IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER 61,044

GLORIA DAVIS, :

Appellant :

vs. :

ROSMAN CHARLES DIEUJUSTE, :

Appellee :

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

APPELLEE'S JURISDICTIONAL BRIEF

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CITATIONS OF AUTHORITY

ISSUE PRESENTED FOR REVIEW

WHETHER THE FOURTH DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN VANDERVOORT v. VANDERVOORT, 273 So.2d 43 (Fla. 3rd DCA 1973) ON THE SAME QUESTION OF LAW.

ARGUMENT

Effective April 1, 1980, Article V, Section 3 of the Florida Constitution (pertaining to the jurisdiction of the Supreme Court) was substantially revised. In particular, Section 3(b)3 underwent a dramatic change with respect to review of conflicting Appellate Court decisions. The pertinent language is as follows:

> "The Supreme Court:
>
> (3) 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 . . ." (Emphasis supplied)

The Fourth District decision rendered in this case does not conflict with the rule as stated by the Supreme Court in Finston v. Finston, 37 So.2d 881 (Fla. 1954). Therefore, the only question before this Court is whether the Fourth District decision conflicts with any other District Court decisions, and it does not.

Appellant asserts that conflict lies between the

instant Fourth District decision and Vandervoort v. Vandervoort, 277 So.2d 43 (Fla. 3rd DCA 1973) cert denied 287 So.2d 682 (Fla. 1973). The alleged conflict involves only one sentence in Vandervoort, to wit:

> As to (property rights) which were not so dealt with before the master and not adjudicated by the judgment of August 9, 1972, the parties are at liberty to litigate them in other separate proceedings. Id at 45.

While Judge Anstead's special concurrence in the denial of the Motion for Re-Hearing at the Fourth District stated: " . . . Vandervoort to be 'contrary to the (Finston) rule' and hence in conflict with our holding . . .", there is no real conflict and this Court is without jurisdiction.

The decision in Vandervoort involved 3 issues relating to a partnership the parties had engaged in, to wit: the business of owning, breeding and racing horses. The issues were: (1) The date the partnership commenced; (2) Whether a residence of the parties was a partnership asset, and; (3) Whether certain notes aggregating One Hundred Ninety Thousand ($190,000.00) Dollars constituted a liability of the partnership. Citing Finston, supra, the Vandervoort Court at one point held:

> After that judgment relating to the property rights of the parties concerning the assets and liabilities of the partnership has become final, the Court was without jurisdiction to change, modify or enlarge the judgment with respect thereto. Id at 44.

This particular language has been consistently cited and upheld

by other Florida Courts. See Silverman v. Lichtman, 285 So.2d 633 (Fla. 3rd DCA 1973); Simon v. Simon, 293 So.2d 781 (Fla. 3rd DCA 1974), Schneider v. Schneider, 296 So.2d 77 (Fla. 3rd DCA 1974); Donner v. Donner, 302 So.2d 452 (Fla. 3rd DCA 1974); Cabeza v. Cabeza, 358 So.2d 1169 (Fla. 3rd DCA 1978); Gutjahr v. Gutjahr, 368 So.2d 93 (Fla. 3rd DCA 1979). Later, in the same opinion, the Court unfortunately also made the earlier cited sentence (at Page 45), however, this portion of the decision has never been cited or relied on by another Florida Court, therefore this later language could only be considered surplusage or obiter dictum. Appellant is actually requesting this Court to reconcile the conflicting language in Vandervoort, as there is no conflict between Vandervoort and the instant Fourth District decision. In Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980), this Court eloquently resolved the Appellant's request when it stated:

> The issue to be decided from a Petition for Conflict Review is whether there is express and direct conflict in the decision of the District Court before us for review, not whether there conflict in a prior written opinion which is now cited for authority. (Emphasis added)

Appellant next urges that this Court's denial of certiorari in Vandervoort be "considered" an affirmance or "implicit decision", thereby creating an express conflict with Cooper v. Cooper, 69 So.2d 881 (Fla. 1954), which followed the

rule as set out in Finston. In Florida, it is without question that a simple denial of certiorari, without opinion, is not an affirmance, and cannot be construed as passing upon any of the issues in the litigation. Don Mott Agency, Inc. v. Harrison, 362 So.2d 56 (Fla. 2nd DCA 1978).

Appellants due process issue is without merit as it was neither litigated below nor preserved for appeal. Appellant also discusses the merits in his brief, in direct violation of Florida Rules of Appellate Procedure 9.120(d), therefore, these arguments should not be considered.

CONCLUSION

The Fourth District decision followed the Supreme Court. The Third District decision, except for one confusing sentence, followed the Supreme Court. Therefore, the decision of the Fourth District Court of Appeal does not conflict with the Third District Court of Appeal's decision in Vandervoort, and under Article V, Section 3(b) of the Florida Constitution, certiorari should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appelee's Jurisdictional Brief was furnished by U.S. Mail to. RICHARD K. INGLIS, Esquire, Attorney for Appellant, 100 Southeast 6th Street, Fort Lauderdale, Florida 33301, this 9 day of September, 1981.

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