

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1377

LOWER TRIBUNAL CASE NUMBERS: 3D14-274; 3D13-1733; 12-27257

YACHTBRASIL MOTORBOATS
& CHARTERS, LLC,

Petitioner,

vs.

JOHN GLUCK,

Respondent.

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

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I. STATEMENT OF THE CASE AND FACTS

Petitioner YachtBrasil Motor Boats and Charters, LLC (“YachtBrasil”) states in the opening paragraph of its petition (Petition, at 1) that it is confining its argument supporting invocation of the Court’s discretionary jurisdiction “to those facts as stated in the underlying Third District Court of Appeal’s Opinion . . .” However, its assertions of express conflicts between the Third District’s Opinion (“the Opinion”) and decisions of the Supreme Court and the Fourth District are premised entirely on characterizations of the record below which are outside of the Opinion. It states that there were “[n]o prior discovery sanctions . . . entered against [it] in the Trial Court.” (Petition, at 1.) It further states (Petition, at 3) that this is “not a case involving a protracted history of discovery abuses, numerous motions to compel, prior sanctions by the trial court, [or] patent prejudice to the opposing party . . .” However, the Opinion does not discuss the record below or the specifics of the trial court’s evaluation of the record which support its determination that the trial court appropriately exercised its discretion. In its entirety, the Opinion states, as follows:

YachtBrasil Motor Boats & Charters LLC and Aderbal Coelho, Junior appeal the trial court’s Order Granting Sanctions dated June 5, 2013 striking YachtBrasil’s answers and affirmative defenses and dismissing YachtBrasil’s counterclaim with prejudice. Although these are severe sanctions, we find the trial court did not abuse its discretion and find that each of the elements of Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993) is

supported by the evidence.

Affirmed.

(YachtBrasil's Appendix, 1 - 2.)

As we show below, there is nothing in the Opinion which supports an argument that it conflicts with any decision of this Court or another District Court. Accordingly, under well-settled precedent there is no basis for the exercise of the Court's discretionary jurisdiction.

II. SUMMARY OF THE ARGUMENT

YachtBrasil seeks to invoke the Supreme Court's discretionary jurisdiction, arguing that the Opinion directly and expressly conflicts with the Court's opinion in *Ham v. Dunmire*, 891 So. 2d 492 (Fla. 2004), and the Fourth District's opinion in *PNC Bank v. Duque*, 137 So. 3d 476 (Fla. 4th DCA 2014). Its predicate for that argument is its claim that since there were no prior sanctions entered against it in the trial court the Opinion fails to consider whether less severe sanctions were appropriate, as mandated by *Ham* and *Duque*. First, the predicate is faulty. The Opinion does not discuss whether there were prior sanctions, but it does not matter whether there were or were not, as there is no requirement either in *Ham* or in *Duque* that there be prior sanctions before a trial court may strike a party's pleadings and dismiss its claim as a sanction. While *Ham* does require that consideration be given to less severe sanctions, there is nothing in the Opinion to

support YachtBrasil's assertion that the District Court failed to do that. What *Ham* (and *Duque* following it) does require is that a trial court give consideration to the factors described in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993). The Opinion does just that. It states that while the sanctions imposed by the trial court were severe, it did not abuse its discretion and it correctly considered each of the *Kozel* factors.

Under longstanding precedent, the Court lacks discretionary jurisdiction over a district court opinion, like this one, which is a summary affirmance, does not cite any opinions of the Court which have been reversed or receded from or are under review, or a contrary holding of another district court. See, e.g., *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (1988), and *Wells v. State*, 132 So. 3d 1110, 1113 (Fla. 2014). Accordingly, the Petition should be denied.

III. ARGUMENT

A. THE SUPREME COURT LACKS DISCRETIONARY JURISDICTION HERE AS THERE IS NO DISCERNABLE EXPRESS CONFLICT BETWEEN THE DISTRICT COURT OF APPEAL'S OPINION AND A DECISION OF THE SUPREME COURT.

YachtBrasil argues (Petition, at 3 - 5) that the District Court Opinion directly conflicts with *Ham v. Dunmire*, 891 So. 2d 492 (Fla. 2004), which states that dismissal is unwarranted where less severe sanctions are appropriate alternatives. It claims (Petition, at 5) that the Opinion ignores the fact that the trial

court failed to consider whether lesser sanctions were available since no prior sanctions had been entered against it. However, since this issue is not addressed by the Opinion, an express conflict cannot be discerned between it and *Ham*.

The Supreme Court has long held that it lacks discretionary jurisdiction to review district court summary affirmances. As it stated in *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (1988),

. . . there can be no actual conflict in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court. *See Jollie v. State*, 405 So.2d 418, 420 (Fla.1981).

Here, the only Supreme Court decision cited in the Opinion was *Kozel v.*

Ostendorf, which remains valid authority, and upon which *Ham* specifically relies.

In *Wells v. State*, 132 So. 3d 1110, 1113 (Fla. 2014), the Court recently explained,

. . . based on our case law since *Jenkins*, it is clear that we have explicitly held that this Court lacks discretionary review jurisdiction over the following four types of cases: (1) a per curiam affirmance rendered without written opinion—*see Jenkins*, 385 So.2d at 1359; (2) a per curiam affirmance with a citation to (i) a case not pending review or a case that has not been quashed or reversed by this Court, (ii) a rule of procedure, or (iii) a statute—*see Dodi Publishing*, 385 So.2d at 1369, and *Jollie*, 405 So.2d at 421; (3) a per curiam or other unelaborated denial of relief rendered without written opinion—*see Stallworth*, 827 So.2d at 978; and (4) a per curiam or other unelaborated denial of relief with a citation to (i) a case not pending review or a case that has not been quashed or reversed by this Court, (ii) a rule of procedure, or (iii) a statute—*see Gandy*, 846 So.2d at 1144

Here, pursuant to these criteria, the Court lacks discretionary jurisdiction. Given the summary nature of the opinion, which is appropriate, there is no basis for supporting YachtBrasil's argument that the District Court failed to consider whether the trial court had properly considered whether less severe sanctions were appropriate. To the contrary, the District Court's acknowledgment that the sanctions imposed were "severe" suggests that it gave appropriate consideration to that requirement.

Moreover, on its face, the District Court's Opinion is consistent with the requirements of *Ham*. In *Ham* the Court affirmed the requirement that trial courts apply the *Kozel* factors in deciding when sanctions are appropriate.¹ As *Ham* states:

It is imperative that trial courts strike the appropriate balance between the severity of the infraction and the impact of the sanction when exercising their discretion to discipline parties to an action. The factors articulated in *Kozel* provide a framework for achieving that balance.

Id., at 499 - 500.

Here, the Opinion specifically notes the trial court's proper consideration of the *Kozel* factors. Under *Kozel*, the District Court's review of the trial court's order was limited to a determination whether the trial court had properly exercised

¹ In *Ham* neither the trial court nor the district court had considered the *Kozel* factors and the Court determined that failure was a sufficient ground for remand. *Id.*, at 500.

its discretion. *Kozel*, at 817 - 818. The District Court specifically states in affirming the order that it has done so. As it states,

... we find the trial court did not abuse its discretion and find that each of the elements of Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993) is supported by the evidence.

(Appendix, at 2.)

Finally, YachtBrasil's argument (Petition, at 5) that unless prior sanctions have been imposed lesser sanctions must be found to be available, is a rule of its own making. There is nothing in *Ham*, *Kozel* or any other decision of this Court which imposes that requirement.

B. THE SUPREME COURT LACKS DISCRETIONARY JURISDICTION HERE AS THERE IS NO DISCERNABLE EXPRESS CONFLICT BETWEEN THE DISTRICT COURT OF APPEAL'S OPINION AND *PNC BANK V. DUQUE*, 137 SO. 3D 476 (FLA. 4TH DCA 2014), AND, IN ANY EVENT, THE HOLDING OF THAT CASE IS MISSTATED.

YachtBrasil argues (Petition, at 5 - 6) that the District Court's Opinion directly conflicts with *PNC Bank v. Duque*, 137 So. 3d 476 (Fla. 4th DCA 2014). However, for the same reasons stated in the last section, *supra*, at pp. 4 - 5, since the opinion is a summary affirmance and cites only to *Kozol*, a valid precedent, there is no discernible conflict with any opinion of another district court of appeal and, under longstanding precedent, the Court lacks discretionary jurisdiction.

Moreover, YachtBrasil misstates the holding in *Duque*. It argues (Petition, at 6) that *Duque* holds that "prior sanction(s) are a prerequisite prior to case

dismissal for discovery violations. See *Duque*, 137 So. 3d at 478.” That is not correct. *Duque* reverses the trial court’s dismissal as a sanction for discovery violations because “the order lacked specific findings as to each [of the *Kozel* factors].” *Id.*, at 479. It did not hold, as *Kozel* also does not hold, that prior sanctions are a prerequisite to a dismissal sanction.

In sum, there is no basis for the exercise of discretionary jurisdiction due to an express and direct conflict with *Duque*.

IV. CONCLUSION

For all the above reasons, Gluck respectfully requests that YachtBrasil's petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished on August 5, 2014, via e-mail upon: Martin G. McCarthy, Esq., Richard S. Gendler & Associates, P.A., at mccarthy@miami-law.com and ivonne@miami-law.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated Brief is in compliance with the font requirements of Rule 9.210(a)(2), Fla.R.App.P. as submitted in Times New Roman 14-point.

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