THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER: SC07-1529
LOWER CASE NO: 04-16419

JASON M. WANDNER, P.A.,

Appellant

v.

XPRESS TITLE, INC.,

Appellee

APPELLANT'S AMENDED BRIEF ON JURISDICTION

APPEAL FROM THE DISTRICT COURT OF APPEALS OF FLORIDA
THIRD DISTRICT

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STATEMENT OF THE CASE AND FACTS

On or about April 18, 2003, the Plaintiff filed a civil complaint against Marlene Ramirez in Case Number 03-09582 CA08. The civil complaint alleged numerous counts stemming from the undersigned's representation of Ms. Ramirez, including civil theft of service, and the tendering of a bad check. The Plaintiff's motion for default was signed on June 2, 2003, and an amended final judgment was signed by the trial court on July 22, 2003 in the amount of $21,260.84. The amended final judgment was properly and timely recorded with the clerk of the circuit court on July 31, 2003, and a judgment lien was properly and timely filed with the Florida Department of State on December 8, 2003, thereby creating a cloud on the title to Marlene Ramirez' home located at 22174 S.W. 24th Terrace, Miami, Florida 33145.

When Marlene Ramirez attempted to sell her home, Xpress Title, Inc., the closing agent, notified Jason M. Wandner, P.A. they would satisfy the lien at closing. They did not. On September 22, 2004, Jason M. Wandner, P.A. filed suit against XPress Title, Inc. for Civil RICO, statutory fraud and fraudulent misrepresentation for XPress Title, Inc.'s failure to satisfy Jason M. Wandner, P.A.'s judgment lien. On June 28, 2005, XPress Title, Inc. defaulted, and in doing so, admitted the well plead allegations that it failed in its obligation to pay off Marlene Ramnirez' lien, and the trial court rendered a final judgment in the

amount of $21,307.74 without a hearing. Xpress Title filed a Motion to Vacate Final Judgment, in which it ultimately stipulated to the default but contested the monetary judgment, which was denied on or about April 4, 2005.

XPress Title, Inc. then filed an appeal in the Third District Court of Appeals. On December 28, 2005, in a *per curiam* decision, the Third District Court of Appeals affirmed the trial court's default judgment based upon the fact that the damages set forth in the claim were "clearly fixed and definite" and therefore liquidated upon default. *XPress Title Inc., v. Wandner*, 2005 WL 3535549 (Fla. 3rd DCA December 28, 2005). ("Xpress Title I"). (Appellate Index: 1).

XPress Title, Inc. then filed a Motion for Rehearing, in which XPress Title, Inc. proffered a new argument that the Court had "overlook[ed]" well established principles that a judgment creditor seeking to enforce a judgment lien against a third party . . . is only entitled to enforce that lien to the extent the third party retains property of the judgment debtor." (Motion for Rehearing, p.2).

The Third District Court of Appeals reversed itself subsequently in *XPress Title Inc., v. Wandner*, 32 Fla. Law Weekly D242 (Fla. 3rd DCA 2007) ("Xpress Title II"). (Appellate Index: 2). In April, 2007 Jason M. Wandner, P.A. filed an Omnibus Motion for Rehearing, a Motion for Rehearing En Banc,

a Motion to Certify Conflict, and a Motion to Certify a Question of Great Public Importance. On July 19, 2007 the Third District Court of Appeals denied these motions. Subsequently, Jason M. Wandner, P.A. timely filed a Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court on August 9, 2007.

SUMMARY OF THE ARGUMENT

In *XPress Title Inc., v. Wandner*, 2005 WL 3535549 (Fla. 3rd DCA December 28, 2005) (Xpress Title I), the Third District Court of Appeals initially determined that the damages below were liquidated based upon the Fifth District Court of Appeals' reasoning in *Dunkley Stucco, Inc., v. Progressive American Insurance Company*, 751 So.2d 723 (Fla. 5th DCA 2000). XPress Title, Inc. filed a Motion for Rehearing arguing that the damages were un-liquidated and that *Dunkley Stucco* was "wrongly decided." The Third District Court of Appeals then reversed itself, holding the damages below were not liquidated. *XPress Title Inc., v. Wandner*, 32 Fla. Law Weekly D242 (Fla. 3rd DCA 2007) (Xpress Title II). (Appellate Index: 2). The Florida Supreme Court should grant jurisdiction in this matter because the Third District Court of Appeals' decision in XPress Title II is directly in conflict with its decision in XPress Title I and the Fifth District Court of Appeals' decision in *Dunkley Stucco* on the same question of law.

ARGUMENT

I. THE SUPREME COURT SHOULD GRANT DISCRETIONARY JURISDICTION BECAUSE AN EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE THIRD DISTRICT COURT OF APPEALS AND THE FIFTH DISTRICT COURT OF APPEALS ON THE SAME QUESTION OF LAW

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. Fla.R.App.P. 9.030(a)(2)(A)(iv). Accordingly, this Court should grant jurisdiction in this matter because there exists an express and direct conflict on the same question of law between the Third District Court of Appeals' decision in *XPress Title, Inc. v. Wandner*, 32 Fla. Law Weekly D242 (Fla. 3rd DCA 2007) (XPress Title II) and the Fifth District Court of Appeals' decision in *Dunkley Stucco, Inc., v. Progressive American Insurance Company*, 751 So.2d 723 (Fla. 5th DCA 2000).

In *XPress Title, Inc. v. Wandner*, 32 Fla. Law Weekly D242 (Fla. 3rd DCA 2007) (XPress Title II), the Third District Court of Appeals held that a damage amount (which it had already determined in Xpress Title I to be readily identifiable based upon a fixed and specific amount that was to be paid at closing pursuant to the recorded lien) was nevertheless un-liquidated for purposes of whether or not a hearing on damages was necessary subsequent to

the Defendant's stipulated default on the Plaintiff's multiple fraud related claims. Specifically, the court stated,

"Since XPress Title, Inc. was acting as an escrow agent, Wandner suffered injury only if there was enough money in escrow for him to have his judgment paid in whole or in part after senior claims were satisfied. As payoff of the purchase money mortgage on the property has priority over other liens, the purchase money mortgage would have to be paid off first. Only if there is money left over would Wandner be paid. If no money was left over, Wandner never would have received anything from the escrow and therefore suffered no damage. Because the escrow agent's liability cannot exceed the amount left over in the escrow, the damages are unliquidated." *Id.* [1]

Thus, the Third District Court of Appeals ruled that despite the fact that Xpress Title was guilty of fraud (via its own stipulation of default on the complaint in which it was accused of failing to pay off the fixed and definitive amount of the Plaintiff's lien), the loss was still un-liquidated because the defaulting Defendant argued that it was not obligated to pay the lien and therefore it did not actually owe the Plaintiff anything.

This decision is in direct conflict with the Fifth District Court of Appeals' decision in *Dunkley Stucco, Inc., v. Progressive American Insurance Company*,

[1] Xpress Title's claim that a purchase money mortgage superior to Plaintiff's lien existed in this matter was the sole basis for the Third District Court of Appeals revised opinion in Xpress Title II that the damages below were un-liquidated. It is striking to the undersigned how the Third District Court of Appeals could reverse the trial court's ruling, and its own initial ruling in Xpress Title I, based upon nothing more than the mere representation of counsel for the Defendant that an interest superior to the Plaintiff's existed, since no such evidence was ever presented by way of sworn statement or even as an attachment to a pleading. Indeed, no such evidence has ever been made part of the permanent record in this case. *See Kephart v. Hadi*, 932 So.2d 1086 (Fla. 2006), *Paladin Properties v. Family Investment*, 952 So.2d 560 (Fla. 2nd DCA 2007), and *Toyota v. Crittendon*, 732 So.2d 472 (Fla. 5th DCA 1999).

751 So.2d 723 (Fla. 5th DCA 2000) on the same question of law. In *Dunkley,* a car accident occurred which resulted in $44,982.72 in damages. *Id.* The victim of the accident was reimbursed by his own insurance company, which became the plaintiff/appellee. *Id.* The appellee insurance company sued the appellant, whose employee caused the accident underlying the claim, in subrogation. *Id.* at 724. The appellant defaulted, and the insurance company obtained a judgment in the full amount of the claim, plus interest, costs, and attorneys fees. *Id*. The appellant appealed the entering of the final judgment on the ground that the damages were un-liquidated and therefore they had a right to notice of a hearing to determine the amount of the damages and attorney's fees. *Id.* The court affirmed in part and reversed in part.

In considering the issue of "the effect of a default" upon the need for a hearing on damages, the *Dunkley* Court stated that "the defaulting party admits all well plead allegations of the complaint . . . [and therefore by] defaulting and thus failing to deny this allegation, appellant is deemed to have admitted it. This admission converts what would have been an un-liquidated amount into a liquidated one." *Id.* In affirming the final judgment, the *Dunkley* Court went on to hold that "[i]f defendant admits that the amount claimed is due, whether by general admission or by default, he has, by not disputing the claim, 'determined' it and is not thereafter entitled to a hearing to require plaintiff to again establish

that amount to which defendant agrees he is liable." *Id*.

Thus, in *Dunkley*, the Fifth Circuit ruled that the Defendant, by defaulting, admitted the basis for the claim, and the specific amount of damages clearly set forth in the pleadings, and therefore waived any right to later contest either their obligation to pay or the amount. *Id.* However, in Xpress Title II, the Third District Court of Appeals obliterated the *Dunkley* standard by ruling that the defaulting Defendant (who therefore was guilty of multiple counts of fraud for failing in its promise and obligation to pay off the Plaintiff's lien) nevertheless had the right to contest its obligation to pay and the amount obliged to pay (even a fixed and definite amount) simply because it claimed on appeal that it did not really owe it.

In other words, the Xpress Title II decision has in essence vacated the effect of the stipulated default, thereby allowing the Defendant to argue that it has a meritorious defense to the allegations.[2] Had the *Dunkley* Court ruled on this matter, it would have held that by stipulating to the default (and therefore agreeing that it was guilty of fraud for failing to pay off the Plaintiff's lien), the Defendant admitted it was liable for the full amount specified in the lien and would not have a right to contest it. This represents an express and direct conflict under Fla.R.App.P. 9.030(a)(2)(A)(iv), since a party cannot legally (or

[2] Of course, the Defendant waived any right to claim a meritorious defense to the allegations by stipulating to the default in the first place.

logically) admit on the one hand that it is guilty of failing in its promise and obligation to pay another a specific amount, and despite that, be permitted on the second hand to claim that it is not actually obligated to pay the very same amount. Such a situation would cause chaos in the law, and lead to completely inconsistent results such as what has occurred here.

Given Xpress Title's argument (which was obviously persuasive on the Third District Court of Appeals in Xpress Title II) that the holding of *Dunkley Stucco* "violates the clear and express provision of the Florida Rules of Civil Procedure" and therefore "was quite simply, wrongly decided," (Xpress Title's Motion for Rehearing, page 3-4), it is imperative for the Florida Supreme Court to resolve this express and direct conflict once and for all. This is especially true since the Third District Court of Appeals itself was so conflicted in regards to the question that its two rulings were so dramatically contradictory to each other.

CONCLUSION

The Florida Supreme Court should resolve the express and direct conflicts enunciated above in order to give guidance as to the essence of Florida law in regards to the issues discussed herein.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the forgoing was furnished this _10__th day of September, 2007 to Rodolfo Nunez, Esq., 100 Almeria Ave., Suite 340, P.O. Box 140910 Miami, Florida 33114 and to Christopher J. Lynch, Esq. at Hunter, Williams & Lynch, 66 West Flagler Street, 8th Floor, Concord Building, Miami, Florida 33130.

CERTIFICATE OF COMPLIANCE

This is to certify that this jurisdiction brief was prepared in 14 point, Times New Roman font pursuant to Fl.R.App.P 9.210.

Respectfully submitted,

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