

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

Third District Court of Appeal Case No. 3D09-1836

DAN ROTTA,

Petitioner,

vs.

RENEE ROTTA,

Respondent.

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

RESPONDENT'S JURISDICTIONAL BRIEF

Lee Milich, Esq.
Fla. Bar No. 287581
LEE MILICH, P.A.
100 West Cypress Creek Road
Suite 935, Trade Centre South
Fort Lauderdale, FL 33309
Phone: (954) 771- 0211
Fax: (954) 771- 1128
Attorneys for Respondent

TABLE OF CONTENTS

	PAGES
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
APPELLATE STANDARD OF REVIEW AND JURISDICTIONAL CRITERIA	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
POINT I	5
THE PETITIONER’S REQUEST TO INVOKE THE DISCRETIONARY JURISDICTION OF THIS COURT SHOULD BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL’S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL OR THIS COURT ON THE SAME QUESTION OF LAW - HUSBAND’S MANUFACTURED ISSUE OF A PRETRIAL STIPULATION.	
POINT II	8
THE PETITIONER’S REQUEST TO INVOKE THE DISCRETIONARY JURISDICTION OF THIS COURT SHOULD BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL’S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL OR THIS COURT ON THE SAME QUESTION OF LAW - HUSBAND’S MANUFACTURED ISSUE OF AN ILLUSORY CONTRACT.	
CONCLUSION	9
CERTIFICATE OF SERVICE	10
CERTIFICATE OF COMPLIANCE	11

TABLE OF CITATIONS

CASES

<i>Cortina v. Cortina</i> 98 So.2d 334 (Fla. 1957)	7
<i>Department of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.</i> 498 So.2d 888 (Fla. 1986)	3, 4, 5, 8
<i>Department of Revenue v. Johnston</i> 442 So.2d 950 (Fla. 1983)	3, 5, 7, 9
<i>Griffin v. Griffin</i> 463 So.2d 569 (Fla. 1 st DCA 1985)	6
<i>Jenkins v. State</i> 385 So. 2d 1356 (Fla. 1980)	3
<i>Kyle v. Kyle</i> 139 So.2d 885 (Fla. 1962)	5, 7, 9
<i>Pan-Am Tobacco Corporation v. Department of Corrections</i> 471 So.2d 4 (Fla. 1984)	9
<i>Provident National Bank v. Thunderbird Associates</i> 364 So.2d 790 (Fla. 1 st DCA 1978)	6, 7
<i>Reaves v. State</i> 485 So.2d 829 (Fla. 1986)	3, 4, 5, 8
<i>Rotta v. Rotta</i> 34 So.3d 107 (Fla. 3d DCA 2010)	2, 4, 7, 8, 9
<i>Wilson v. Sandstrom</i> 317 So.2d 732 (Fla. 1975)	8

CONSTITUTIONAL PROVISION

Fla. Const., Article V, § 3(b)(3)	3
-----------------------------------	---

RULES

Fla. R. App. P. 9.030 (a)(2)(A)(iv)	3
-------------------------------------	---

STATEMENT OF THE CASE AND FACTS

Respondent (“Wife”) appealed various rulings contained in a Final Judgment of Dissolution of Marriage entered by the lower court. Several months after divorce proceedings commenced between the parties, the Petitioner (“Husband”) paid the Wife the sum of \$400,000 in partial resolution of a greater amount owed by Husband of his debt to Wife. The \$400,000 payment reduced the total amount owed from Husband to Wife. During the proceedings in the lower court, the Husband acknowledged the debt and the partial resolution of the amount owed to Wife.

The lower court ruled that the Wife should return the \$400,000 to Husband.

The balance of the additional amount owed from Husband to Wife on the debt (after payment of the \$400,000) was in the form of fixed obligations (which was the subject of the third item in the Decision by the Third District Court of Appeal.) The Third District Court of Appeal ruled that, in addition to the fixed obligations, Wife was also “entitled to prejudgment interest on the fixed obligations owed her by the [H]usband.” (The lower court had denied prejudgment interest on the fixed obligations.)

The Third District Court of Appeal in reversing the lower court ruled that “the portion of the judgment returning to the [H]usband \$400,000 he had

voluntarily and unconditionally paid to [W]ife to reduce a self-acknowledged debt to her is vacated...” (underlining added).

The Third District Court of Appeal held that the Husband had reduced the amount owed to Wife by his voluntary and unconditional payment of \$400,000 which was self-acknowledged as a debt he owed from Husband to Wife.

Secondly, the Third District Court of Appeal ruled that the Husband had “never pled, asserted or claimed in any other fashion” the return of the \$400,000. In addition, the return of the \$400,000 from Wife to Husband was never the “subject of the trial” in the lower court.

Thirdly, the Third District Court of Appeal held that the ruling by the lower court to require the Wife to return the \$400,000 “cannot substantively be justified” (in that the money was clearly owed as acknowledged by the Husband who paid the debt.)

After the entry of the decision by the Third District Court of Appeal (“Decision”) on April 14, 2010 (*Rotta v. Rotta*, 34 So.3d 107 (Fla. 3d DCA 2010)), the Husband filed a Motion for Rehearing and Rehearing En Banc, which was unanimously denied on May 28, 2010.

APPELLATE STANDARD OF REVIEW AND JURISDICTIONAL CRITERIA

Petitioner seeks discretionary review pursuant to Fla. R. App. P. 9.030 (a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The Constitution provides: “The supreme court ... [may] review any 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.”

The conflict between decisions "must be express and direct" and the only relevant facts for the determination of discretionary jurisdiction must appear within the four corners of the majority decision. *Reaves v. State*, 485 So.2d 829 (Fla. 1986); *Accord, Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986) (rejecting "inherent" or "implied" conflict; dismissing petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. *Reaves v. State, supra*. It is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). Conflict jurisdiction is present only when decisions which interpret the same principles of law are applied to indistinguishable facts. *See, Department of Revenue v. Johnston*, 442 So.2d 950 (Fla. 1983).

Because *Rotta v. Rotta, supra*, does not directly and expressly conflict on any point with the decision of this Court or any district court of appeal, this Court should deny Husband's request for discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

Husband's request to invoke the discretionary jurisdiction of this Court fails to meet the mandatory jurisdictional requirements set forth in the Florida Constitution. Specifically, this Court lacks jurisdiction to hear Husband's discretionary appeal because the Third District Court of Appeal's written Decision in this case does not conflict expressly and directly with a decision of another district court of appeal or of this Honorable Court on the same question of law.

Husband has manufactured issues and facts in order to obtain "direct conflict" jurisdiction which are outside of the four corners of the Decision. *Reaves v. State, supra*. The Decision involved the payment of \$400,000 from Husband to Wife on a self-acknowledged debt of Husband which payment was made by Husband to Wife after litigation had commenced between the parties. The Third District Court of Appeal ruled that the lower court had erred in requiring the Wife to return the \$400,000 to the Husband.

Husband has implied conflict by raising issues and facts that are not part of the Decision. *Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., supra* (rejecting "implied" conflict.)

This is not a case in which the Third District Court of Appeal reached a different result than reached in other district courts of appeal or this Honorable Court. *Department of Revenue v. Johnston, supra* (no conflict where cases were distinguishable on their facts); *Kyle v. Kyle*, 139 So.2d 885, 887 (Fla. 1962).

The cases cited by Husband are not only inapplicable but are distinguishable on their facts.

ARGUMENT

I. THE PETITIONER’S REQUEST TO INVOKE THE DISCRETIONARY JURISDICTION OF THIS COURT SHOULD BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL’S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL OR THIS COURT ON THE SAME QUESTION OF LAW - HUSBAND’S MANUFACTURED ISSUE OF A PRETRIAL STIPULATION.

Husband has manufactured facts and issues in his attempt to secure “direct conflict” jurisdiction. Husband misrepresents that the Third District Court of Appeal’s Decision means that relief cannot be granted by the lower court on issues stipulated between the parties in a pretrial stipulation.

The Husband thus (absurdly) implies that the Wife had agreed and stipulated that the Husband was entitled to the return of his \$400,000 which he paid as a partial payment to reduce the debt he owed to his Wife. *Reaves v. State, supra*; *Dept. of Health and Rehabilitative Services v. Nat’l Adoption Counseling Service, Inc., supra* (“implied” conflict rejected).

Firstly, the four corners of the majority Decision of the Third District Court of Appeal does not address or mention a “Pretrial Stipulation” because it was never an issue. Indeed, quite the opposite. The Third District Court of Appeal’s Decision clearly states that the return of the \$400,000 from Wife to the Husband was never asserted or claimed in any other fashion by the Husband. The Husband never entered into a stipulation with the Wife that he would be entitled to a return of this \$400,000 which he paid to reduce his debt. As the Third District Court of Appeal noted, the payment was unconditional.

In the case of *Griffin v. Griffin*, 463 So.2d 569 (Fla. 1st DCA 1985), cited by Husband, the issue presented was whether the trial judge erred in admitting over timely objections, evidence on an issue not framed by the pleadings; and then, in rendering judgment on that issue. *Supra* at 573.

The court ruled that the trial court erred in ruling on an issue that had not been raised in the pleadings. *Supra* at 574.

There is no direct conflict between the ruling in *Griffin v. Griffin, supra*, and the decision of the Third District Court of Appeal in this matter.

In *Provident National Bank v. Thunderbird Associates*, 364 So.2d 790 (Fla. 1st DCA 1978), also cited by Husband, the court in a foreclosure lawsuit ruled that the trial judge was correct in rejecting evidence not raised in the pleadings such as “waste, “advances”, etc. *Supra* at 794, 795.

There is no direct conflict between the ruling in *Provident National Bank v. Thunderbird Associates, supra*, and the decision of the Third District Court of Appeal in this matter.

The facts in neither case dealt with pretrial stipulations. *Rotta v. Rotta, supra*, is not a case in which the Third District Court of Appeal reached a different result than reached in other district courts of appeal or this Honorable Court involving the same controlling facts. There is no express and direct conflict. *See, Department of Revenue v. Johnston, supra* (no conflict where cases were distinguishable on their facts); *Kyle v. Kyle, supra* (same).

The Decision by the Third District Court of Appeal is entirely consistent with the ruling by this Court in *Cortina v. Cortina*, 98 So.2d 334, 337 (Fla. 1957), cited in the *Rotta* decision (“It is fundamental that a judgment upon a matter entirely outside of the issues made by the pleadings cannot stand; and where, as here, an issue was not presented by the pleadings nor litigated by the parties during the hearing on the pleadings as made, a decree adjudicating such issue is, at least, voidable on appeal.”)

Accordingly, Husband’s request for discretionary jurisdiction based on a direct conflict with decisions of another District Court of Appeals or this Honorable Court should be denied.

II. THE PETITIONER’S REQUEST TO INVOKE THE DISCRETIONARY JURISDICTION OF THIS COURT SHOULD BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL’S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL OR THIS COURT ON THE SAME QUESTION OF LAW - HUSBAND’S MANUFACTURED ISSUE OF AN ILLUSORY CONTRACT.

Husband has again manufactured facts and issues in his attempt to secure direct conflict jurisdiction.

The Decision by the Third District Court of Appeal did not address any issue involving contracts which are “mutually enforceable” or “illusory” as claimed by Husband. The Husband has improperly weaved facts and issues “cut out of whole cloth.”

The four corners of the Decision revolved around the \$400,000 payment by Husband of a debt owed by Husband to Wife. The Husband’s payment of a self-acknowledged debt is not “illusory.” The four corners of the Decision make no mention of any issue involving “mutually enforceable” contracts or “illusory” contracts. Husband improperly arrives at these theories by implication and supposition. *Reaves v. State, supra*; *Dept. of Health and Rehabilitative Services v. Nat’l Adoption Counseling Service, Inc., supra* (“implied” conflict rejected).

Husband cites two cases by this Court that have absolutely no connection to the Decision of the Third District Court of Appeal in *Rotta*. The case of *Wilson v. Sandstrom*, 317 So.2d 732 (Fla. 1975) involved an injunction against owners of

greyhounds who refused to produce their greyhounds at a racetrack as required by their contract.

The second case cited by Husband is *Pan-Am Tobacco Corporation v. Department of Corrections*, 471 So.2d 4 (Fla. 1984) which involved a contract between Pan-Am and the Department of Corrections to provide vending machines in six correctional facilities. The state agency invoked sovereign immunity as a bar to an action for breach of contract.

The facts in neither case dealt with the payment by a husband to wife of a self-acknowledged debt. The same controlling facts in *Rotta v. Rotta, supra*, are not contained in either case cited by Husband. There is no express and direct conflict. *Department of Revenue v. Johnston, supra* (no conflict where cases were distinguishable on their facts); *Kyle v. Kyle, supra*.

Accordingly, Husband's request for discretionary jurisdiction based on a direct conflict with decisions of another District Court of Appeals or this Honorable Court should be denied.

CONCLUSION

There is no constitutional basis for discretionary jurisdiction. The Petition should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by mail to SHOLOM BOYER, Esq., and PAMELA CHAMBERLIN, Esq., Mitrani, Rynor, Adamsky & Toland P.A., 301 Arthur Godfrey Road, PH, Miami Beach, Florida 33140, Counsel for Petitioner, this 29th day of July, 2010.

LEE MILICH, P. A.
Attorneys for Appellant, Renee Rotta
leemilich@aol.com
100 West Cypress Creek Road
Suite 935, Trade Centre South
Ft. Lauderdale, FL 33309
Tel (954) 771-0211
Fax (954) 771-1128

By: /s/
LEE MILICH, ESQ.
Fla. Bar No. 287581

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure as it has been prepared in Times New Roman, 14 point font.