

IN THE SUPREME COURT OF FLORIDA

S.Ct. Case No.: 05-1456

CASE NO.: 3D04-569
Lt. Case NO. 00-5555

FITTIPALDI USA, INC.

Petitioner,

vs.

HELIO CASTRONEVES,

Respondent,

_____ /

RESPONDENT-S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS¹

Fittipaldi USA, Inc. (AFUSA@) seeks review of a decision of the Third District Court of Appeal, which affirmed a final judgment on a defense verdict favoring Helio Castroneves (ACastroneves@). FUSA's jurisdictional brief quotes from the **underlying record**, in place of the district court's decision. (J.B. pp. 5-7). FUSA thus tacitly concedes that there is no basis for conflict jurisdiction. See Reaves v. State, 485 So. 2d 829, 830 & n.3 (Fla. 1986) (conflict between decisions must appear within the four corners of the majority decision, and it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, as jurisdiction may not be based on review of the record); Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). In an abundance of caution, this new statement of the case and facts follows and is taken from the district court's decision.

On June 11, 1997, Castroneves, a race car driver, and FUSA, through its principal, Emerson Fittipaldi (AFittipaldi@) entered into a five-year management agreement. FUSA agreed to serve as Castroneves' exclusive manager and representative, with a host of

¹ All references are to the Third District's decision appended to this brief, (App. 1-17), and the Petitioner's Jurisdictional Brief. (J.B. pp. 1-10).

duties, in return for varying percentages of Castroneves' gross revenues. The management agreement allowed either party to terminate for ~~A~~reasonable cause. Reasonable cause for Castroneves to terminate the Agreement was defined to include FUSA's breach of any term and condition and/or its failure to use its best efforts to procure necessary licensing, merchandising, endorsement and sponsorship agreements. (App. 2).

On January 26, 1999, FUSA obtained an employment agreement for Castroneves with Hogan Racing, LLC (the ~~A~~Hogan agreement). Hogan agreed to pay Castroneves a \$250,000 salary, plus incentives and \$50,000 in travel expenses. (App. 2).

Simultaneously with execution of the Hogan agreement, FUSA and Fittipaldi entered into a Marketing agreement with Hogan, whereby Fittipaldi personally guaranteed to fund or raise through corporate sponsorships a minimum of \$1 million by March 15, 1999 and committed to raising a minimum of \$3 million in corporate sponsorship funds for Hogan Racing. (App. 2-3). In return, FUSA was to receive a 15% commission from Hogan on certain funds. (App. 3). However, under the terms of the Hogan agreement, Hogan was not required to pay Castroneves' salary and expenses if it did not receive the requisite sponsorship funds from FUSA or Fittipaldi. (App. 3).

On February 12, 1999, Hogan, Castroneves and Ilmor Engineering, Inc. (~~A~~Ilmor) executed an assignment of the Hogan agreement, which gave Ilmor various rights to Castroneves'

services, if Hogan was unable to obtain sufficient funding for the next racing season. (App. 3).

When Fittipaldi failed to raise the required sponsorship funds for Hogan, Hogan withheld Castroneves' salary and expenses. (App. 3). Months later, Fittipaldi was still in default to Hogan, and Castroneves had not received salary payments. Ten months after Fittipaldi's initial default, Hogan notified Fittipaldi of its intent to sue. (App. 3).

In October 1999, at a race in Fontana, California, Hogan publicly announced the cessation of team operations. Ilmor contemplated organizing a racing team, but had insufficient funds in place to do so. (App. 4). Other teams expressed interest in Castroneves, but Fittipaldi was not present to assist him during this critical time period. (App. 4).

On November 1 or 2, 1999, Castroneves asked attorney Alan Miller (AMiller@) to represent him. On November 3, 1999, Castroneves served FUSA notice of terminating the Management agreement, citing a plethora of contract violations. (App. 4). Castroneves also notified Ilmor that its agreement was void since the date for providing Castroneves an alternative driving position was past. (App. 5).

On November 5, 1999, Castroneves represented by Miller, executed a driver's contract and relationship agreement with another racing team. (App. 4, 5).

FUSA then sued Castroneves for breach of contract. (App. 5).

Castroneves defended, raising a host of affirmative defenses. (App. 5). Miller was a disclosed witness, deposed by FUSA prior to trial. (App. 6). Following a six day trial resulting in a defense verdict in Castroneves= favor on FUSA=s breach of contract claims, FUSA appealed the judgment to the Third District. FUSA contended that the trial court abused its discretion by allowing Miller to give Aexpert testimony.@ (App. 6-7).

The Third District ruled that the error was preserved, and that at least some of Miller=s testimony was Aexpert@ in nature. (App. 7-10). Admission of this testimony was error, but did **not** Aunduly prejudic[e] FUSA or the outcome of the case.@ (App. 10).

The District Court agreed that Castroneves= claims he properly terminated FUSA=s management contract did **not** depend on Miller=s expert testimony. Instead, they Adepended on evidence and testimony regarding numerous promises that he alleged were broken by Fittipaldi (including Fittipaldi=s failure to satisfy the \$1 million guaranty), Fittipaldi=s unavailability, and Fittipaldi=s lackluster efforts on Castroneves= behalf.@ (App. 11).

Additionally, FUSA could hardly claim Asurprise@ or Atrial by ambush@ in the substance of Miller=s trial testimony. (App. 11, 12). FUSA deposed Miller pretrial and his trial testimony was entirely consistent with his pretrial deposition. (App. 11-12).

FUSA seeks further review of the Third District=s decision.

SUMMARY OF THE ARGUMENTS

This Court, in its discretion, may review any decision of a district court of appeal that expressly and directly conflicts with a decision of this Court or another district court of appeal. Fla. Const. Art. V, '3(b)(3); Fla. R. App. Proc. 9.030(a)(2)(A)(iv). This conflict requires the announcement of a rule of law which conflicts with a rule of law previously announced by this Court or another district court, or 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 or another district court of appeal.

Here, the Third District's decision is in conflict with neither of the two cases cited as the ostensible basis for jurisdiction. In Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981), this Court indicated that the paramount factor for a trial court to consider in exercising its discretion to exclude a non-disclosed witness is whether the opposing side was prejudiced, i.e. Asurprised in fact. Other factors for the trial court's consideration included the opposing party's ability to cure the nondisclosure.

In Dept. of Health & Rehabilitative Services v. Spivak, 675 So. 2d 241 (Fla. 4th DCA 1996), the Fourth District applied Binger factors to a new expert opinion. It found that a doctor

had not disclosed his new examination of the minor child plaintiff until after the discovery cutoff. This surprised the opposing side, which had no opportunity to cure the attendant prejudice.

The facts presented here are far different. Miller was a **disclosed** witness, who was deposed by FUSA prior to trial, and gave trial testimony consistent with his deposition. Thus, the Third District found - consistent with Binger **B** that FUSA was not prejudiced by his testimony. FUSA further had ample ability to cure any **prejudice** by pretrial motion in *limine*, or reclassification of the witness' testimony (from lay testimony to expert testimony).

FUSA's quarrel with the merits affords no basis for conflict jurisdiction. Its petition for review has no jurisdictional basis and should be denied.

ARGUMENTS

THERE IS NO INTERDECISIONAL CONFLICT BETWEEN THE THIRD DISTRICT DECISION AND A DECISION OF THIS COURT OR THAT OF ANOTHER DISTRICT COURT OF APPEAL

 FUSA seeks review pursuant to Fla. Const. art. V, section 3(b)(3); Fla. R. App. Proc. 9.030(a)(2)(A)(iv). These pertinent jurisdictional provisions require the District Court's decision to **expressly** and directly conflict with a decision of another district court of appeal or the supreme court on the same

question of law. This Adecisional conflict@ envisions either the announcement of a rule of law which conflicts with a rule previously announced by this Court or of another district court of appeal, or 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 or another district court of appeal. Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960).

Where the cases claimed to be in conflict are distinguishable in controlling factual elements, then no express, direct conflict can arise. Wilson v. Southern Bell Tel. & Tel. Co., 327 So. 2d 220 (Fla. 1976); Lynch v. Peoples Gas Systems, Inc., 267 So. 2d 81 (Fla. 1972); Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962) (AConflict must be such that if the later decision and the earlier decision were rendered by the same court, the former would have the effect of overruling the latter@).

FUSA claims the Third District's decision conflicts with Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981) and Dept. of Health and Rehabilitative Services v. J.B., 675 So. 2d 241 (Fla. 4th DCA 1996). That is not the case.

In Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981), the Florida Supreme Court laid down general rules to guide the trial court in the exercise of its discretion to exclude

testimony of a **nondisclosed** witness. Central to the exercise of that discretion was the determination of **Aprejudice@** to the opposing party or **Asurprise in fact.@** Id. at 1313-14. Other factors included the objecting party's ability to cure the prejudice, or his independent knowledge of the witness, the calling party's possible intentional or bad faith noncompliance with a pretrial order and the possible disruption of the trial. Id..

In Dept. of Health and Rehabilitative Services v. Spivak, 675 So. 2d 241 (Fla. 4th DCA 1996), the Fourth District applied Binger to require exclusion of a doctor's testimony regarding his examination of a minor child, some two days **after** the discovery cutoff. Id. at 243. The Fourth District held that the doctor's new opinion unfairly surprised the defendant which had **no** opportunity to obtain information or expert testimony to rebut the testimony of the witness and thereby cure the prejudice.@ Id. at 244.

Here, the Third District's decision is not in conflict with **either** decision. As the Third District aptly observed, Miller was a **Adisclosed@** witness, who was deposed by FUSA prior to trial. (App. 6). FUSA could **Ahardly** claim it was surprised or ambushed@ when Miller gave trial testimony **Aconsistent@** with his pretrial deposition. (App. 12). Moreover, FUSA had the ability to cure the error, by taking appropriate pretrial measures.

(App. 11).

FUSA also cites Capital Bank v. G & J Investments Corp., 468 So. 2d 534 (Fla. 3d DCA 1985). (J.B. pp. 1, 6, 10). This Court's conflict jurisdiction may not be based on conflict between two decisions of the **same** district court of appeal. The Constitution requires express, direct conflict between the Third District decision and that of **another** district court of appeal or the supreme court. Fla. Const. art. V, '3(b)(3); Fla. R. App. Proc. 9.030(a)(2)(A)(iv) (emphasis added). To the extent there is **intradistrict** conflict between two decisions of the same district court of appeal, that is for the district court itself to resolve. See Fla. R. App. Proc., 9.331(a). Here, the Third District found its own decision in Capital Bank to be distinguishable. (App. 10).

In the instant case, FUSA clearly disagrees with the district court's decision. It characterizes the District Court's opinion to be **inaccurate**, and reargues the merits based on its perception of the underlying record. (J.B. p. 7, n.1). This affords no basis for jurisdiction in the absence of express, direct conflict between **decisions**. There is no such conflict here.

CONCLUSION

For all of the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF TYPE SIZE AND FONT

I hereby certify that the Type Size and Font utilized in this brief is Courier New, 12pt.

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