

**IN THE SUPREME COURT OF FLORIDA**

JOSEPH NAPLES,	)	CASE NO. SC07-2042
	)	
Petitioner,	)	
vs.	)	
	)	L.T. NO. 2D06-3421
CHARLOTTE NAPLES,	)	
	)	
Respondent.	)	
_____	)	

**PETITIONER'S BRIEF ON JURISDICTION**

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## **STATEMENT OF THE ISSUE**

Whether the Supreme Court of Florida has discretionary jurisdiction to review the decision of the Second District Court of Appeals under article V, section 3(b)(3) of the Florida Constitution because that decision expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question(s) of law.

## **STATEMENT OF THE CASE AND FACTS**

Prior to his 2002 divorce from Respondent, Joseph Naples began receiving veterans' disability benefits from the Veterans Administration ("VA"), for a combat-related injury. The judgment in the parties' divorce action approved and incorporated their mediation agreement. (R-51.) As to alimony, the agreement (para. 2) states in material part:

"Each party agrees to permanent alimony as follows: The Husband shall pay periodic installment alimony directly to the Wife through his VA benefits, effective June 1, 2002, the sum of \$1,000 per month, on the first of each month until direct deposit by the VA is in effect."<sup>1</sup>

Thereafter, Mr. Naples was unable to effectuate direct deposit by the VA because federal law prohibits an assignment of disability benefits to a former spouse. The reason is that veterans' disability benefits are intended solely to

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<sup>1</sup> See R-53.

benefit the disabled veteran and his dependents, and that, by definition, his former spouse is no longer his dependent, nor part of his family.<sup>2</sup>

Nonetheless, Mr. Naples made monthly payments to Respondent, through his VA benefits, per the agreement, as far as he was able, but his monthly remittals were not always in the full amount. An arrearage accrued under the terms of the agreement, and Respondent filed a *pro se* motion for contempt and enforcement in August 2004. (R-56.) His monthly remittals continued. Respondent challenged the enforceability of the judgment for want of jurisdiction. (R-68.)

The matter was heard May 25, 2006, with no court reporter present. The trial court found that the parties had entered into the Agreement intending that alimony would be paid solely from Mr. Naples' veterans' disability benefits, and intending that he would effect a partial assignment of those benefits – that is, he would direct the VA to disburse \$1,000 each month directly to Respondent.

The trial court found no ambiguity in the intent of the parties as to the source of the alimony, and the manner in which it was to be assigned, and that such expressions were not surplusage. The trial court deemed the agreement

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<sup>2</sup> See e.g., 38 U.S.C.A. § 101 (defining intended beneficiaries) and § 301 (purpose of program); *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 82 S.Ct. 1231, 8 L.Ed.2d 407 (D.C. Cir. 1962) (statute must be liberally construed in order to provide for maintenance and support of intended beneficiaries).

unenforceable under *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997), ruling that federal preemption principles divested the state court of jurisdiction.

Respondent appealed, and the Second District reversed in a written opinion. On appeal, Mr. Naples argued the application of statutes that prohibit assignment of veterans' disability benefits, including 38 U.S.C.A. § 5301. The district court held that Mr. Naples, as appellee, was precluded from making such arguments because he had not presented them to the trial court.<sup>3</sup>

Mr. Naples filed a petition for a writ of certiorari, which this Court treated as a notice to invoke discretionary jurisdiction. This Brief followed.

### **SUMMARY OF THE ARGUMENT**

1. This Court has jurisdiction under art. V, sec. 3(b)(3), Fla. Const., because the Opinion expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question(s) of law.

2. The Opinion expressly and directly conflicts with a decision by this Court, *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999). See Opinion, p. 6. This conflict is material to the outcome.

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<sup>3</sup> The Opinion (p. 6) cites *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999) for this proposition of law. The Opinion is attached to the Petition for a Writ of Certiorari.

3. The Opinion expressly and directly conflicts with another decision by this Court, *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997). That case states that Florida courts are precluded from enforcing marital settlement agreements that divide or assign veterans' disability benefits to non-military spouses. This conflict is also material to the outcome.

### **ARGUMENT**

#### **I. THE COURT'S DISCRETIONARY JURISDICTION IS PROPERLY INVOKED BASED ON THE STATE CONSTITUTION.**

This Court's conflict jurisdiction can be invoked per se, when a district court certifies conflict with a decision of another district court. *See* art. V, sec. 3(b)(4), Fla. Const. Such certification is not required, however, if the district court's decision expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law. *See State v. Vickery*, 961 So.2d 309 (Fla. 2007) (interpreting art. V, §§ 3(b)(3) and 3(b)(4), Fla. Const., and clarifying the distinction between the two ways in which conflicting decisions confer jurisdiction).

Because the subject opinion does not contain a certification of conflict pursuant to art. V, § 3(b)(4), the basis for jurisdiction turns on whether the opinion expressly and directly conflicts with a decision of another district court of appeal

or of this Court on the same question of law, pursuant to art. V, § 3(b)(3).

Petitioner contends that such conflict exists, and that jurisdiction obtains.

A. The Second District's Opinion Expressly and Directly Conflicts with Opinions of this Court and Other District Courts of Appeal.

Conflict is found in the district court's citation to *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999) in asserting that Mr. Naples, the appellee, is barred on appeal from presenting argument relating to pertinent federal statutes, including 38 U.S.C.A. § 5301, because he had not made those arguments below.<sup>4</sup> This determination caused the district court to ignore or reject fully half of Mr. Naples' Answer Brief. To have done so, however, conflicts with the express language of this Court's ruling in *Dade County Sch. Bd.*, to wit:

“If an appellate court, in considering whether to uphold or overturn a lower court's judgment, is not limited to consideration of the reasons given by the trial court but rather must affirm the judgment if it is legally correct regardless of those reasons, it follows that an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below. It stands to reason that the appellee can present any argument supported by the record even if not expressly asserted in the lower court.”

*Dade County Sch. Bd.*, 731 So.2d at 644 (emphasis added) (citing *MacNeill v. O'Neal*, 238 So.2d 614, 615 (Fla. 1970)).

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<sup>4</sup> The cited statute is set forth in the Opinion, p. 6, and other related, rejected arguments are set forth in the Answer Brief, pp. 8-13.

This express, direct conflict is material because it goes to the essence of the case – that is, whether federal law prohibits division and assignment of veterans’ disability benefits, and thus preempts state courts from enforcing same.

The court’s rejection of these pertinent arguments renders its legal analysis circular in nature. The (rejected) statutory argument establishes conclusively that the agreement these parties made is *deemed* an “assignment of benefits” under federal law, and that such assignments are prohibited. Thus, only by ignoring that argument can the Opinion assert that Mr. Naples “did not assign his disability benefits to [Respondent] nor did they purport to divide those benefits. At most, the parties recognized that the disability benefits were an income source available to satisfy” his obligation. *See Opinion*, p. 5.

At most? The unambiguous language of the subject agreement makes plain that Mr. Naples’ veterans’ disability benefits were the only source through which alimony would be paid; moreover, it is beyond dispute that he agreed to effect a partial assignment of those benefits such that the VA would pay some of his benefits directly to Respondent. Thus, the Opinion lacks genuineness in asserting that the parties did not “purport to divide those benefits.” The contract expressly purports to divide Mr. Naples’ disability benefits.<sup>5</sup>

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<sup>5</sup> It is fundamental that where a contract is clear and unambiguous in its terms, a court may not give those terms any meaning beyond the plain meaning of

Regarding the other conflict, the Second District recognized that *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997), precludes Florida courts from ordering or enforcing a division of veterans' military benefits. The court made a point of noting that *Abernethy* did not interpret *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), or the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 as prohibiting state courts from enforcing indemnity provisions designed to guarantee a minimum monthly income to a non-military spouse. *See Abernethy*, 699 So.2d at 239-40; Opinion, p. 5.

The Opinion fails to mention, however, that *Abernethy* expressly held that the enforceability of such an indemnity provision depends upon the source of the funds committed in satisfaction of the military spouse's obligation. Instead, the court merely noted that *Abernethy* had affirmed the enforcement of a settlement agreement because it "did not expressly provide for a division of disability" (which, under the USFSPA and *Mansell*, would be invalid).

The Opinion relies on the legal construct of "assignment" in holding that this Court's pronouncements in *Abernethy* are not implicated in this case. But, as

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the words contained therein. *See Burns v. Barfield*, 732 So.2d 1202, 1205 (Fla. 4th DCA 1999). Where the terms are unambiguous, the parties' intent must be discerned from the four corners of the document. *Id.* It is never the role of a court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain. *Dickerson Florida Inc. v. McPeck*, 651 So.2d 186, 187 (Fla. 4th DCA 1995).

stated, this is precisely where the court's failure to consider Mr. Naples' pertinent legal arguments renders the court's analysis suspect – and in conflict with *Dade County School Board*, as well as with *Abernethy*. Per the federal statutes cited within the Answer Brief, the agreement made by these parties is deemed an assignment, and is expressly prohibited, and only by disregarding this legal argument can the court assert that no assignment was intended or made.

*Abernethy* establishes that a Florida court cannot legally order Mr. Naples to divide his veterans' disability payments to provide income to Respondent, per *Mansell*. See also *McMahan v. McMahan*, 567 So.2d 976 (Fla. 1st DCA 1990). The Second District relied on *Allen v. Allen*, 650 So.2d 1019, 1020 (Fla. 2d DCA 1994) for the proposition that the USFSPA's exclusion of disability benefits from military retirement pay did not preclude a state court from ordering a husband to pay alimony, or relieve him from paying such obligation. See Opinion, p. 5. How this impertinent assertion confers subject matter jurisdiction over a division or assignment of Mr. Naples' disability benefits was not explained, frankly. The court also did not explain how a court can order Mr. Naples to effect the agreed partial assignment of benefits directly to Respondent. Instead, the court merely glossed over the contract language regarding partial assignment, acknowledging that it “will never be ‘in effect’.” Opinion, p. 5.

The subject opinion conflicts with *Abernethy* partly because the court compared the convoluted facts and holding in *Abernethy* to the straightforward facts of this case. The pertinent distinction is that *Abernethy* dealt with veterans' disability benefits that had been received in lieu of military retirement pension. (The opinion acknowledged that the USFSPA and *Mansell* absolutely prohibit direct payments of alimony from veterans' disability benefits received in lieu of retirement pay.)

In *Abernethy*, the payor spouse waived his military retirement pay in order to receive disability benefits, after having contracted to divide his retirement pay. In *Allen*, the case relied on below, the facts likewise dealt with disability benefits received in lieu of military retirement pay. In each case, *Allen* and *Abernethy*, the fact that the USFSPA allows retirement pay to be divided and assigned – and prohibits division or assignment of veterans' disability pay – was central to the legal analysis. That scenario, however, simply is not present here. Mr. Naples never received a military retirement pension; he never waived any such divisible veterans' benefits in order to receive an indivisible kind. His disability benefits were at all times, by law, indivisible.

Although the timing of the military pensioner's conversion of benefits from a divisible to indivisible status drove the actual result in *Abernethy*, that case still

stands for the unvarnished proposition that, under federal law, veterans' disability benefits cannot be divided or assigned, and that an agreement to do so cannot be enforced under federal preemption principles. The subject opinion conflicts with *Abernethy* in this basic regard, as well as with the reasoning and holding of *McMahan*, which *Abernethy* expressly approved. And it matters not a bit whether the indivisible benefit is labeled "alimony" or "asset distribution." The essential feature is its indivisibility, and its lack of nexus to state court jurisdiction.

The supreme courts of sister states have held that any parsing of terms such as "division" or "assignment" in this context basically amounts to a distinction without a difference. *See e.g., Ex parte Billeck*, 777 So.2d 105, 109 (Ala., 2000) (declining to follow *Allen v. Allen* and holding that when a state court makes an alimony award based on the amount of veterans' disability benefits, it essentially awards the non-military spouse a portion of those benefits and thereby violates federal law.); *Ryan v. Ryan*, 600 N.W.2d 739 (Neb. 1999) (federal law precludes state court in a dissolution proceeding from exercising subject matter jurisdiction over VA disability benefits in a contempt / alimony arrearage action).<sup>6</sup>

## **CONCLUSION**

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<sup>6</sup> The facts in *Ryan* are nearly identical to the instant case.

Based on the foregoing, the discretionary jurisdiction of this Court has been properly invoked and the Court should proceed to review the subject decision under its constitutional authority.

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the font standards required by Fla. R. App. P. 9.210 for computer-generated briefs.

/s/ Brett A. Geer  
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### **CERTIFICATE OF SERVICE**

I CERTIFY that the original and seven copies of this paper have been furnished to the Hon. Thomas D. Hall, Clerk, Supreme Court of Florida, at 500 South Duval Street, Tallahassee, Florida 32399-1925, with a true copy by mail to Richard A. Motley, Esq., at 8406 Massachusetts Avenue, #B-2, New Port Richey, Florida 34653 on December 4, 2007.

/s/ Brett A. Geer  
BRETT ALAN GEER