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IN THE SUPREME COURT
STATE OF FLORIDA

J. STANFORD LIFSEY,
Petitioner,

Case No: _____

vs.

L. T. No: 2D12-6297

MARY ANN MCCANDLESS,
Individually and as Trustee of the Julian
J. Lifsey, Jr. Trust Fund No. 3 and
JOHN SHEPARD, Individually and as
Trustee of the Julian H. Lifsey, Jr. Trust
Fund No. 3,

Respondents.

PETITION FOR WRIT OF CERTIOARARI SEEKING DISCRETIONAL
REVIEW FROM AN ORDER
OF THE SECOND DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER, J. STANFORD LIFSEY

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STATEMENT OF THE ISSUE

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ISSUE 4

WHETHER THE FLORIDA SUPREME COURT HAS
DISCRETIONARY CONFLICT JURISDICTION TO REVIEW THE
SECOND DISTRICT'S DISMISSAL OF LIFSEY'S APPEAL
BASED ON ITS EXPRESS AND DIRECT CONFLICT BY
MISAPPLICATION OF THE DECISIONAL LAW IN *BRAKE v.*
SWAN AND *KONDLER V. BOTTNER*

PRELIMINARY STATEMENT

The petitioner, J. Stanford Lifsey, shall be referred to as "Lifsey."

The respondents, Mary Ann McCandless and John Shepard, shall be referred to as "the trustees," "Shepard," or "McCandless."

STATEMENT OF THE CASE AND OF THE FACTS

In 1989 Lifsey, as the trustee for a remainder beneficiary of Lifsey Trust Fund No. 3, brought an action against the trustees of Lifsey Trust Fund No. 3, McCandless and Sheppard (hereinafter "trustees"), for claims that included breaches of trust and breaches of fiduciary duty. At the conclusion of the action, the trial court entered an order on June 14, 2011, in favor of the trustees entitled "Final Judgment Awarding Respondents' Reasonable Attorneys' Fees and Costs."

In the "Ordered and Adjudged" section of the order, the trial court awarded the trustees attorneys' fees and costs in the amount of \$243,251.97. Paragraph 19 of the order states in pertinent part that "[t]he Court finds that (Lifsey's) personal liability is limited to his interest in the Lifsey Trust Fund Number Three (3) created under the Julian H. Lifsey, Jr. Revocable Trust of 1988." The court also reserved jurisdiction to determine whether the amount of attorneys fees and costs awarded to the trustees "exceeds (Lifsey's) interest in the trust and how the amount is to be satisfied."

Lifsey appealed the order to the Second District Court of Appeals and the trustees cross-appealed. On July 27, 2011, the trustees filed a Motion to Relinquish Jurisdiction and Stay Appeal in order to seek clarification from

the trial court of its Final Judgment Awarding Respondents' Reasonable Attorneys' Fees and Costs. On August 8, 2011, Lifsey filed a response opposing the trustees' Motion to Relinquish Jurisdiction and Stay Appeal. On August 19, 2011, the Second District entered an order denying the trustees' Motion to Relinquish Jurisdiction and Stay Appeal. The parties filed their various briefs and oral arguments were heard on September 25, 2012.

On April 2, 2013, however, the Second District *sua sponte* entered an order (1) vacating its order of August 19, 2011, (2) treating the respondents' Motion to Relinquish Jurisdiction and Stay Appeal as a motion to dismiss the appeal as being from a non-final, non-appealable order, and (3) dismissing the appeal citing *Brake v. Swan*, 767 So. 2d 500 (Fla. 3d DCA 2000); *cf. Kondler v. Bottner*, 85 So. 3d 1225 (Fla. 4th DCA 2012). (Appendix, Tab 1). Lifsey filed a motion for rehearing or clarification of the order on March 30, 2012, which was denied on May 23, 2013.

On June 24, 2013, Lifsey filed a timely notice to invoke discretionary proceedings in this Court to review the decision of the Second District Court of Appeal dismissing his appeal. Fla. R. App. P. 9.120(c).

SUMMARY OF ARGUMENT

The Second District Court of Appeals cited *Brake v. Swan*, 767 So. 2d 500 (Fla. 3d DCA 2000), and *Kondler v. Bottner*, 85 So. 3d 1225 (Fla. 4th DCA 2012), in its decision dismissing Lifsey's appeal as being from a nonfinal, nonappealable order. However, unlike the final judgments from which appeals were taken in *Brake v. Swan* and *Kondler v. Bottner*, the final judgment from which Lifsey appeals entitles the trustees to immediate possession of up to \$243,251.97 of Lifsey's interest in Lifsey Trust Fund Number Three without any further action or orders required from the trial court. Therefore, the Second District's decision expressly and directly conflicts with the decisions entered in *Brake v. Swan* and *Kondler v. Bottner* by misapplying the law as set forth in those decisions which are materially at variance with the case *sub judice*.

Accordingly, it is on the basis of the Second District's express and direct conflict with *Brake v. Swan* and *Kondler v. Bottner* that the Florida Supreme Court has discretionary jurisdiction to review the decision of the Second District dismissing Lifsey's appeal as being from a nonfinal, nonappealable order. Art. 5, § 3(b)(7); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

ISSUE: WHETHER THE FLORIDA SUPREME COURT HAS DISCRETIONARY CONFLICT JURISDICTION TO REVIEW THE SECOND DISTRICT'S DISMISSAL OF LIFSEY'S APPEAL BASED ON ITS EXPRESS AND DIRECT CONFLICT BY MISAPPLICATION OF THE DECISIONAL LAW IN *BRAKE v. SWAN* AND *KONDLER v. BOTTNER*

Lifsey, pursuant to Art. 5, § 3(b)(7), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv), 9.100(c), and 9.120, petitions this Court for a Writ of Certiorari to review an order of the Second District Court of Appeals dismissing his appeal. The Florida Supreme Court has authority and discretionary jurisdiction to issue writs of certiorari pursuant to Art. 5, § 3(b)(7), Fla. Const., and Fla. R. App. P. 9.030(a)(3), where, as in the instant case, the decision of the Second District expressly and directly conflicts with the decisions of other district courts in *Brake v. Swan*, 767 So. 2d 500 (Fla. 3d DCA 2000) and *Kondler v. Bottner*, 85 So. 3d 1225 (Fla. 4th DCA 2012). Specifically, by relying on *Brake v. Swan* and *Kondler v. Bottner* in reaching its decision as cited in its order of dismissal, the Second District misapplied the law as set forth in those decisions which are materially at variance with the case at bar. *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d 520, 521 (Fla. 1980) ("This Court has certiorari jurisdiction based on

conflict when a district court of appeal misapplies the law by relying on a decision which involves a situation materially at variance with the one under review.”); *see also Acensio v. State*, 497 So. 2d 640, 641 (Fla. 1986) (Florida Supreme Court has jurisdiction to review an affirmance that expressly relies on a decision involving a factual situation that is materially at variance); Art. 5, § 3(b)(7), Fla. Const.

The Second District dismissed Lifsey’s appeal by order dated April 2, 2013, on the grounds that it was an appeal from a non-final, non-appealable order. (Appendix, Tab 1). The sole issue in determining whether this Court has jurisdiction to review the Second District’s decision is whether the Second District correctly applied *Brake v. Swan* and *Kondler v. Bottner* in determining that Lifsey’s appeal should be dismissed as being from a non-final, non-appealable order.

Brake v. Swan, like the instant case, involved a lengthy probate action. 767 So. 2d at 502. As in the instant case, the trial court at the conclusion of the case awarded attorneys’ fees in excess of \$200,000 to the attorneys for the prevailing party. *Id.* at 501-02. As in the instant case, the Third District in *Brake v. Swan* dismissed the appeal on the grounds that the order being appealed was not appealable from either a final judgment or

non-final order. *Id.* at 502

The crucial distinction between *Brake v. Swan* and the instant case, however, lies in the language of reservation in the two orders under appeal.

This distinction can be found in the following language from *Brake v. Swan*:

Although the probate court set the amount of fees and costs to be awarded, the order deferred to a future date *the determination of who should pay the award*. The court has reserved jurisdiction to decide whether part of the award should be surcharged against Mrs. Brake individually, or charged against Mrs. Brake's distributive share of the estate, or whether the estate itself should be charged. Absent that determination, the order is not appealable either as a final judgment or as a non-final appeal under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv). (emphasis added).

Id.

In *Brake v. Swan*, the trial court's order had determined neither (1) who was liable for the attorneys fees nor (2) for what parts of the attorneys' fees the as-yet-undetermined liable parties would be responsible. In the instant case, however, the final judgment clearly apportions personal liability to Lifsey *alone*, directs the source from which the attorneys' fees and costs are to be paid (i.e. from Lifsey's interest in Trust Fund Number Three), and reserves jurisdiction *only in the event* that the award of \$243,251.97 exceeds Lifsey's interest in Lifsey Trust Fund Number Three.

Kondler v. Bottner, also cited in the Second District's order of dismissal, is a decision that dismisses an appeal from an order that *did not determine an amount of attorney's fees nor the source from which they were to be paid*, and is, therefore, also misapplied law as to the facts of the instant case. 85 So. 3d at 1227.

Unlike the final judgments from which appeals were taken in *Brake v. Swan* and *Kondler v. Bottner*, the final judgment from which Lifsey seeks to appeal is a final order from which the trustees are entitled to immediate possession of up to \$243,251.97 of Lifsey's interest in Lifsey Trust Fund Number Three, without the trial court having to take any further action or enter any further orders and, as it stands, without Lifsey ever having had the opportunity and the right to have his appeal from the award heard on its merits. *See, e.g., Greene v. Borsky*, 961 So. 2d 1057, 1058 (Fla. 4th DCA 2007) (an order determining the right to immediate possession of money is appealable); *see also Caufield v. Cantele*, 837 So. 2d 371, 374 (Fla. 2002)

If the cost determination is entered in the final judgment or is made subsequent to the rendition of the final judgment but prior to timely appeal from that judgment, plenary appeal from the final judgment ... will bring the cost order to the appellate court....

quoting *Chatlos v. City of Hallandale*, 220 So. 2d 353, 354 (Fla. 1968).

Because the Second District misapplied the decisional law in *Brake v. Swan* and *Kondler v. Bottner* to the case *sub judice* in its order dismissing Lifsey's appeal, this Court has conflict jurisdiction to review the Second District's departure from the essential requirements of the law that will cause material injury to Lifsey for which there is no adequate remedy by appeal. *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d at 521; *see also Acensio v. State*, 497 So. 2d at 641; *Knowles v. State*, 848 So.2d 1055, 1056 (Fla. 2003) (accepting jurisdiction based on conflict created by misapplication of decisional law); *Robertson v. State*, 829 So.2d 901, 904 (Fla. 2002) (stating that misapplication of decisional law creates conflict jurisdiction); Art. 5, § 3(b)(7), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv), 9.100(h).

CONCLUSION

Because the Second District misapplied the decisional law from *Brake v. Swan* and *Kondler v. Bottner* in dismissing Lifsey's appeal, effectively denying him a right to appeal the final judgment giving the trustees the right to immediate possession of up to \$243,251.9 of Lifsey's interest in Lifsey Trust Fund Number Three, Lifsey petitions this Court to accept jurisdiction and to allow Lifsey to file a brief on the merits seeking a

writ of certiorari quashing the Second District's order of April 2, 2013, dismissing his appeal.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing has been computer generated in Times New Roman 14 point and complies with the requirements of Fla. R. App. P. 9.100(l) and 9.210.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. mail to Marie Tomassi, Attorney for Appellee, Trenam Kemker, 200 Central Ave, Suite 1600, St. Petersburg, Florida 33701, this 3rdth day of July, 2013.

By: /s/ [Signature]
J. STANFORD LIFSEY, ESQ.
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275
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MARY ANN MCCANDLESS,
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Trustee of the Julian H. Lifsey, Jr. Trust
Fund No. 3,

Respondents.

_____ /

APPENDIX TO PETITIONER'S JURISDICTIONAL BRIEF

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Order of the Second District Court of Appeal Dismissing
Lifsey's Appeal (April 2, 2013)

Tab 1

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327**

April 2, 2013

CASE NO.: 2D11-2993

L.T. No. : 02-CP-1276

J. Stanford Lifsey, Esq.

v.

In Re: Trust Fund Number

3

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

We vacate our order of August 19, 2011, denying Appellees' Motion to Relinquish Jurisdiction and Stay Appeal, we treat the motion as a motion to dismiss this appeal as from a nonfinal, nonappealable order, and we grant the motion and dismiss the appeal and cross-appeal. See Brake v. Swan, 767 So. 2d 500 (Fla. 3d DCA 2000); cf. Kondler v. Bottner, 85 So. 3d 1225 (Fla. 4th DCA 2012).

NORTHCUTT, KELLY, and VILLANTI, JJ, Concur.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

J. Stanford Lifsey, Esq.

Marie Tomassi, Esq.

Charles M. Harris, Esq.

Stephanie S. Leuthauser, Esq.

Pat Frank, Clerk

Hon. Claudia R. Isom

dc


James Birkhold
Clerk

