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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-2025

YALI GOLAN and LESLIE GOLAN,

Petitioners,

vs.

MARC PULEO,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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IN THE SUPREME COURT OF FLORIDA

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CASE NO: SC14-2025

Petitioners,

vs.

**PETITIONER'S
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MARC PULEO,

Respondent.

Petitioners Yali Golan and Leslie Golan seek to invoke the discretionary jurisdiction of this Court on the grounds of express and direct conflict of decision. Yali Golan and Leslie Golan, Appellees below, shall be jointly referred to as “Petitioners” and individually referred to by their first names. Respondent Marc Puleo, Appellant below, shall be referred to as “Puleo”. The letters “App.” shall represent the Appendix of Petitioner.

Statement of the Case¹

Yali sued Puleo for breach of an oral agreement to share compensation involving a corporation by the name of PetMed (App. 3). Puleo prevailed in the lawsuit and obtained a final judgment on July 24, 2007 (App. 3). Jurisdiction was reserved over Puleo’s claims for attorney’s fees and costs (*Id.*). Pursuant to this reservation of jurisdiction, in 2007 Puleo filed a motion for fees and costs and in 2010

1 The facts of this case are taken from the opinion below.

obtained judgments against Yali for attorney's fees and costs exceeding \$365,000 (App. 5).

In April of 2004, Scorpion Performance, Inc. as part of a recapitalization issued a stock certificate for ten million shares to Yali, individually (*Id.*). The Scorpion Performance share transfer records showed that no shares were issued to or held by Leslie from April, 2004 through November 1, 2007 (*Id.*). In an October 12, 2007, public filing with the SEC, Scorpion reported that the only Golan shares were the ten million shares issued to Yali (*Id.*). On November 2, 2007, Yali surrendered the stock certificate solely in his name for ten million shares and received a new certificate for ten million shares issued in joint names to Yali and Leslie, as joint tenants (App. 6). On May 2, 2008, Scorpion entered into an addendum to a "lock up agreement" with Yali and Leslie, which indicated that Yali had transferred all of his shares to himself and Leslie as joint tenants (*Id.*). Leslie signed the addendum (*Id.*)

When he was unable to satisfy his judgment, Puleo commenced proceedings supplementary and implead Leslie as part of a fraudulent transfer claim (App. 7). In his order ruling for Yali and Leslie on the fraudulent transfer claim, the trial court stated that Puleo's claim was denied for the reasons set forth on the record in open court (*Id.*). The District Court of Appeal reversed in a decision that expressly and directly conflicts with decisions of other district courts of appeal.

Summary of the Argument

The decision of the District Court of Appeal Third District in the case at bar is in express and direct conflict with *Schwieterman v. Schwieterman*, 114 So. 3d 984 (Fla. 5th DCA 2012), *Landmark Towers, LLC v. Ibarguen*, 954 So. 2d 43 (Fla. 1st DCA 2007), *Houlihan's Restaurants, Inc. v. Apac-Florida, Inc.*, 911 So. 2d 816 (Fla. 1st DCA 2005), *rev. dism.* 944 So. 2d 340 (Fla. 2006), *LaHodik v. LaHodik*, 969 So. 2d 533 (Fla. 1st DCA 2007) and *Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d 145 (Fla. 4th DCA 1994) because a review of the face of the decision establishes that the District Court ignored findings of fact of the trial court which was supported by competent substantial evidence, and reevaluates the evidence in order to reverse the trial court's decision.

Argument

THERE IS AN EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT RENDERED IN THE INSTANT CASE AND THAT OF OTHER DISTRICT COURTS ON WHETHER AN APPELLATE COURT CAN REWEIGH THE EVIDENCE AND REDETERMINE THE CREDIBILITY OF THE WITNESSES WITH REGARD TO A TRIAL COURT DECISION THAT IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

In order to vest this Court with jurisdiction, Petitioner must demonstrate that the decision rendered below expressly and directly conflicts with the decision of

another District Court of Appeal or this Court on the same point of law. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980); *Dodi Publishing Company v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980). Such a conflict is present here.

In *Schwieterman v. Schwieterman*, 114 So. 3d 984, 988 (Fla. 5th DCA 2012), the Court held:

No doubt other judges could very well have reached a different result, but in its totality, we cannot find a lack of competent substantial evidence to support the trial court's determination or that the trial court abused its discretion. Her findings seem to discount former wife's testimony and concerns and the credibility of witnesses is uniquely a function of the trial court, which is in the best position to evaluate witnesses.

(Emphasis Supplied)

In *Landmark Towers LLC v. Ibarguen*, 954 So. 2d 43, 44 (Fla. 1st DCA 2007), the court held:

Although we might reach a different result were we the fact finder, we cannot exercise that authority and must affirm because the JCC's conclusion is supported by competent, substantial evidence.

In *Houlihan's Restaurants, Inc. v. Apac-Florida, Inc.*, 911 So. 2d 816, 819 (Fla. 1st DCA 2005), *rev. dism.* 944 So. 2d 340 (Fla. 2006), the court stated:

While Houlihan's expert witness certainly had a different view, and we may have reached a different result if we were the fact finders, it was the trial court's exclusive province, as the finder of fact, to accept all or part of the testimony of the expert witness.

(Emphasis Supplied)

In *LaHodik v. LaHodik*, 969 So. 2d 533 (534 (Fla. 1st DCA 2007), the court stated:

It is well-established that the appellate court does not reweigh the evidence or the credibility of witnesses. See *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla.1976); *Futch v. Head*, 511 So.2d 314, 317 (Fla. 1st DCA 1987); *Froman v. Froman*, 458 So.2d 833 (Fla. 3d DCA 1984). Similarly, the appellate court does not assess whether it is possible to recite contradictory record evidence which supports arguments rejected below, nor does it retry the case or substitute its judgment for the trial court's on factual matters supported by competent, substantial evidence. See *Bullard v. Anheuser Busch*, 900 So.2d 774, 775 (Fla. 1st DCA 2005); *La. Pac. Corp. v. Marcus*, 774 So.2d 751 (Fla. 1st DCA 2000); *Fla. Mining & Materials v. Mobley*, 649 So.2d 934, 934 (Fla. 1st DCA 1995) (“case[s] may not be retried on appeal, and a ruling which is supported by competent, substantial evidence will be upheld even though there may be some persuasive evidence to the contrary.”).

(Emphasis Supplied)

In *Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d 145, 148-149 (Fla. 4th DCA 1994), the court stated:

In a non-jury trial, the trial court's function is to evaluate the witnesses and weigh the testimony and other evidence to arrive at findings of fact. *Puritz v. Rosen*, 442 So.2d 278, 280 (Fla. 4th DCA 1983). When reviewing the facts, the appellate court must disregard conflicting evidence and accept the facts in evidence which are most favorable to the party who prevailed below.

(Emphasis Supplied)

The decision of the court below is contrary to the foregoing authorities. Here the opinion of the court below suggests that the Third District did exactly what the foregoing authorities say an appellate court cannot do:

From that document [the post nuptial agreement], the [trial] court concluded that “[t]here is actually a contract between the two regarding their marital assets.” Acknowledging the evidence that Leslie Golan surrendered her five hundred Scorpion shares (and Yali Golan surrendered his five hundred shares) in the recapitalization for ten million shares issued solely in Yali Golan’s name the court nonetheless found that “none of this divests Mrs. Golan’s interest,” and that “even if Mr. Golan had the intent to maintain these shares, himself, he did not have a legal right to do so” based on the postnuptial agreement.

(App. 7-8)

The District Court of Appeal then reconsidered the evidence below to reach a factual conclusion different from that reached by the trial court:

The recitals in the “Postnuptial Agreement” state that the Golans entered into the agreement “to resolve in advance any and all possible financial claims of any sort whatever which each might have. Or might hereafter acquire, against the other party and/or the other party’s estate.” [sic]. The evident purpose was to document their rights as against one another, not as against later, non-party creditors. There is no expression of any intention to affect the rights of any subsequent creditor of either or both of the Golans, and the existence and terms of the agreement were not recorded or made public, on this record, until Dr. Puleo asserted his fraudulent transfer claim against Yali Golan and Leslie Golan.

Further, the Golans' actions were inconsistent with their supposed intention to hold all property as joint tenants. As already noted, when Yali Golan commenced his lawsuit in 2003 against Puleo relating to his alleged interests in compensation and stock options of PetMed, he neither disclosed a joint interest in such property by his wife under the 1999 "Postnuptial Agreement," nor did he include her as a co-plaintiff. A year later, Yali Golan *and* Leslie Golan surrendered their certificate for 500 shares of Scorpion stock to the transfer agent in a recapitalization, in return for ten million shares issued to Yali Golan individually. This was followed by the public securities filings in 2007 acknowledging that the shares were *his* personal property. The securities filings made no mention of the "Postnuptial Agreement" or any property interest by Leslie Golan in the shares.

(App. 10-11)

Thus, the Third District rejected the testimony of Yali and Leslie as to the purpose of the agreement and their ongoing and continued joint ownership of the Scorpion Stock, which testimony and evidence had been accepted by the trial court, thereby failing to accept the evidence which was most favorable to Yali and Leslie the parties that had prevailed below. The opinion of the Third District is in express and direct conflict with the above decisions because it the opinion demonstrates that the Third District ignored that the trial court's decision was supported by competent substantial evidence.

Conclusion

Based upon the foregoing cases and arguments, Petitioners YALI GOLAN

and LESLIE GOLAN, respectfully request that this court accept jurisdiction over the instant case on the ground of express and direct conflict of decision and that this court order the parties to file briefs on the merits.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to Andrew Herron, Esquire, aherron@herronortiz.com; Brian Lechich, Esquire, blechich@herronortiz.com; 255 Alhambra Circle, Suite 1060, Coral Gables, Florida, 33134, and to Carlos A. Mesa, Esquire, 4960 SW 72 Avenue, Suite 206, Miami, Florida, 33155 cmesa@mesafloridalawyer.com; this 29TH day of October, 2014.


Attorneys for Petitioners

Certificate of Type Size and Format

Counsel for Petitioner hereby certifies that this brief has been prepared in 14 point Times New Roman Microsoft Word format.



Attorneys for Petitioners