

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1417

JAY KUCHERA,

Petitioner/Appellant.

vs.

CLAIRE RICE KUCHERA,

Respondent/Appellee.

**RESPONDENT/APPELLEE'S ANSWER BRIEF IN OPPOSITION TO
JURISDICTION
On Appeal from the Fourth District Court of Appeal**

CHRISTOPHER CHOPIN
931 Village Boulevard, Suite 908
West Palm Beach, Florida 33401
Ph: (561) 242-2722
Fax: (561) 242-2820
cchopin@cchopin.com
Counsel for Respondent/Appellee

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SUMMARY OF THE ARGUMENT

Appellant first claims a conflict exists because the lower tribunal failed to consider the parties' post-contract conduct in determining if abandonment had occurred. In fact, however, Appellant admits that the parties' conduct two years after execution was considered by the lower tribunal, and offers no support whatsoever for his suggestion that only the post-reconciliation conduct was relevant.

Appellant next suggests a conflict was created by the Fourth District Court's ruling that a contract with a non-modification clause cannot be abandoned. No such rule, however, was created. The lower tribunal in this case first found five separate non-modification clauses, and then proceeded to make a factual determination that the parties' post-execution conduct did not constitute abandonment. Nothing in the Fourth District's ruling in the instant case precluded a finding of abandonment in the face of a non-modification clause when based on different facts.

Finally, Appellant argues that the non-modification clause was required to be irrelevant to the factual determination regarding abandonment, but fails to cite any authority for this concept. In fact, each case cited by the Appellant makes clear that a Court cannot determine whether abandonment occurred without considering the terms of the contract itself.

ARGUMENT

I. THERE IS NO EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THE DISTRICT COURTS WHICH FOUND ABANDONMENT

Appellant first suggests that the Fourth District Court of Appeal decided “to ignore the parties’ post-contract conduct” and, as such, created a conflict with numerous district court decisions finding that examination of post-contract conduct is the method to determine whether abandonment has occurred. (Brief on Jurisdiction, Page 4), In fact, however, the Appellant has argued that it is the Court’s failure to consider post-contract conduct since 1994 (the agreement was executed in 1992), which creates a conflict. (Brief on Jurisdiction, Page 5).

While the sole basis on which jurisdiction is invoked is a complete failure to consider post-execution conduct, the Court clearly reviewed post-execution conduct to make its determination. The Court relied on the parties’ 1994 decision, after both contract and subsequent dissolution action, to seek an order approving the agreement executed two years prior. (Opinion, Page 3, 4-5).

Appellant’s suggestion of conflict is not that the Fourth District improperly reviewed the post-contract behavior of the parties, but that the Court failed to review that behavior at all. The Opinion makes clear, however, that the parties’ conduct two years after the agreement in seeking independent validation and

approval through a Court Order alone shows that the Court considered post-contract conduct in reaching its decision. Thus, no conflict has been demonstrated.

Appellant cites several cases in which the District Courts made *ad hoc* determinations as to abandonment, and argues not that the Court in this case failed to consider post-contract conduct, but that the result of that review was incorrect.

Citing Plant v. Plant, 320 So.2d 455, 457 (Fla. 3d DCA 1975), the Appellant recites that abandonment occurred because the Husband failed to obtain a life insurance policy alone. In fact, the holding of Plant, *supra*, regarding the Husband's abandonment of a contract was a factual assertion made only after determination that the agreement in question was invalid for five separate, additional reasons. The Plant Court did not determine whether the Wife had acquiesced to the abandonment and only makes reference to the Husband's failure even to argue compliance with the contract as further evidence of its invalidity. In the thirty-three years since this ruling, no Court of this state has ever cited Plant as standing for the idea that any single unilateral breach of contract is sufficient to constitute mutual abandonment, nor would such a ruling be anything but anomalous to the body of law on this subject.

The entirety of Plant, *supra*'s mention of abandonment is one sentence relying on the McMullen v. McMullen, 185 So.2d 191 (Fla. 2d DCA 1966) decision, also cited by the Appellant as in conflict with the instant ruling.

However, in McMullen, *supra*, rather than failing to implement any term, the parties reversed the monetary transfers made under the agreement, whose sole purpose was to grant the parties the benefit resulting from those transfers. Each party actively rescinded the agreement. This *ad hoc* determination is not in conflict with the one made in the case at bar, based on strikingly different facts.

In the present case, the full terms of the agreement were not implemented after its execution. Had the parties never addressed the agreement again, this might have been sufficient to suggest possible abandonment. Two years later, however, the parties returned to Court, again sought dissolution, and, again reconciled. Before doing so however, they confirmed with each other and the Court the validity of the agreement *despite the parties' failure to implement the terms of the agreement*. In other words, even though the accounts had not been split in their entirety, the parties' confirmed that this *was not meant* to show abandonment, and sought the Court's Order on point.

Appellant correctly notes that the question of whether abandonment has occurred is purely one of fact. Wales v. Wales, 422 So.2d 1066 (Fla. 1st DCA 1982). He uses this point of law to suggest that "the Fourth District ignored whether the parties intended to abide by their MSA, by disregarding the parties' actions since their 1994 reconciliation." (Brief on Jurisdiction, Page 5). The holding, however, of each and every case cited by Appellant is that the relevant

conduct is post-contract, meaning all conduct since 1992, not 1994. There simply is no legal or factual basis to suggest that the Court was restricted to consider only conduct beginning more than two years after execution. As the Court clearly considered post-contract conduct in determining that abandonment was neither attempted nor intended, there is no conflict illustrated by the Appellant.

Next, Appellant cites Painter v. Painter, 823 So.2d 268 (Fla. 2d DCA 2002) and Maruri v. Maruri, 582 So.2d 116 (Fla. 3d DCA 1991). In these two cases, factual determinations resulted in a finding of abandonment. In Painter and Maruri, however, the post-contract conduct consisted not only of actions inconsistent with the letter of the agreement, but also acquiescence by the non-defaulting party to the other's unilateral abandonment. In each case the Court primarily relied on the conduct of the non-defaulting party in assuming the agreement was void to make a determination.

In the case *sub judice*, however, after the parties' failed to completely comply with the contract's terms for two following execution, they returned to Court and confirmed their mutual consent to the contract regardless of any failure to implement its terms. They sought a court order confirming that validity despite their intent to reconcile, clearly showing that the reconciliation relied in part or in whole on the fact that the contract, despite the failure to implement its terms, had

not been abandoned. As the Fourth District relied on this post-execution conduct to reject abandonment, no conflict has been illustrated.

II. THE FOURTH DISTRICT COURT DID NOT CONCLUDE THAT A NON-MODIFICATION CLAUSE PREVENTED MODIFICATION OR ABANDONMENT

Appellant next asserts that the Fourth District erroneously ruled that the existence of “a non-modification clause prohibits abandonment of a contract.” (Brief on Jurisdiction, Page 6)

In fact, nothing could be further from the truth. It is certainly true that in the instant case, rather than a single non-modification clause in the agreement, the Court found five separate clauses that invalidated any suggestion that “failure to carry out or enforce a provision after reconciliation would result in a mutual abandonment of the entire agreement.” (Opinion, Page 2).

Nevertheless, the Fourth District continued on to make the factual determination, based on the parties’ conduct two years and more after execution of the agreement, that abandonment, as defined and restricted by the MSA, *had not occurred*. Appellant’s clear suggestion is that the finding created a rule that, in the face of a non-modification clause, abandonment *could not have occurred*.

Appellant cites several cases in which a contract containing a non-modification clause was either abandoned or modified. No review of these cases

will be made, as the Appellee does not in any fashion dispute this point. More importantly, the Fourth District did not contradict it either.

Indeed, the Fourth District Court made clear that abandonment of a contract *was* possible despite the numerous clauses preventing it, in that after reviewing those five clauses, the Court proceeded immediately to make a factual determination based on the parties' post-execution conduct as to *whether an abandonment had occurred in this case*. If it could not have occurred, no factual determination would have been made.

Appellant's argument is that the existence of a non-modification clause must be *irrelevant* to any determination of whether abandonment has occurred or not. (Brief on Jurisdiction, Page 6). However, no single case cited by Appellant stands for the proposition that the Court cannot consider the existence of the clause.

In Wiener v. Wiener, 343 So.2d 1319 (Fla. 3d DCA 1977), the Court noted the existence of a non-modification clause in determining the status of the agreement, and included the existence of that clause in its factual determination of whether abandonment had occurred. In Beach Higher Power Corp. v. Granados, 717 So.2d 563, 565 (Fla. 3d DCA 1998), the Court found only that a party *may* invalidate a contract containing a non-modification clause, but made no statement that the existence of such a clause was irrelevant to determination of abandonment.

In St. Joe Corp v. McIver, 875 So.2d 375 (Fla. 2005), this Court made clear that while modification could occur in the face of a non-modification clause, there are considerable factual considerations at play. There must be a showing that the modification was mutually intended, and that due consideration was given.

This Court has in so ruling made clear that to determine whether a contract has been abandoned or modified despite a non-modification clause, a factual determination must be made, including the possible consideration for the modification. Appellant's suggestion that such a factual determination can be made without considering the terms of the contract, *as well as* the parties post-execution conduct as evidence of their intention to keep, modify, or abandon it, is unsupported by any cited authority, and presents no conflict to this Court.

In Kiwanis Club of Little Havana, Inc. v. Kalafe, 723 So.2d 838, 841 (Fla. 3d DCA 1998), the holding was that oral modification of a written contract was possible. The case did not stand, as suggested, for the irrelevance of a non-modification clause, especially since the contract in that case did not contain one. Again, in Wilson v. Woodward, 602 So.2d 547 (Fla. 2d DCA 1992), while the Court rejected summary judgment precluding the possibility of modification of a contract containing a non-modification clause, no statement was made that the clause itself was irrelevant. In fact, it was restated in the opinion in its entirety.

Nevertheless, Appellant again argues that “contractual language cannot eliminate the necessity to examine the actions of the parties subsequent to the contract execution,” and then immediately proceeds to discuss the Fourth District Court’s examination, in the case at bar, of the parties’ actions subsequent to the contract’s execution, in 1994. (Brief on Jurisdiction, Pages 8-9).

Appellant suggests that the ruling in the instant case “effectively eliminates the rule that parties may mutually waive or abandon terms of an agreement, subsequent to the execution of that agreement.” (Brief on Jurisdiction, Page 9). Nevertheless, Appellant admits that the Court did consider conduct two years after execution of the agreement, but argues that court approval should not matter when the parties’ intent is the factual determination.

In the instant case, however, mere court approval is not the fact in question. The parties waited two years after their agreement, and did not execute its provisions in their entirety. They reconciled. They abandoned their plans for divorce, twice. But, in the same, they were unwilling to do so without first confirming that, despite any failure to employ its terms, and even after two years during which the provisions had not been put into effect, the parties’ still wanted the agreement to control, and both affirmed its validity. Clearly, the parties’ vehement interest in *seeking* that Court approval of the contract *after the conduct suggested to show abandonment* invalidates claim of conflict.

CONCLUSION

The suggestion of conflict raised in Appellant's brief relies in its entirety on the lower tribunal's failure to consider the parties' post-execution conduct in determining whether abandonment had occurred. No argument is made that the factual determination was made, but that it was made incorrectly. Again, the suggestion of conflict is that no factual determination was made. At the same time, Appellant clearly admits that the parties' conduct two years after execution in reaffirming the validity of the contract despite their contrary behavior in prior years was a major factor in the Court's determination.

Appellant's repeated claim that the Court was bound to consider only *post-reconciliation* conduct occurring more than two years after the agreement is unsupported by any authority. And, while the Appellant suggests that the factual determination made should have treated the non-modification clause as irrelevant, there is no authority offered for that point or conflict cited.

The Appellant has shown a conflict warranting this Court's interest in the instant case *only if the Fourth District failed to make a factual determination at all*. The consideration of post-contract conduct by the Court makes clear that neither conflict, nor basis for jurisdiction, exists in this matter.

Respectfully submitted this 15th day of 2008:

CHRISTOPHER CHOPIN
Counsel for Respondent/Appellee
931 Village Blvd., Suite 908
West Palm Beach, Florida 33409
PH: (561) 242-2722
FAX: (561) 242-2820
cchopin@cchopin.com

By: _____
Christopher Chopin
Florida Bar Number 0540455

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Michael P. Walsh, Esquire, Michael P. Walsh, P.A., 501 S. Flagler Drive, Suite 306, West Palm Beach, Florida 33401 and to Philip M. Burlington, Esquire, Burlington & Rockenbach, P.A., 2001 Professional Building, Suite 410, 2001 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33409, via United States Mail and facsimile this 15th day of September, 2008.

Christopher Chopin
Florida Bar Number 0540455

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

Christopher Chopin
Florida Bar Number 0540455