

**IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA**

JOHN ROE,

Petitioner,

vs.

HSN, LP and HSN INTERACTIVE LLC,

Respondents.

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CASE NO: SC07-1602

**ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA, LAKELAND**

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Second District entered an order (i) determining that Respondents (collectively, “HSN”) were entitled to recover their attorney’s fees, both in the trial court and on appeal, from Petitioner, John Roe, and (ii) remanding the matter to the trial court to determine the amount of the fee award. (App1). On remand, the trial court determined the total amount of a reasonable fee award for both the trial and appellate proceedings without allocating the award between them. (App1).

Roe sought review of the award of trial court fees by direct appeal to the Second District, and that appeal remains pending. (App1). Roe also sought review of the trial court’s award of appellate fees by motion pursuant to Florida Rule of Appellate Procedure 9.400. (App1). The Second District denied the motion, noting that Roe had not specifically challenged the amount of the fee award and that the scope of its review was limited to determining whether the award was reasonable. (App1)

Roe thereupon filed a notice to invoke the discretionary jurisdiction of this Court, asserting that the Second District’s order denying his motion expressly and directly conflicts with decisions from this Court and other District Courts of Appeal.

SUMMARY OF THE ARGUMENT

This Court has no jurisdiction over this appeal. Nothing in the Second District's two-paragraph order below expressly and directly conflicts with any rule of law announced by this Court or another District Court of Appeal. The Second District simply declined to disturb the trial court's fee award because Rule 9.400 limits appellate review to the reasonableness of the appellate fee award, which Roe did not challenge and the record did not delineate.

Given the highly limited scope of what the Second District's order actually said and did, it should come as no surprise that neither this Court nor any of the District Courts of Appeal has expressly and directly issued a rule of law that is contrary to anything in that order. Recognizing this, Roe relies upon alleged facts outside the Second District's order and purportedly implied rulings to concoct a conflict where none exists. But at the end of the day Roe has simply failed to satisfy the constitutional requirement of an express and direct conflict.

ARGUMENT

I. **THERE IS NO EXPRESS AND DIRECT CONFLICT, AND THIS COURT THEREFORE SHOULD DENY REVIEW.**

This Court has discretionary conflict jurisdiction only where there is an express and direct conflict between two decisions on the same rule of law, as evidenced by the written rulings themselves. See Art. V, § 3(b)(3), Fla. Const. (1980); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Reaves v. State, 485 So. 2d 829 (Fla. 1986). Inherent or implied conflict does not serve as a basis for jurisdiction. Dept. of Health & Rehab. Svcs. v. National Adoption Counseling Svc., Inc., 498 So. 2d 888, 889 (Fla. 1986).

The only facts relevant to jurisdiction are those set forth within the four corners of the decisions allegedly in conflict. See Reaves, 485 So. 2d 829, 830, n.3; Hardee v. State, 534 So. 2d 706, 707 (Fla. 1988). The issues in the allegedly conflicting cases must be the same, or the facts must be analytically the same. See In re M. P., 472 So. 2d 732 (Fla. 1985); Dept. of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983); Nielsen v. Sarasota, 117 So. 2d 731 (Fla. 1960). This high standard is simply not met in this case.

In an attempt to support his argument that there is an express and direct conflict, Roe recites numerous alleged facts and rulings the Second District allegedly made. This Court, however, may not consider any of them in its

jurisdictional inquiry. That inquiry is limited to what is contained in the Second District's order. Dept. of Health & Rehab. Svcs., 498 So. 2d at 889.

Here, the Second District correctly noted that it had jurisdiction to review only the reasonableness of the amount of fees awarded. Because Roe did not challenge the reasonableness of the fee award, the court denied Roe's motion for review. The Second District's ruling does not conflict with a decision from this Court or another Court of Appeal. Accordingly, Roe may not invoke this Court's discretionary conflict jurisdiction.

A. No Express And Direct Conflict Exists Regarding The Specific Rule Of Law Requiring Findings Of Fact In An Attorney's Fee Award.

Roe argues that the *trial court's* alleged failure to make factual findings expressly and directly conflicts with Hamlin v. Hamlin, 722 So. 2d 851, 852 (Fla. 1st DCA 1998), Faircloth v. Bliss, 917 So. 2d 1005 (Fla. 4th DCA 2006), and Douglas v. Douglas, 795 So. 2d 99 (Fla. 5th DCA 2001). (Petitioner's Jurisdictional Brief, pp. 45). The fatal flaw in this argument is that the *trial court's* alleged mistakes -- which the Second District neither repeated nor endorsed -- cannot be the basis for an express or direct conflict purportedly arising out of the *Second District's* order. Nothing in the Second District's order expressly and directly conflicts with a rule of law announced in Hamlin, Faircloth, or Douglas.

In Faircloth, the Fourth District addressed whether a fee award could be upheld on appeal if the party requesting fees had failed to provide sufficient support for the fee petition. Faircloth, 917 So. 2d 1005. In Hamlin, the First District addressed whether a trial court's failure to make specific findings as to the factors set forth in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1150 (Fla. 1985), constitutes reversible error. Hamlin, 722 So. 2d 851. Finally, in Douglas, the Fifth District held that child support guidelines require income to be computed considering various factors and that the trial court's failure to make such findings limited meaningful appellate review. Douglas, 795 So. 2d 99.

Here, the Second District did not hold that insufficient evidence could support a trial court's fee award. Nor did the court hold that it could affirm a fee award absent the findings required by Rowe. Rather, the Second District merely noted, correctly, that Roe did not challenge the amount of the fee award and that its review was limited to the reasonableness of the amount awarded. Faircloth, Hamlin, and Douglas do not address, let alone conflict with, the Second District's narrow, case-specific ruling.

- B. No Express And Direct Conflict Exists Regarding The Standard For Determining Entitlement To Attorney's Fees Under Section 501.2105, Florida Statutes, Or The Standard Of Appellate Review Of Such Determinations.

Roe argues that the Second District's order conflicts with Humane Society of Broward County, Inc. v. Florida Humane Society, 951 So. 2d 966 (Fla. 4th DCA

2007), in which the Fourth District held that the trial court may exercise discretion in determining entitlement to attorney's fees under the Florida Deceptive and Unfair Trade Practices Act. (Petitioner's Jurisdictional Brief, pp. 5-6). The court affirmed the trial court's determination of entitlement to fees, identifying various factors a trial court may consider in determining the issue. After ruling that the trial court did not abuse its discretion in making the entitlement determination, the Fourth District affirmed without comment the amount of the award.

Humane Society thus addresses issues involved in the determination of *entitlement* to a fee award under Section 501.2105, not the determination of the *amount* of the fee award. Here, the Second District did not address the criteria for determining entitlement under Section 501.2105. Rather, it held that it could not review the issue of entitlement under Rule 9.400, but only the reasonableness of the amount of the appellate fee award.

C. No Express And Direct Conflict Exists Regarding The Specific Method For Determining The Amount Of Attorney's Fees

Roe claims that the Second District's order conflicts with Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979), in which this Court held that a trial judge's misconception of a controlling principle of law can constitute grounds for reversal. Roe argues that the Second District misconstrued whether Rowe or Humane Society provides the controlling rule of law in this case and that

accordingly the court's order expressly and directly conflicts with Applegate. (Petitioner's Jurisdictional Brief, p. 7).

Roe's argument, to the extent it is even intelligible, is meritless. The Second District's order contains no hint of disagreement with this Court's holding in Applegate. Nor did the order even mention Rowe or Humane Society, let alone purport to determine which case "controlled" – hardly a surprising omission inasmuch as neither case has anything to do with the actual issue before the Second District: whether a court whose scope of review is limited to the reasonableness of a fee award has anything to decide when the amount of the award is not being challenged.

D. There Is No Exception To This Court's Limited Conflict Jurisdiction For Decisions Litigants Consider To Be "Unjust"

Roe argues that this Court should alternatively accept jurisdiction because the Second District's order is "manifestly unjust." (Petitioner's Jurisdictional Brief, pp. 8-9). But this Court has repeatedly confirmed that it does not have authority to act as a second error-correcting court. See Mystan Marine, Inc. v. Harrington, 339 So. 2d 200, 201 (Fla. 1976) ("Time and again we have noted the limitations on our review and we have refused to become a court of select errors."). Thus, merely disagreeing with an outcome, or calling it "unjust," is simply not enough to invoke this Court's limited jurisdiction. Instead, this Court has only "concern with

decisions as precedents as opposed to adjudications of the rights of particular litigants.” Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958).

This Court’s conflict jurisdiction requires a “real, live and vital conflict.” Nielsen v. City of Sarasota, 117 So. 2d 731, 734-35 (Fla. 1960). No matter how “unfair” Roe characterizes the result below, in the absence of a conflict between two rules of law, this Court cannot accept jurisdiction. State v. Seraphin, 818 So. 2d 485, n.1 (Fla. 2002).

CONCLUSION

There is no conflict, and this Court should deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Patricia Roe Fitzgerald, 3517 8th Ave. North, St. Petersburg, FL 33713 counsel for Appellant and Mark Alan Boling, Esq., Law Office of Mark Boling, 21986 Cayuga Lane, Lake Forest, CA 92630, counsel for Appellant, on October 17⁹, 2007.

Hala Sandridge

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Hala Sandridge

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