal's Opinion below and either a decision from this Court or another district court. The Saccocios erroneously argue matters that are not contained within the four corners of the Opinion. This Court has clearly established that its discretionary review jurisdiction can be invoked only from a district court decision which expressly addresses a question of law within the four corners of the opinion by including a statement or citation effectively establishing a point of law upon which the decision is based.

The Fourth District did not establish a point of law on which its Opinion is based. The Fourth District affirmed the trial court's ruling that the Saccocios' evidentiary presentation on the issue of adverse or inconsistent use was lacking so as to prevent a ruling of substantial likelihood of success on the merits of their

prescriptive easement claim. The Opinion only reflects a statement of the evidentiary elements for a temporary injunction and prescriptive easement that are consistent with both this Court's case law and the case law from other district courts. Therefore, there is no decisional conflict jurisdiction.

ARGUMENT

I. INTRODUCTION

The Saccocios' July 22, 2005 Notice to Invoke Discretionary Jurisdiction is premised solely upon the following allegation: "The decision expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law." Applying this Court's standards for determining whether decisional conflict jurisdiction exists, Plantation demonstrates herein that there is no decisional conflict between the Fourth District's Opinion in the case at bar and any appellate decision of this Court or another district court.

The Saccocios' Jurisdictional Brief ignores this Court's governing rules and procedures for both the preparation of a jurisdictional brief and determining whether to exercise its discretionary jurisdiction to consider an appeal on the merits. This is because the Saccocios have presented a recitation of alleged facts that do not appear in the subject Opinion of the Fourth District Court of Appeal. The Saccocios' Jurisdictional Brief goes far beyond addressing the issue of whether this Court has decisional conflict jurisdiction. The Saccocios have

prematurely argued the merits of the Fourth District's and trial court's decisions that the Saccocios were not entitled to a temporary injunction. This Court should ignore such arguments on the merits, and, based upon the jurisdictional argument in this Brief, this Court should conclude that there is no decisional conflict jurisdiction.

II. THE SACCOCIOS ERRONEOUSLY ARGUE MATTERS THAT ARE NOT ADDRESSED IN THE FOUR CORNERS OF THE OPINION THEY CHALLENGE IN THIS APPEAL.

In *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986), this Court explained what the Court called "a common error made in preparing jurisdictional briefs based on alleged decisional conflict", stating:

> The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decision allegedly in conflict. As we explained in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.

On page 2 of their Jurisdictional Brief, the Saccocios allege that the Fourth District Court of Appeal did not issue an opinion. That is not true. An accurate review of the Opinion, reveals a one paragraph *per curiam* opinion affirming the trial court's denial of the Saccocios' motion seeking a temporary injunction. The Opinion is as follows:

PER CURIAM.

> We affirm the circuit court's order denying appellants' motion for temporary injunction regarding appellants' claim of prescriptive easement in land bordering a golf course owned by the City of Plantation. The trial court's ruling that appellants failed to prove a substantial likelihood of success on the merits of their claim was correctly premised upon the lack of a showing of adverse or inconsistent use.
>
> *Affirmed.*

WARNER, KLEIN and TAYLOR, JJ., CONCUR.

The brevity of the Opinion does not render it a per curiam affirmance without opinion ("PCA"), and if in fact the Fourth District had issued a PCA decision, prior opinions of this Court clearly dictate that this Court could not exercise it discretionary decisional conflict jurisdiction to consider a PCA decision. *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988); *State v. Jenkins*, 385 So. 2d 1235 (Fla. 1980). As detailed below, the Fourth District constructed its Opinion in manner which reflects consistent application of the prior appellate decisions of this Court and Florida's district courts as to the elements of proof for both temporary injunctive relief and a prescriptive easement. *See Aerospace Welding, Inc. v. Southstream Exhaust & Welding, Inc.*, 824 So.2d 226, 227 (Fla. 4th DCA 2002) (setting forth elements of proof for temporary injunction, including likelihood of success on the merits); *Downing v. Bird*, 100 So. 2d 57, 65 (Fla. 1957) (setting forth elements of proof for a prescriptive easement, including clear and positive

proof of adverse use or claim of right by the party claiming the easement).

Any alleged facts presented to the trial court or the Fourth District, which do not appear within the four corners of the one paragraph Opinion are irrelevant because of the above-quoted standard announced in *Reaves*. In line with established precedent, Plantation confines this Brief to arguments which address the four corners of the Fourth District's Opinion to explain why this Court should conclude that there is no decisional conflict on which to grant review.

III. THERE IS NO DECISIONAL CONFLICT BECAUSE THE FOURTH DISTRICT'S OPINION REFLECTS CONSISTENT APPLICATION OF THE LEGAL STANDARDS FOR PROVING ENTITLEMENT TO TEMPORARY INJUNCTIVE RELIEF AND A PRESCRIPTIVE EASEMENT.

The Saccocios do not explain and cannot establish the requisite "express" conflict for which this Court would have jurisdiction under Rule 9.030(a)(2)(A)(iv), which incorporates language from Art. V, §3(b)(3) of Florida's Constitution. The conflict simply does not exist. Paraphrasing this Court's *Florida Star* decision, there are potentially two issues for consideration in determining jurisdiction under Art. V, §3(b)(3): "Whether the supreme court has discretionary jurisdiction is one issue and whether the court elects to exercise that jurisdiction is an entirely different issue." Judge Philip J. Padovano, *Florida Appellate Practice* §3.10 (2005 Edition).

In *Persuad v. State*, 838 So. 2d 529, 532 (Fla. 2003), this Court reiterated its

standard of review for determining whether there is decisional conflict:

> As we explained in *Florida Star*, this Court's discretionary review jurisdiction can be invoked only from a district court decision "that expressly addresses a question of law within the four corners of the opinion itself" by "contain[ing] a statement or citation effectively establishing a point of law upon which the decision rests." *Florida Star*, 530 So.2d at 288.

This Court further stated: "[I]n those cases where the district court has not explicitly identified a conflicting decision, it is necessary for the district court to have included some facts in its decision so that the question of law addressed by the district court in its decision can be discerned by this Court." *Id.* This does not mean that the district court is required to include such facts.[1] It merely means that this Court's discretionary jurisdiction will not arise if facts are not included in the district court's decision from which this Court can discern a question of law addressed by the district court.

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[1] On page 5 of their Jurisdictional Brief, the Saccocios contend that they were entitled to an explanation as to why the panel from the Fourth District concluded the Saccocios did not make the requisite showing of adverse or inconsistent use. They argue that their failure to receive that explanation, either initially or in response to their rehearing motion, justifies the exercise of this Court's discretionary jurisdiction. To make that argument, the Saccocios implicitly contend that the Fourth District violated Florida Rule of Appellate Procedure 9.330 in denying their rehearing motions. In *Allstate Ins. Co. v. Langston*, 655 So. 2d 91 (Fla. 1995), this Court ruled that its discretionary jurisdiction does not extend to a district court of appeal decision that is allegedly in express conflict with a Florida Rule of Civil Procedure. Article V, §3(b) of Florida's Constitution also does not provide for conflict jurisdiction based upon alleged conflict between a district court opinion and a Florida Rule of Appellate Procedure.

The *Florida Star* decision also contains the following important statements about this Court's decisional conflict jurisdiction, which further support the conclusion that there is no decisional conflict in the case at bar:

> [I]t 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. This is the only reasonable interpretation of this constitutional provision. . . . While this Court has subject-matter jurisdiction to hear any petition arising from an opinion that establishes a point of law, we have operated within the intent of the constitution's framers, as we perceive it, in refusing to exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court.

Florida Star, 530 So. 2d at 288-289. The application of the foregoing standards to the Opinion in the case at bar clearly demonstrates that there is no decisional conflict between the Fourth District's Opinion and *Downing*, or any other case cited in the Saccocios' Jurisdictional Brief.

The Fourth District's Opinion does not "contain a statement or citation effectively establishing a point of law, upon which the decision rests." *Florida Star*, 530 So. 2d at 288. This is because the Fourth District simply stated that the trial court was correct in reaching the factual conclusion that the Saccocios did not make the requisite showing of adverse or inconsistent use so as to prove a substantial likelihood of success on the merits of their claimed prescriptive easement. Notwithstanding, reading the Opinion in the light most favorable to the

Saccocios, at most the Opinion reflects the Fourth District's statement that Florida law requires a party seeking a temporary injunction regarding a claimed prescriptive easement to prove a substantial likelihood of success on the merits, which in turn requires a showing of adverse or inconsistent use.

It is without dispute that the controlling body of Florida case law setting forth the elements of a claim for temporary injunctive relief requires the moving party to establish a substantial likelihood of success on the merits. *Aerospace Welding*, 824 So.2d at 227. It is further without dispute that the controlling body of Florida case law setting forth the elements for proving a prescriptive easement, including *Downing*, requires proof of adverse or inconsistent use of the property over which the easement is claimed. 100 So. 2d at 65. Since the Fourth District's Opinion does not contain any conflicting statement of the law regarding the elements of proof for a temporary injunction or a prescriptive easement, this Court has no decisional conflict jurisdiction.

The Saccocios ignore the decisional conflict standards addressed above. Instead, they attempt to persuade this Court to review this Appeal by arguing that the trial court and Fourth District misapplied controlling law when each court concluded that the Saccocios had not made the requisite factual presentation of adverse or inconsistent use to support a temporary injunction against interference with their alleged prescriptive easement. Such review is not contemplated within

this Court's constitutionally prescribed conflict jurisdiction. *Persuad*, 838 So. 2d at 532; Art. V, §3(b)(3), Fla. Const.

On page 4 of the Saccocios' Jurisdictional Brief, in the section entitled "Standard of Review, the Saccocios indicate that they are only relying upon alleged conflict between the Fourth District's Opinion and *Downing.* However, later in their Jurisdictional Brief, they discuss the Fifth District Court of Appeal decision in *Gay Brothers Constr. Co. v. Florida Power & Light Co.*, 427 So. 2d 318 (Fla. 5th DCA 1983). Plantation addresses *Gay Brothers* in this Brief because the Saccocios' Jurisdictional Brief conceivably may be read to include an argument that there is express conflict between *Gay Brothers* and the Opinion in the case at bar. As with *Downing*, this Court should reject the Saccocios' attempt to rely upon *Gay Brothers* as jurisdictional support for this Appeal.

This Court in *Downing*, the Fifth District in *Gay Brothers*, and the Fourth District in the case at bar each applied the same legal standard for proof of a prescriptive easement, in particular the requirement of adverse or inconsistent use. Decisional conflict jurisdiction does not exist in circumstances where two courts have applied the same legal standard but reached opposite conclusions as to whether the standard was satisfied based on the facts presented. *Downing* and the Opinion below are consistent in that both cases contain rulings that the facts presented by the party claiming the prescriptive easement were not sufficient to

clearly and positively prove the requisite adverse or inconsistent use.

The pertinent point of law announced in *Gay Brothers* is that it is immaterial whether the party claiming the prescriptive easement intentionally or mistakenly occupied the subject property. *Id*. at 320. Since there was proof that placement of the FP&L poles was pursuant to a clearly adverse claim of right to the property owner, irrespective of intent, the Fifth District affirmed the trial court's summary judgment order which concluded that FP&L had established all of the elements for a prescriptive easement. The Fourth District's Opinion in the case at bar reflects its agreement with the trial court that the Saccocios have yet to establish a cognizable claim of right, whether intentional or mistaken, to establish the requisite inconsistent or adverse use. At this point, the lower courts have determined that the Saccocios' evidentiary presentation on the issue of adverse or inconsistent use was lacking. Thus, there is no decisional conflict between *Gay Brothers* and the Fourth District's Opinion.

CONCLUSION

Based upon the foregoing arguments, Plantation respectfully requests that this Court dismiss this Appeal because there is no express decisional conflict between the Fourth District's Opinion and any another case decided by either this Court or another district court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail upon Joseph J. Huss, Esq., Co-Counsel for City of Plantation, Krinzman, Huss & Lubetsky, SunTrust Center, Suite 1100, 515 East Las Olas Blvd., Fort Lauderdale, FL 33301 and Richard M. Saccocio, Esq., Attorney for Plaintiffs, Richard M. Saccocio, P.A., 100 S.E. 12th Street, Fort Lauderdale, FL 33316 this ____ day of August 2005.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies compliance with the font requirements of Fla.R.App.P. 9.100(l). This Jurisdictional Brief of Respondents was prepared using Times New Roman 14-point font.

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