

IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC10-1273

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Third District Case No. 3D09-1836

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**DAN ROTTA,**

Petitioner,

vs.

**RENEE ROTTA**

Respondent.

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On Discretionary Conflict Review of a  
Decision of the Third District Court of Appeal

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**PETITIONER'S JURISDICTIONAL BRIEF**

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

On April 15, 2009, a Final Judgment of Dissolution of Marriage (“Final Judgment”) which dissolved the marital union of the Petitioner, Dan Rotta (“Petitioner” or “Mr. Rotta”) and the Respondent, Renee Rotta (“Respondent” or “Mrs. Rotta”) was entered by Judge Kevin M. Emas in the Miami-Dade County Circuit Court. Subsequently, Mrs. Rotta appealed a number of the individual rulings contained within the Final Judgment. Although the Final Judgment was otherwise affirmed, three of the appealed individual rulings were vacated, dismissed and/or remanded by the Third District Court of Appeal. The Petitioner is seeking review of the first and third of the Third District’s three holdings, and argues herein that the Court has conflict jurisdiction arising out of the first of those rulings.

The sole facts pertinent to the Court’s jurisdictional determination are those contained within the four corners of the majority opinion in the Third District’s decision (“Appellate Order”)<sup>1</sup>, see Reaves v. State, 485 So.2d 829 (Fla.1986), a conformed copy of which is contained in the Appendix.

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<sup>1</sup> The Appellate Order’s citation is Rotta v. Rotta, 34 So.3d 107, 35 Fla. L. Weekly D842 (Fla.3d DCA 2010).

## **SUMMARY OF THE ARGUMENT**

The Court has ‘direct conflict’ jurisdiction to review the Appellate Order, as:

a) it ruled that relief may be granted at trial only if the issue had been plead, claimed, asserted or a subject of trial, which places it squarely in opposition to the First District’s decisions in Griffin v. Griffin, 463 So.2d 569, 573 (Fla. 1st DCA 1985) and Provident National Bank v. Thunderbird Associates, 364 So.2d 790, 794 (Fla. 1st DCA 1978), which allow additional forms of relief to be added to the issues for trial via other methods, including agreement of the parties, court order or even by implication from the evidence; and b) although it recited the fact that the Petitioner made the \$400,000.00 payment to the Respondent “voluntarily and unconditionally” in order to “reduce a self-acknowledged debt,” the Third District vacated the trial court’s award with respect to that sum because it evidently found that the ‘voluntary and unconditional’ payment was made pursuant to a contract between the parties, a position that expressly and directly conflicts with the Court’s holdings in both Wilson v. Sandstrom, 317 So.2d 732 (Fla.1975) (contract needs to have some mutuality of obligation) and Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 5 (Fla.1984) (“It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract.”).

## **ARGUMENT**

The parameters of the Court's 'direct conflict' jurisdiction are provided in Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and Article V, section 3(b)(3), of the Florida Constitution, each of which state that the Court has the discretionary authority to review any decision by 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."

The Court has helped to clarify this rule by holding that discretionary review jurisdiction can be invoked only from a district court decision "that expressly addresses a question of law within the four corners of the opinion itself" by "contain[ing] a statement or citation effectively establishing a point of law upon which the decision rests ... it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result." Florida Star v. B.J.F., 530 So.2d 286, 288-89 (Fla.1988).

In practice, there are generally two different circumstances that will fall under the category of 'express and direct conflict': "(1) the announcement of a rule of law that conflicts with a rule previously announced by this Court or another district court; or (2) the application of a rule of law to produce a different result in

a case that involves substantially similar controlling facts as a prior case disposed of by this Court or another district court.” Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla.1960). Also see Aravena v. Miami-Dade County, 928 So.2d 1163 (Fla. 2006) (one of the tests for the Court's conflict jurisdiction is whether the holding being appealed from and prior holding of Florida Supreme Court or district courts of appeal are “irreconcilable”); State v. Stacey, 482 So.2d 1350 (Fla.1985), citing State v. Williams, 397 So.2d 663 (Fla.1981) (holding that the Court had direct conflict jurisdiction where the court below misapplied controlling case law to the facts of the case).

Once the Court accepts jurisdiction over a case in order to resolve a legal issue in conflict, it may consider any other issues properly raised and argued before it. Savoie v. State, 422 So.2d 308 (Fla.1982). As such, the Court may assume jurisdiction over all issues in this case if it deems either one of the conflicts raised *infra* to be ‘express and direct’.

**I. The Third District’s Reversal of Relief Granted at Trial, on Basis the that it “Was Never Pled, Asserted, Claimed in Any Other Fashion, or a Subject of the Trial,” is in Express and Direct Conflict with the First District’s Decisions that Trial Issues can be Added via Pretrial Stipulation**

The first of the Third District’s rulings at issue is its holding that “[t]he portion of the judgment returning to [Petitioner] \$400,000 he had voluntarily and



unconditionally paid the Respondent to reduce a self-acknowledged debt to her is vacated ...” Appellate Order, p.2 [comments added].

The first basis<sup>2</sup> provided by the Third District for this ruling was “(a) that relief [return of the \$400,000.00] was never pled, asserted, claimed in any other fashion, or a subject of the trial.” Appellate Order, p.2 [comments added].

While the courts in the Third District may no longer grant relief in a Final Judgment if is not “pled, asserted, claimed in any other fashion or addressed at trial,” pursuant to the rule of law established by this precedent, courts in the First District award relief even in instances where it was not pled, asserted or claimed before trial or addressed directly during trial, but where the parties simply agreed between themselves to add the relief to the trial issues, or even where the court orders of its own accord that it be so included: “Once the issues have been fixed by the pleadings, they may be changed only by (a) stipulation of the parties, (b) consent or acquiescence of the parties, (c) motion and order, or (d) by amendment express or implied to conform to the evidence.” Griffin v. Griffin, 463 So.2d 569, 573 (Fla. 1st DCA 1985), quoting Provident National Bank v. Thunderbird Associates, 364 So.2d 790, 794 (Fla. 1st DCA 1978).

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<sup>2</sup> Each of the two stated bases are addressed in separate sections herein for purposes of clarity, as each constituted its own individual ‘express and direct’ conflict with prior decisions entered by this Court and/or other district courts of appeal.

Not only does this portion of the Appellate Order constitute “the announcement of a rule of law that conflicts with a rule previously announced by...another district court,” Nielsen at 754, but the express and direct/irreconcilable nature of the conflict is self-evident, as judges in the Third District can no longer rule on issues that they previously determined should be addressed at trial unless they were pled, asserted, claimed or argued at trial by the parties, while judges in the First District still retain that ability.

**II. The Third District’s Reversal of the Relief Granted at Trial, on the Basis that Petitioner’s ‘Voluntary and Unconditional’ Payment of an Acknowledged Debt to Respondent Constituted an Enforceable Settlement Agreement, is in Express and Direct Conflict with this Court’s Prior Holding that Contracts are Void Unless Mutually Enforceable**

The second basis that the Third District provided for its decision to vacate “[t]he portion of the judgment returning to [Petitioner] \$400,000 he had **voluntarily and unconditionally** paid the Respondent to **reduce a self-acknowledged debt to her**” was simply that it “cannot substantively be justified.” Appellate Order, p.2 (emphasis added). By way of additional explanation, the Appellate Order cited two cases (among others) with summarized holdings, as follows:

*See Lotspeich Co. v. Neogard Corp.*, 416 So.2d 1163, 1164 (Fla. 3d DCA 1982) (The trial court's “personal dislike” for the terms of a **settlement agreement** was not valid reason for directing a verdict against the defendant.); *Steiner v. Physicians Protective Trust Fund*, 388 So.2d 1064, 1066 (Fla. 3d DCA 1980) (“Courts may not rewrite a

**contract** or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain.”); *Churchville v. GACS Inc.*, 973 So.2d 1212, 1216 (Fla. 1st DCA 2008) (“It is never the role of a trial 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.”) (citing *Barakat v. Broward County Hous. Auth.*, 771 So.2d 1193, 1195 (Fla. 4th DCA 2000)).

Appellate Order, pp. 2-3 (emphasis added).

Although the Third District explained its holding in an indirect fashion, it still clearly communicated its finding that the parties had entered into a settlement agreement during their marriage with respect to the Petitioner’s outstanding debt to the Respondent, pursuant to which the Petitioner made the \$400,000.00 payment to the Respondent.

Although the Third District based its holding regarding the purported marital settlement agreement on caselaw that simply addressed contracts, it obviously felt there to be no need for any such clarification, as there is no confusion among the courts about the fact that marital settlement agreements are contracts, and are to be interpreted as such. “Certainly, a marital settlement agreement is a contract subject to interpretation as any other.” Chaphe v. Chaphe, 19 So.3d 1019, 1023 (Fla.1st DCA 2009), citing Underwood v. Underwood, 64 So.2d 281 (Fla.1953). However, the very fact that the Third District found there to be a contract between the parties at all is the source of the conflict.

While the Appellate Order is not belabored by an overabundance of facts, it does relate that the Petitioner's payment of the \$400,000.00 to the Respondent was made "**voluntarily and unconditionally**" – thus rendering its determination that the \$400,000.00 payment was made under a contract in express and direct conflict with two black letter law rules previously enunciated by this Court: a) Wilson v. Sandstrom, 317 So.2d 732 (Fla. 1975) (each party to contract need be obligated under at least some terms), and b) "It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract." Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 5 (Fla.1984), citing Howard Cole & Co. v. Williams, 157 Fla. 851, 27 So.2d 352 (1946). As the payment was made voluntarily, then there is by definition not being given pursuant to an enforceable right, but rather of the Petitioner's own volition; and as he made the payment unconditionally, then again by definition there was no mutuality of obligation between the parties. As such, the Appellate Order's determination that the \$400,000 was paid pursuant to a contract that the trial court should not have interpreted is thus predicated upon a legal determination that a valid contract can be found on the basis of an unenforceable and unilateral payment which places it in express and direct conflict with this Court's holdings in Wilson and Pan-Am.

## **CONCLUSION**

Based on the foregoing arguments and authorities, Petitioner respectfully requests this Honorable Court to determine that it has jurisdiction over the Third District ruling at issue and to accept review of same pursuant to its discretionary authority.

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## **CERTIFICATE OF SERVICE**

I certify that a copy of this brief on jurisdiction was mailed on July 8, 2010 to Lee Milich, Esq., Lee Milich, P. A., 100 West Cypress Creek Road, Suite 935, Trade Centre South, Ft. Lauderdale, FL 33309.

**CERTIFICATE OF FONT SIZE**

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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