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STATEMENT OF THE CASE AND FACTS

Respondent was the significant other of Meyer Joseph. Petitioner and Petitioner's sister were Meyer Joseph's two daughters. Respondent alleged that she had an oral agreement with Meyer Joseph that they would each deposit funds into a checking account and use those funds only for their joint expenses, with the remainder to go to the survivor at the other's death. Meyer Joseph purchased two certificates of deposit and funded one savings account, each of which he titled to pass to one of his daughters at his death.

After Meyer Joseph died, Respondent sued Petitioner and her sister for conversion of these three assets. The case went to a jury trial, and the jury found in favor of Respondent regarding the savings account only. The jury awarded Respondent \$48,720.52 in damages (equal to the amount in the account as of the date of Meyer Joseph's death) plus prejudgment interest. The trial court entered a Final Judgment on August 4, 2005 awarding that amount.

Petitioner timely appealed the Final Judgment. The Fourth District Court of Appeal affirmed the Final Judgment on October 4, 2006, in its opinion specifically stating in Footnote 1 that it would view "the facts in the light most favorable to Chanin, the prevailing party in the circuit court. *See, e.g. D'Amico v. Brightfelt,*

924 So.2d 872 (Fla. 4th. DCA 2006).”

Rehearing was denied on November 14, 2006, and the Petitioner’s Notice to Invoke Discretionary Jurisdiction of this Court was timely filed on December 8, 2006.

SUMMARY OF THE ARGUMENT

The Fourth District affirmed the trial court (as to amount) by viewing “the facts in the light most favorable to Chanin, the prevailing party in the circuit court.”

However, such an opinion expressly and directly conflicts with other opinions of the Florida Supreme Court and the District Courts of Appeal which require that any finding of fact must still be supported by competent substantial record evidence (including the sub-rule that damages cannot be based upon speculation).

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point

of law. Art. V, §3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF OTHER APPELLATE COURTS.

Respondent alleged that Meyer Joseph took funds she had a right to possess (from his checking account) and placed them into the savings account, which Petitioner converted by refusing to turn it over to Respondent.

Petitioner asserted in the trial court proceeding, in her Initial Brief, in her Reply Brief, and in her Motion for Rehearing, the absence of competent substantial evidence to support a finding that \$48,720.52 (i.e., the amount in the savings account at the time of Meyer Joseph's death) was taken from the checking account and placed in the savings account.

Since a cause of action for conversion requires that the Plaintiff had a present right to possess the asset allegedly converted, the Plaintiff could prove conversion damages only for those funds she could prove came from the checking account and went into the savings account.

No witness testified that Meyer Joseph took money from the checking account and put it into the savings account, not even Respondent. Therefore, the only evidence the jury or the trial court could have relied upon to determine the

amount of damages was record evidence which is not given the deference of oral testimony. *See Deluca v. Hislop*, 868 So.2d 1254 (Fla. 4th DCA 2004); *Adams v. Adams*, 385 So.2d 688 (Fla. 3d DCA 1980).

Regarding documentary evidence, Respondent placed the following into evidence:

- A. A copy of the passbook for the savings account which reflected all the deposits, interest and withdrawals for the account.
- B. Copies of a large number of checks written from the checking account between 1996 and 2001.

A thorough examination of all of these exhibits shows only the following funds going from the checking account to the savings account:

1. \$2,000.00 check #773, dated 12/12/96;
2. \$2,000.00 check #802, dated Feb 21st 97;
3. \$300.00 check #1378, dated Dec 24th 98;
4. \$50.00 check #1569, dated Feb 7th 2000;
5. \$57.00 check #1049, dated July 16, 1998; and
6. \$1,000.00 check #1701, dated Feb 1st 2001.

No other documents admitted into evidence show a check deposited into the savings account; or even reflect a date or amount consistent with an indirect

transfer from the checking account into the savings account.

No other documents were admitted into evidence that showed the source of any of the funds that went into the savings account as coming from the checking account.

Viewing the facts as shown by the evidence “in the light most favorable to Chanin,” the highest amount of Chanin’s funds converted by Petitioner withdrawing funds from the savings account is \$5,407.00 (plus a proportionate share of interest generated in the account), not \$48,720.52 (plus interest thereon) which the jury awarded.

The decision of the Fourth District Court of Appeal in *Joseph v. Chanin*, 940 So.2d 483 (Fla. 4th DCA 2006) is in direct conflict with the following principles/cases, by applying the principle of viewing evidence “in the light most favorable” to the prevailing party at the circuit court level in such as way as to do away with the requirement for competent substantial evidence:

When a jury verdict is not based upon competent substantial evidence or is against the manifest weight of the evidence it should be reversed. *South Carolina Insurance Company v. Wolf*, 331 So.2d 337 (Fla. 1st DCA 1976); *Bell v. Jefferson*, 414 So.2d 273 (Fla. 5th DCA 1982).

“Competent substantial evidence is ‘such evidence as will establish a

substantial basis of fact from which the fact at issue can reasonably be inferred (or) . . . such relevant evidence as a reasonable mind may accept as adequate to support a conclusion.’ *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957).” *Duval Utility Company v. The Florida Public Service Commission*, 380 So.2d 1028, 1029 (Fla. 1980).

A “jury’s verdict cannot rest on a mere probability or guess, and a verdict cannot be affirmed where there is no rational predicate for it in the evidence.” *Florida Department of Transportation v. Raiche*, 527 So.2d 842 (Fla. 2nd DCA 1988).

“ . . . damages must be shown with a degree of certainty that satisfies the mind of a prudent and impartial person and cannot be left to speculation and conjecture because damages that are uncertain, speculative, or conjectural cannot be recovered, whether the action be in contract or tort.” 17 *Fla.Jur.2d* Damages §16. Also see *Colangelo v. Stone Flex, Inc. of Fla.*, 551 So.2d 565 (Fla. 4th DCA 1989) (Evidence that converted property had a value of \$34,000 was too speculative and indefinite to support that amount of damage award in a conversion action).

CONCLUSION

This court has discretionary jurisdiction to review the decision below, and

the court should exercise that jurisdiction to consider the merits of the petitioner's argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been served by U.S. mail on December 18, 2006, to: Robert Rivas, Esquire, Sachs, Sax & Klein, P.A., 200 W. College Ave., Suite 216, Tallahassee, FL 32301.

By: _____
Jay L. Kauffman, Esq.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the foregoing brief complies with the font standards of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

By: _____
Jay L. Kauffman, Esq.