

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

DAVID MICHAEL SACKS
AND FOOD SUPPLY, INC.,

Petitioner,

vs.

Case No. SC08-2121
Lower Tribunal No. 5D07-1682

LINDA MARIE ANNE SACKS,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

CLIFTON H. GORENFLO, ESQ.

Florida Bar No: 0992666

GRAY & GORENFLO, P.A.

901 E. 2nd Street

Sanford, FL 32771

(407) 324-0778

Attorney For Respondent

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent, Linda Marie Anne Sacks, objects to the inclusion in Petitioner's Statement of The Case and The Facts of any facts which do not appear within the four corners of the Fifth District Order under review. See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The only facts relevant to this Court's decision on conflict jurisdiction are those disclosed in the Order itself. Id.

On August 18, 2008, The Fifth District rendered an Order that states in its entirety as follows:

“ORDERED that Appellant Linda Marie Anne Sacks’ Motion For Attorney’s Fees, filed October 11, 2007, pursuant to Section 61.16, Florida Statutes, is granted conditioned upon a finding by the trial court of need and a commensurate ability to pay after appropriate consideration of the financial resources of both parties. Accordingly, this cause is hereby remanded to the Circuit Court for Volusia County, Florida, for that consideration, and to assess the amount of the award, if any.”

The Order makes one statutory reference to Florida Statute Section 61.16 and cites to no appellate opinions.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction in the instant case. This case does not fall within the narrow class of cases invoking this Court’s

jurisdiction. The Court is limited to the facts contained within the four corners of the decision to determine whether an express and direct conflict exists. On the face of the order under review, there is no express and direct conflict with any decision of this Court or any district court.

ARGUMENT

I. NO EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THIS COURT OR OF ANOTHER DISTRICT COURT OR WITH THE CASES REFERENCED BY PETITIONER APPEARS WITHIN THE ORDER UNDER REVIEW. THIS COURT SHOULD THEREFORE DECLINE TO ACCEPT JURISDICTION.

A. Standards For This Court's Jurisdiction

The discretionary jurisdiction of this Court is extremely narrow. Mystan Marine, Inc. v. Harrington, 339 So. 2d 200 (Fla. 1976). It extends solely to the classes referenced in Article V, Section 3(b)(3) of the Florida Constitution. The only possible ground for discretionary jurisdiction in this case is a “decision of a district court of appeal... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law”. Article V, § 3(b)(3), Fla. Const.

The decision to be reviewed and the conflicting decision must address the same legal issues. Times Publishing Co. v. Russell, 615 So. 2d 158 (Fla. 1993). There is no jurisdiction if the facts of the case are distinguishable from those in the case alleged to be in conflict. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983). Applying these exacting standards to the cases cited by the Petitioner,

it is clear that he has failed to demonstrate the required conflict between the Fifth District Order and any decision of this Court and lower appellate courts.

B. The Fifth District Order Does Not Conflict With Decisions of this Court or Other Appellate Decisions.

It is difficult to determine the alleged conflict relied upon by the Petitioner. Noticeably absent from Petitioner's Brief is any reference to the express language and holdings contained in the Fifth District Order. Given the absence of any substantive reference to the Fifth District Order, Petitioner appears to assert a conflict by implication. Implied conflict is no longer a basis for this Court's discretionary jurisdiction. See Department of Health and Rehabilitation Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986).

Petitioner has not asserted and cannot assert an express and direct conflict between any appellate decision whatsoever and the Fifth District's Order. Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction. See Jenkins v. State, 385 So. 2d 1356 (Fla.1980).

Pursuant to Article V, Section 3(b)(3) of the Florida Constitution, the supreme court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with the decision of the supreme court or another district court of appeal. See also Fla. R. of App. P.

9.030(a)(2)(A)(iv). The conflict must be both expressed and direct. See St. Paul Title Ins. Corp. v. Davis, 392 So. 2d 1304 (Fla. 1980). The authorities cited by Petitioner for this proposition, supra, do neither. None of the cited cases address the award of appellate attorney fees and the Order under review makes no reference to the validity or invalidity of a prenuptial agreement.

CONCLUSION

Petitioner has failed to establish the express and direct conflict required under Art. V, § 3(b)(3), Fla. Const. Based upon the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court to decline to accept jurisdiction of this cause.

Respectfully submitted this 3d day of December, 2008.



CLIFTON H. GORENFLO, ESQ.
Florida Bar No. 0992666
GRAY & GORENFLO, P.A.
901 East Second Street
Sanford, Florida 32771
(407) 324-0778
(407) 324-0053 Facsimile
Attorney For Respondent

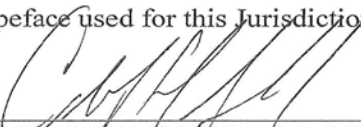
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by United States Mail to: James L. Rose, Esquire, Post Office Box 2599, Daytona Beach, Florida 32115, Leonard R. Ross, Esquire, 628 North Peninsula Drive, Daytona Beach, Florida 32115 and Raven E. Sword, Esquire, Post Office Box 2599, Daytona Beach, Florida 32115, this 3d day of December, 2008.


CLIFTON H. GORENFLO, ESQ.
Florida Bar No. 0992666
GRAY & GORENFLO, P.A.
901 East Second Street
Sanford, Florida 32771
(407) 324-0778
(407) 324-0053 Facsimile
Attorney For Respondent

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the typeface used for this Jurisdictional Brief is Times New Roman, 14 pt.


CLIFTON H. GORENFLO, ESQ.
Florida Bar No. 0992666
GRAY & GORENFLO, P.A.
901 East Second Street
Sanford, Florida 32771
(407) 324-0778
(407) 324-0053 Facsimile
Attorney For Respondent