

IN THE SUPREME COURT OF FLORIDA

STEVEN ECKER, M.D.,

Petitioner,

CASE NO.: SC08-460

L.T. CASE NO.: 3D06-2175

vs.

NEIL LEFF AND PHYSICIANS
FINANCIAL CONSULTANTS
CORPORATION,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

**RESPONDENTS, NEIL LEFF AND PHYSICIANS FINANCIAL
CONSULTANTS CORPORATION'S BRIEF ON JURISDICTION**

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PREFACE

This is a Petition to invoke the discretionary jurisdiction of this Court under Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure.

The Petitioner, Steven Ecker, M.D., will be referred to as “Petitioner.”

The Respondents, Neil Leff and Physicians Financial Consultants Corporation, will be referred to as “Respondents.”

STATEMENT OF THE CASE AND FACTS

Petitioner seeks review of a decision reversing the denial of Respondents' renewed motion to enforce a mediated settlement agreement. The dispositive facts and controlling law are straightforward. Petitioner settled an underlying lawsuit against Respondents following a mediation. *Leff v. Ecker*, 972 So. 2d 965, 966 (Fla. 3d DCA 2007), *rehearing denied*, 2008 Fla. App. LEXIS 2633 (Fla. 3d DCA Feb. 7, 2008). At the time of the conference, Petitioner had "admitted suspicions" about the applicable insurance policy limits. *Id.* As such, he did not have a "clear picture of what the policy limits were for the incidents in question." *Id.* Notwithstanding his suspicions, Petitioner entered into a settlement agreement. *Id.*

Respondents later moved to enforce the agreement. The Circuit Court denied their renewed motion. *Id.* The Third District, in a *per curiam* decision, applied the well-settled principle that litigants may not avoid contracts based upon mutual mistake if they treat limited knowledge as sufficient. *Id.* Because the record "amply" demonstrated Petitioner's limited knowledge, he bore the risk of any "mistake" as a matter of law. 972 So. 2d at 966. The District Court therefore reversed the denial of Respondents' renewed motion to enforce. *Id.* Petitioner now seeks review under Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure.

SUMMARY OF THE ARGUMENT

The Third District's opinion does not conflict with a decision of another court on the same question of law, nor does it misapply the facts to settled law. The decision straightforwardly applies the undisputed facts to the law regarding mutual mistake. Fatal to Petitioner's reliance on this doctrine are his "admitted suspicions about the policy limits" at the time of the settlement. 972 So. 2d at 966. The decision correctly concludes that where, as here, a party treats limited knowledge as sufficient, he cannot, as a matter of law, avoid an agreement on the grounds of mutual mistake. *Id.* Any finding to the contrary constitutes reversible error under any standard of review.

Petitioner's efforts to concoct an "express and direct" conflict regarding the standard of review are meritless. Initially, and in callous disregard of the rules of appellate procedure, Florida statutes and decisions of this Court, Petitioner improperly and extensively relies upon "facts" from the lower court record. Equally unavailing is his unsubstantiated supposition that because the District Court did not explicitly mention the standard of review, it "necessarily" applied an incorrect one. Clearly, the four corners of the opinion do not demonstrate or even suggest that the Court applied an improper standard of review.

Petitioner alternatively attempts to demonstrate conflict based upon an alleged demand for insurance policy information before the mediation, and by

referencing other decisions discussing such demands. This argument again relies upon facts outside the record, and the Third District's opinion does not even mention it. Because the Third District did not address this issue of law, Petitioner may not rely upon it to establish jurisdiction.

STANDARD OF REVIEW

Discretionary jurisdiction exists where the District Court's decision expressly and directly conflicts with another decision on the same question of law. Article V, § 3(b)(3), Florida Constitution; Appellate Rule 9.030(a)(2)(A)(iv). This Court's conflict jurisdiction arises primarily in the following two situations:

(1) the announcement of a *rule of law* which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court. Under the first situation the facts are immaterial. It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the court of appeal. Under the second situation the controlling facts become vital and our jurisdiction may be asserted only where the court of appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in allegedly conflicting prior decisions of this Court.

Nielson v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960); *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975).

Under either scenario, an express and direct conflict “must appear within the four corners of the majority decision.” *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986); *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

ARGUMENT

I. THE THIRD DISTRICT DID NOT APPLY AN IMPROPER STANDARD OF REVIEW

Petitioner does not claim that the District Court announced a conflicting rule of law or incorrectly applied the facts to existing law regarding mutual mistake. Rather, he submits that the District Court applied an incorrect standard of review. He cannot establish this conclusion, however, without looking outside the four corners of the District Court decision. As set forth below, Petitioner falls far short of his heavy burden of demonstrating an express and direct conflict.

A. The Four Corners Of The Decision Demonstrate The Lower Court’s Error Under Any Standard Of Review

The four corners of the District Court’s decision do not conflict with any of the authority relied upon by Petitioner. *See* Petitioner’s Brief, at 8. To the contrary, the Third District’s decision precisely demonstrates the Circuit Court’s failure to apply clearly established law to undisputed, dispositive facts. As a matter of law, a mutual mistake may not occur where a party executes a contract despite “admitted suspicions” regarding a key element. *Leff*, 972 So. 2d at 966 (citing *Rawson v. UMLIC VP, L.L.C.*, 933 So. 2d 1206, 1210 (Fla. 1st DCA 2006));

see Graham v. Clyde, 61 So. 2d 656, 657 (Fla. 1952) ("If one's mistake is due to his own negligence and lack of foresight and there is absence of fraud or imposition, equity will not relieve him"). To rule otherwise, as the Circuit Court did, contravenes *Rawson's* holding, and constitutes reversible error under any standard. Notably, Petitioner does not dispute the record evidence regarding his admitted suspicions. Nor does he attempt to explain how the facts of this case contravene *Rawson*, or any other decision regarding mutual mistake.

A trial court does not have unlimited discretion; it may not disregard dispositive facts or fail to apply those facts to clearly-established law. *See Marr v. Webb*, 930 So. 2d 734, 737 (Fla. 3d DCA 2006) (findings of fact must be supported by "competent substantial evidence"). Nor does a trial court have the "right or power under the law of Florida to issue such order it considers to be in the best interest of 'social justice' at the particular moment without regard to established law." *Nordberg v. Green*, 638 So. 2d 91, 93 (Fla. 3d DCA 1994) (citing *Flagler v. Flagler*, 94 So. 2d 592, 594 (Fla. 1957)). In *Nordberg*, the Court noted that:

[I]t was improper for the trial court to base its decision on its own view that it would be "grossly inequitable" to enter judgment against Mrs. Green under these circumstances. Whether this conclusion is justified as a personal matter or not, the fact is that the law holds Mrs. Green to her word and provides a remedy to those to whom she has given it when they are damaged by her breaking it. No judge has the authority to ignore that law because he believes it inappropriate in a particular case.

638 So. 2d at 93.

The Third District presumably issued its decision with this principle in mind. The standards governing enforcement of settlement agreements are well known, as are the elements of mutual mistake. The Circuit Court was not free to ignore them.

Because the undisputed facts demonstrated that Petitioner could not, as a matter of law, escape the settlement agreement on the grounds of mutual mistake, reversal was required under any standard of review. Otherwise, any party like Petitioner experiencing “buyer’s remorse” could always avoid an agreement by conjuring up after-the-fact excuses or demanding additional representations. This would hold true even if that party took no steps to protect her interests before signing the agreement, or was “admittedly suspicious” about some critical detail. If this were the case, settlement agreements would be meaningless, and litigation would lack finality. Because the Circuit Court’s decision does not conflict with any decision relied upon by Petitioner, conflict cannot exist.

B. Petitioner Cannot Demonstrate Conflict Through Reference To The Lower Court Record

Petitioner claims that the Third District reviewed the matter *de novo*, giving “no deference” to the Circuit Court’s conclusions. Petitioner’s Brief, at 7-9. To demonstrate this point, he compares “factual conclusions” made by the District Court with the trial court’s “conclusions.” *Id.* at 1-5, 9. None of the trial court’s

“conclusions,” however, appear within the District Court’s decision. Instead, the first four pages of Petitioner’s brief, and half of the fifth, rely exclusively upon citations from the lower court record and Petitioner’s Appendix.

The Appellate Rules of Procedure plainly limit the mandatory appendix accompanying a jurisdictional brief to “only a conformed copy of the decision of the district court of appeal.” Fla. R. App. P. 9.120(d); *see* Art. V, § 3(b)(3), Fla. Const. (decision must “expressly and directly” conflict). This Court previously warned that “it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record.” *Reaves*, 485 So. 2d at 830 n.3 (court may not base jurisdiction “on a review of the record”); *see* Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court*, 29 *Nova L. Rev.* 431, 524 (2005) (“the record cannot be used to establish conflict, and attorneys who ignore this fact do themselves and their clients a disservice”).

Respondents object to Petitioner’s extensive reliance upon the record below. They further dispute his inaccurate portrayal of the facts and of the conduct attributed to themselves and their counsel. Petitioner’s efforts in this regard are particularly troubling since Respondents cannot address his assertions without violating the rules of appellate procedure themselves. Because one must look beyond the four corners of the Third District’s opinion to determine whether

Petitioner's arguments have any validity, much less whether they were even properly raised below, conflict jurisdiction cannot exist. *See Reaves*, 485 So. 2d at 830. At a minimum, this Court should strike the out-of-record statement from Petitioner's brief and consider *only* the four corners of the District Court decision.¹

C. Petitioner Cannot Demonstrate Conflict Based Upon Inference Or Implication

Nor may Petitioner demonstrate a conflict based upon unsupported inferences or implication. *Dep't of Health & Rehabilitative Services v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986).² Contrary to Petitioner's erroneous assumption, the District Court's failure to discuss the applicable standard does not "necessarily" mean that it applied the wrong one. Were this the case, decisions such as this would be subject to automatic review.

This Court's opinion in *Ford Motor Company v. Kikis*, 401 So. 2d 1341 (Fla. 1981) does not compel a different result. There, the lower court vacated a jury verdict in favor of the plaintiff and granted Ford a new trial. The appellate court reversed. Its decision explicitly noted that "there was evidence in the record

¹ Petitioner's conduct demonstrates that he is either unfamiliar with the Florida Rules of Appellate Procedure or purposefully ignored them in an effort to disparage Respondents and their counsel and influence this Court.

² *See State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) ("it frequently occurs that an opinion will discuss some phases of a case, but will not mention others[;] [c]ounsel should not from this fact draw the conclusion that the matters not discussed were not considered").

to support the jury verdict” 401 So. 2d at 1342. The sufficiency of the evidence was not, however, relevant to Ford’s motion for a new trial. The proper standard, the Court observed, was abuse of discretion. Because the four corners of *Kikis* demonstrated an application of the incorrect standard, this Court quashed the decision. *Id.* Here, unlike *Kikis*, the four corners of the decision do not *otherwise demonstrate* that the District Court applied a “de novo” standard of review or substituted its judgment for that of the trial court. Because the facts set forth by the District Court, when reviewed together with the cases cited by Petitioner, do not demonstrate any misapplication of the law, the Court should dismiss Petitioner’s petition.

II. CONFLICT DOES NOT EXIST WITH *SCHLOSSER V. PEREZ* OR *CHEVERIE V. GEISSER*

Petitioner alternatively argues that this Court has conflict jurisdiction because the decision below conflicts with opinions concerning statutory demands for insurance information. *See* Petitioner’s Brief, at 10. This argument fails because Petitioner did not rely upon it below, and the Third District did not apply, much less even mention, the decisions upon which Petitioner relies.

Petitioner’s argument additionally fails because once again, he relies upon facts outside the four corners of the Third District’s ruling. *See id.* (attempting to demonstrate that the District Court’s “factual conclusions” “contradict” the “findings of the Lower Court” and addressing alleged requests for insurance

coverage information made by Petitioner pursuant to Section 627.4137, Florida Statutes, as well as events occurring during mediation). As set forth above, reference to matters outside the record cannot establish jurisdiction. The Third District's decision does not even mention the alleged demands for policy information.³

Because Petitioner's argument requires the Court to look beyond the four corners of the Third District's opinion to determine whether it was even properly raised below, there can be no conflict jurisdiction based upon either Section 627.4137, or *Schlosser v. Perez*, 832 So. 2d 179 (Fla. 2d DCA 2002) and *Cheverie v. Geisser*, 783 So. 2d 1115 (Fla. 4th DCA 2001).

CONCLUSION

Petitioner has failed to demonstrate any conflict between the Third District's decision and another decision on the same question of law. Consequently, the Court should dismiss the Petition.

³ Another clear distinguishing factor is that in both *Schlosser* and *Cheverie*, the settlement offers in question were expressly contingent upon the provision of insurance information. *See* 832 So. 2d at 181; 783 So. 2d at 1117-1118. Here, neither the decision itself, nor the trial court record upon which Petitioner erroneously relies, demonstrates that the subject agreement contained a similar requirement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent U.S. Mail this ____ day of April, 2008 to: **Adam Hall, Esq.** and **Andy Hall, Esq.**, Hall, Joseph & Lamb P.A., Offices at Grand Bay Plaza, Penthouse One, 2665 South Bayshore Drive, Miami, Florida 33133

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been typed using the Times New Roman 14-point font, and therefore complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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