

THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO: SC07-1529

JASON M. WANDNER, P.A.

Petitioner,

vs.

XPRESS TITLE, INC.

Respondent

RESPONDENT'S JURISDICTION ON BRIEF

HUNTER, WILLIAMS & LYNCH, P.A.
Christopher J. Lynch, Esq.
Gables Square, Suite 1150
75 Valencia Avenue
Coral Gables, Florida 33134
Telephone: 305-371-1404

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INTRODUCTION

Petitioner, JASON M. WANDNER, P.A., shall be referred to as “WANDNER,” while the Respondent, XPRESS TITLE INC., shall be referred to as “XPRESS.” Finally, all references to the Appendix will be by the symbol “App.”

STATEMENT OF THE CASE AND FACTS

The relevant facts of this matter are set forth in the Third District Court of Appeal’s opinion in *Xpress Title, Inc. v. Jason M. Wandner, P.A.*, 959 So.2d 278 (Fla. 3rd DCA 2007) (App.).

WANDNER sued XPRESS and Nicel and Elizabeth Mendez based on their alleged failure to satisfy a judgment lien WANDNER had obtained against Juan Ramirez in a separate suit. WANDNER claimed that the judgment lien should have been satisfied when Mr. and Mrs. Mendez purchased the home owned by the judgment debtor, Ramirez. XPRESS was the closing agent for the sale of the Ramirez property. (App., pg 2).

Prior to the sale of the Ramirez home, XPRESS had contacted WANDNER requesting that WANDNER forward a payoff letter detailing amounts due under the final judgment WANDNER had obtained against Ramirez. After the Ramirez home was sold and WANDNER’s judgment was not satisfied, the present suit was filed.

In the Amended Complaint, WANDNER sued XPRESS for fraudulent misrepresentation and violation of §501.204 and §772.104 Fla. Stat. (2004). WANDNER also sued the Mendezes in an attempt to foreclose upon the property. When XPRESS failed to file a responsive pleading, the trial court entered a default judgment against XPRESS, followed by a final judgment for the full amount of the judgment lien. *Id.*

XPRESS then sought to set aside the final judgment arguing that since the Amended Complaint sought unliquidated damages, the damages had to be proven at trial, and thus, it was fundamental error to enter final judgment without notice to XPRESS. After a hearing, the trial court entered an order denying XPRESS' motion, finding that the damages set forth in the complaint were fixed and definite, and, therefore liquidated. *Id.*

On appeal, the Third District agreed with XPRESS that the damages sought against XPRESS were unliquidated since the amount WANDNER could recover from XPRESS, which was acting as the escrow agent, depended upon whether the amount held in escrow would be depleted by satisfaction of superior liens. As such, and because XPRESS' liability could not exceed the amount which was left over in escrow, the court concluded that it was error to enter the final judgment for damages without notice and trial. Accordingly the Third District reversed the

judgment and remanded the case to the trial court to determine the amount which was retained by XPRESS in escrow. *Id.*

SUMMARY OF THE ARGUMENT

The court lacks jurisdiction to review the Third District's decision in this case. The decision does not "expressly and directly conflict" with a decision of another district court of appeal or this Court. Consequently, this Court should decline discretionary jurisdiction. The Third District has neither announced a rule of law which conflicts with a rule previously announced by this Court or another district court nor has as the Third District applied a rule of law to produce a different result from a case which involves the same controlling facts as a prior case disposed of by this Court or another district court. Accordingly, no conflict exists and this Court should decline to exercise its discretionary jurisdiction.

ARGUMENT

THE THIRD DISTRICT DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH AN OPINION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THIS COURT

The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution. *Gandy v. State*, 846 So.2d 1141, 1143 (Fla. 2003). Conflict jurisdiction may exist under two circumstances: (1) An announcement of a rule of law which conflicts with a rule previously announced by this Court or another district court or; (2) The application of a rule of law to produce a different result from a case which involves the same controlling facts as a prior case disposed of by this Court or another district court. *Kennedy v. Kennedy*, 641 So.2d 408 (Fla. 1994); *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960).

The conflict must be direct and unequivocal. *Mora v. City of Ft. Lauderdale*, 446 So.2d 97, 98 (Fla. 1984). As such, “inherent” or so-called “implied” conflict is insufficient. *Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986).

In determining whether conflict jurisdiction exists, the Court is limited to the facts which form the basis of the opinion being appealed. *See Kincaid v. World Insurance Co.*, 157 So.2d 517 (Fla. 1963). Thus, this Court is not at liberty to explore the factual situation beyond that narrated in the opinion of the district

court. That is, this Court may not delve into the record to establish conflict jurisdiction. *See, White Construction Co. Inc. v. DuPont*, 455 So.2d 1026, 1031 (Fla. 1984). In other words, the conflict between decisions must appear within the four corners of the majority decision. *Hill v. Hill*, 778 So.2d 967 (Fla. 2001).

Accordingly, to the extent WANDNER contends that Court should grant jurisdiction because the decision from Third District Court of Appeal (App.), which followed the court's granting of XPRESS' motion for rehearing, directly conflicts with the Third District's original opinion, which was withdrawn, WANDNER's petition is obviously insufficient. The Third District's initial opinion is a nullity, and any argument based upon the initial ruling clearly goes beyond the four corners of the decision which is actually at issue.

The alternative ground for jurisdiction asserted by WANDNER - that the Third District's decision directly and expressly conflicts with the Fifth District decision in *Dunkley Stucco Inc. v. Progressive American Ins. Co.*, 751 So.2d 723 (Fla. 5th DCA 2000) is also not present. First, in XPRESS the Third District does not announce a rule of law which conflicts with a rule previously announced by the Fifth District in *Dunkley Stucco*.

The reason is that in XPRESS, the Third District simply reaffirmed and applied the recognized principle that damages are liquidated when they can be

determined by mathematical calculation or the application of definite rules of law. In fact, in support of that proposition, the Third District cited *Dunkley Stucco*.

Contrary to WANDNER's assertion, the Third District never expressly indicated either that it was concluding that in *Dunkley* the court held that upon default an admission converts what would have been an unliquidated amount into a liquidated amount, or that it was disagreeing with such a holding.¹ As such, there is no direct and unequivocal conflict but rather, at best, an inherent or implied conflict which, as indicated previously, is insufficient to confer jurisdiction. *See Mora v. City of Ft. Lauderdale; Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*

Finally, the second basis for jurisdiction - that the Third District has applied a rule of law to produce a different result in a case involving substantially the same controlling facts as a prior case disposed of by another district court of appeal, is also not present. The reason is that, as indicated above, the Third District, like the

¹ Such a holding would clearly conflict with Rule 1.110(e) of the Fla. R. Civ. P. which reads:

(e) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, **other than those as to the amount of damages**, are admitted when not denied in the responsive pleading. . . (emphasis supplied).

Further, since the rule of procedure, which supports the result reached by the Third District, is a rule of practice and procedure adopted by the Florida Supreme Court, binding on trial and appellate courts, litigants and counsel, *E.g. State v. Lott*, 286 So.2d 565 (Fla. 1973), such a holding in *Dunkley* would also conflict with decisions from this Court setting forth that principle.

First District in *Rich v. Spivey*, 922 So.2d 326 (Fla. 1st DCA 2006), concluded that in *Dunkley*, the Second District was faced with a liquidated damages claim. For this reason the decisions are reconcilable and do not conflict.

Accordingly, since WANDNER has failed to establish either of the two alternative grounds for this Court to exercise its discretionary jurisdiction, the Court should decline to review this case.

CONCLUSION

Based on the foregoing argument and authority, XPRESS respectfully submits that this Court lacks jurisdiction to consider this case, and that WANDNER's petition for review should be denied.

Rodolfo Nunez, Esq.
100 Almeria Avenue
Suite 340
Coral Gables, FL 33134

&

HUNTER, WILLIAMS & LYNCH, P.A.
Gables Square, Suite 1150
75 Valencia Avenue
Coral Gables, Florida 33134

By: _____
CHRISTOPHER J. LYNCH
FBN: 331041

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent U.S. Mail on October 1st , 2007 to Jason M. Wandner, Esq., 777 Brickell Avenue, Suite 1210, Miami, Florida 33131.

HUNTER, WILLIAMS & LYNCH, P.A.
Gables Square, Suite 1150
75 Valencia Avenue
Coral Gables, Florida 33134

By: _____
CHRISTOPHER J. LYNCH
FBN: 331041

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer brief of appellee was prepared in 14-point Time New Roman font.

BY: _____
CHRISTOPHER J. LYNCH

