Case No. SC 05-1384

FLORIDA SUPREME COURT

KEVIN BARNHILL, et al.
Petitioners,

v.

SHELBY HARTMAN, et al.,
Plaintiffs/Respondents

v.

MICROSOFT CORPORATION,
Defendant/Respondent.

On Appeal from the Third District Court of Appeals of Florida Case No. 3D04-2051, Consolidated With 3D04-1590; 3D04-1986

BRIEF IN OPPOSITION TO PETITIONERS' BRIEF ON JURISDICTION

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INTRODUCTION

Petitioner's motion to invoke this Court's discretionary jurisdiction should be denied. Petitioners fail to demonstrate that the test for conflict jurisdiction is satisfied. Accordingly, this appeal should be dismissed pursuant to Article 5, §3(b)(3) of the Florida Constitution and Rule 9.030(2)(iv) of the Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

I. Proceedings In The Trial Court and The Attorneys' Fee Award.

On November 24, 1999, the Plaintiffs filed this class action against Microsoft, both individually and on behalf of all persons or entities in Florida similarly situated alleging a violation of FDUTPA. After several years of briefing, discovery, and extensive settlement negotiations, Plaintiffs and Microsoft entered into a settlement agreement which provides the class with significant benefits targeted to the wrongdoing alleged in Plaintiff's complaint.[1] Courts in the District of Columbia, Kansas, Massachusetts, Montana, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, and West Virginia have either preliminarily or

[1] Specifically, it requires that Microsoft will provide up to $202 million in vouchers which can be used to purchase computer hardware and software, including hardware and software that is manufactured and/or sold by Microsoft's competitors. Vouchers may be aggregated by class members and are transferable to both class members and non-class members up to $650. In addition, half of the money allocated which is not redeemed by class members will be donated to Florida schools in the form of vouchers which may be used to purchase computer hardware, software, training, and support.

finally approved settlements against Microsoft with nearly identical terms.

Pursuant to the settlement, Microsoft agreed to pay a "reasonable attorneys' fee" in addition to the benefits it agreed to provide the class. Plaintiffs and Microsoft began negotiating this fee only after the terms of the settlement were agreed upon and preliminarily approved by the trial court. Accordingly, the attorneys' fees paid by Microsoft did not impact the class benefits paid by Microsoft. In fact, the attorneys' fees were paid directly from Microsoft to class counsel—not from the class members' recovery—and therefore did not alter the benefits that Microsoft agreed to pay for the class.

The parties negotiated a fee of $15.5 million plus expenses. This figure represents the class counsel's lodestar of approximately $8 million, plus a contingency risk multiplier of 1.77 and includes payment for post-settlement work such as preparing this brief, as well as the briefs submitted to the Court of Appeals.[2]

II. **Proceedings In The District Court of Appeals.**

Petitioners appealed the trial court's approval of the Settlement Agreement to the Third District Court of Appeals. There, Petitioners contended that the trial court erred in approving the settlement because, among other things, the attorneys' fees agreed upon entailed a contingency risk multiplier. However, Petitioners

[2] Objectors do not challenge class counsel's lodestar—only the application of the contingency risk multiplier.

failed to cite a shred of record support for their contentions that the settlement agreement should be undone. Their brief did not contain a single record citation for any proposition at all. On April 6, 2005, the Court of Appeals affirmed the trial court's order giving final approval to the settlement.

Petitioners now ask this Court to exercise its discretionary jurisdiction to review the Court of Appeals' decision. Petitioners' request should be denied.

SUMMARY OF THE ARGUMENT

Petitioners have failed to demonstrate that a conflict exists warranting exercise of the Court's jurisdiction pursuant to Article 5, §3(b)(3) of the Florida Constitution and Rule 9.030(2)(iv) of the Florida Rules of Appellate Procedure.

Petitioners contend that the Court of Appeals' decision "directly conflicts with two other district court cases as well as prior decisions of this Court." Petitioners are flatly wrong. The decisions they point to as posing decisional conflicts involve the use of a multiplier to arrive at attorneys' fees awards pursuant to a statutory directive. By contrast, the attorneys' fees in this case were agreed upon as part of a settlement: they were not awarded pursuant to a statute and are therefore not subject to any statutory limitations. Indeed, private settlements which include attorneys' fee awards based on the use of a multiplier are routinely upheld by Florida courts. Accordingly, no conflict exists and this Court's discretionary should not be exercised.

ARGUMENT

I. The Standard For The Exercise of Discretionary Conflict Jurisdiction.

This Court's direct conflict jurisdiction is a two-tiered concept: "The first [tier] is a general grant of discretionary subject-matter jurisdiction, and the second [tier] is a constitutional command as to how the discretion itself may be exercised." Tippens v. State of Florida, 897 So.2d 1278, 1280 (Fla. 2005), quoting Florida Star II, 530 So.2d 286, 288 (Fla. 1988). The Court has described the first-tier limitations thusly:

> This Court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as [a decision] issued without opinion or citation….Moreover, there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court.

Florida Star II, 530 So.2d at 288 n. 3. See also Weston v. Nathanson, 173 So.2d 451 (Fla. 1965) ("In order to proceed to the merits we must find a direct conflict between the instant decision and a prior decision of this Court or another District Court of Appeal."); Fla.R.App.Pro. 9.030(2)(A)(iv)("The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law.").

Where the district court decision implicates fundamentally different facts than the decisions going before it, no conflict may be said to exist:

> While conceivably there may be other circumstances, the principal situations justifying the invocation of our jurisdiction to review decisions of Court[s] of Appeal because of alleged conflicts are (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court; or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court….Under the second situation, the controlling facts become vital and our jurisdiction may be asserted only where the Court of Appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in allegedly conflicting prior decisions of this Court.

Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960); quoting Florida Power & Light Co. v. Bell, 113 So.2d 697 (Fla. 1959).

II. Petitioners Have Failed to Demonstrate That The Standard for Discretionary Conflict Jurisdiction Is Met.

Petitioners have failed to demonstrate that the standard for discretionary conflict jurisdiction is met. Petitioners argue that the District Court's order upholding the trial court's approval of the settlement conflicts with two decisions of other district courts of appeal: Stewart Select Cars, Inc. v. Moore, 619 So.2d 1037 (Fla. 4th DCA 1993) and Corvette Shop & Supplies, Inc. v. Coggins, 779 So.2d 529 (Fla. 2d DCA 2000). Additionally, Petitioners contend that the District Court's order conflicts with this Court's decision in Schick v. Department of

Agriculture and Consumer Services, 599 So.2d 641 (Fla. 1992). As demonstrated below, however, none of these cases posits a conflict because all of those cases are factually distinguishable from this case.

A. The Decisions Petitioners Cite As Creating Decisional Conflicts Are Factually Distinguishable From This Case And Can Therefore Not Create A Conflict.

The decisions Petitioners cite as creating a decisional conflict with the Court of Appeals' decision bear no factual similarity to this case. In both Stewart Select Cars, Inc. v. Moore, 619 So.2d 1037 (Fla. 4th DCA 1993) and Corvette Shop & Supplies, Inc. v. Coggins, 779 So.2d 529 (Fla. 2d DCA 2000), attorneys' fees were awarded pursuant to FDUTPA *after a trial on the merits*—not in connection with a settlement agreement reached between the parties. Stewart, 619 So.2d at 1037 ("The case…resulted in a jury verdict and judgment…"); Corvette Shop, 779 So.2d at 529.

Similarly, in Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990) and Schick v. Department of Agriculture and Consumer Services, 599 So.2d 641 (Fla. 1992) attorneys' fees were awarded after a final judgment in favor of the plaintiff was entered—not in connection with a settlement agreement. Quanstrom, 555 So.2d at 829 ("the district court then directed the trial court to

enter a final judgment in favor of [the plaintiff]"); Schick, 599 So.2d at 642 ("successful inverse condemnation case").[3]

Indeed, the statute allows for an award of attorneys' fees only to a "prevailing party." See Fl.St. 501.2105 ("In any civil litigation resulting from an act or practice involving a violation of this part…the prevailing party…may receive his or her reasonable attorney's fees and costs from the non-prevailing party."). There are no prevailing parties in settlement agreements. As this Court stated in Green Companies, Inc. v. Kendall Racquetball Investment, 658 So.2d 1119 (Fla. 3d DCA 1995), the "prevailing party for purposes of attorneys' fees is the party prevailing on the significant issues in the litigation…The fairest test to determine who is the prevailing party is to allow the trail judge to determine from the record which party in fact prevailed on the significant issues tried before the court." Green Companies, 658 So.2d 1119, 1120. This test has no application to a settlement agreement.

As there was no "prevailing party" in this case, the attorneys' fee award could not, as a matter of law, been made pursuant to FDUTPA. Accordingly, the Petitioners' argument that a conflict exists between the District Court's decision

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[3] Quanstrom and Schick are further distinguishable in that neither of them are FDUTPA cases. To the extent Petitioners rely on the United States Supreme Court's ruling in City of Burlington v. Dague, 505 U.S. 557 (1992), such reliance is unwise, as the Objectors admit that that case involves *federal fee shifting statutes.* No fee shifting statute is applicable here—let alone a federal one.

and decisions indicating that the use of a contingency risk multiplier is inappropriate in FDUTPA cases fails as a matter of law.

B. The Use of A Contingency Risk Multiplier In Class Litigation Is Routinely Upheld By Florida Courts.

Moreover, the use of a contingency risk multiplier in class litigation such as this is routinely upheld by Florida courts. In Kuhnlein v. Dept. of Revenue, 662 So.2d 308 (Fla. 1995), the court recognized that the application of a contingency risk multiplier to the lodestar is appropriate in recognition of the risk inherent in class litigation: "[W]e believe that the contingency risk factor, the results obtained and the other lodestar factors are more equitably taken into consideration by accepting or adjusting the lodestar calculation and by permitting the use of multipliers." Likewise, in Ramos v. Philip Morris Co., 743 So.2d 24 (Fla. 3d DCA 1999), a case very similar to this one in that the attorneys' fee award was negotiated separately from the substantive portions of the settlement, this Court approved the use of a multiplier in light of the "extraordinarily risky" nature of the litigation and the "substantial results for the class' benefit." Ramos, 743 So.2d at 32.

Therefore, the District Court's decision upholding the trial court's approval of the use of a multiplier is well-supported by Florida law and cannot be the basis for a decisional conflict.

CONCLUSION

The Petitioners have failed to demonstrate that an express and direct conflict exists between the District Court's decision and any other decision from any other Florida Court. Accordingly, the exercise of this Court's discretionary jurisdiction is not appropriate. Petitioners' motion should be denied.

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CERTIFICATE OF COMPLIANCE WITH FLORIDA RULE OFAPPELLATE PROCEDURE 9.210

I hereby certify that the foregoing is printed in Times New Roman 14-point font and therefore complies with Florida Rule of Appellate Procedure 9.210.

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This is to certify that on this ____ day of _____, 2005, a true and correct copy of the foregoing was served on counsel of record by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to.

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