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IN THE FLORIDA SUPREME COURT  
TALLAHASSEE, FLORIDA

CASE NO. 81-1609

EDWARD CERRITO and  
JOAN R. CERRITO,

Petitioners,

vs

JACKQUELINE R. KOVITCH and  
ED-JO CORP OF FLORIDA, INC.,  
a Florida corporation,

Respondents.

**FILED**

FEB 24 1983

SID J. WHITE  
CLERK SUPREME COURT  
Chief Deputy Clerk

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

The Respondent, JACQUELINE R. KOVITCH, accepts the Statement of the Case, set forth in Petitioners' Brief on Jurisdiction, except for the last statement contained therein.

The Fourth District Court of Appeal did not acknowledge "conflict" with the decision of the First District Court of Appeals in Smith v. Barnett Bank of Murray Hill, 350 So. 2nd 358 (Fla. 1st DCA, 1977). The Court merely sought to create a conflict with that case. The determination of whether, in fact, there is a conflict between the Smith case and the opinion rendered by the Fourth District Court of Appeal is within the discretionary jurisdiction of this Court.

## ARGUMENT

1. THIS COURT DOES NOT HAVE TO EXERCISE ITS DISCRETIONARY JURISDICTION AS IT RELATES TO THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DATED DECEMBER 29, 1982, WHICH DECISION PURPORTEDLY IS IN CONFLICT WITH A PRIOR DECISION OF THE FIRST DISTRICT COURT OF APPEAL ON THE SAME ISSUE OF LAW.

The Petition filed herein was predicated on the fact that the opinion rendered by the Fourth District Court of Appeal on December 29, 1982 expressly conflicts with a prior decision of the First District Court of Appeal, to-wit: Smith v. Barnett Bank of Murray Hill, 350 So. 2nd 358 (Fla. 1st DCA 1977).

The Fourth District Court's opinion, merely sought to create conflict with the First District Court's opinion in the Smith Case. The Appellate Rules, and the Constitution and Article V, Subsection 3(b)3, of the Constitution of the State of Florida, as amended in 1980, specifically require that there be not only an express conflict, but also a direct conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law.

Even assuming that there is both an express conflict and a direct conflict, which this writer does not concede, this Court may exercise its discretion against granting the petition where it is determined that there is no direct conflict. Thus, where the cases claim to be in conflict, are in fact distinguishable either on their facts or on the Rule of Law as applied to those facts, then review by certiorari on the ground of conflict

will not lie. Florida Power & Light Company v. Bell, (1959, Fla.) 113 So. 2nd 697; Shelby Mutual Insurance Company v. Russell, (1962 Fla.) 137 So. 2nd 219; Cinnamon v. Fowlkes, (1958, Fla.) 101 So. 2nd 375; Cohen v. Rothman, (1962, Fla.) 138 So. 2nd 328.

The opinion in Smith is a clear example of a misapplication of a Rule of Law as applied to the facts. There the appellate Court sanctioned the defense of usury as a counterclaim. The Courts of this state have long held that matters involving usury, as provided for under the Statute, are affirmative matters and should be pleaded as such. This Honorable Court, in the case of Tel Service Co. v. General Capitol Corp. (Fla. 1969) 227 So.2nd 667, reviewed the Usury Statute in effect at the time, particularly directed its attention to the remedies provided by the Usury Statute and stated that the statutory penalties against usury could be invoked as a defense in a suit brought by a Lender to enforce the interest rate against the borrower. This Court, therefore, has spoken and has reaffirmed the principle that any matters involving usury must be asserted as a defense. Implicit in such a holding would be that they could not be the subject of a counterclaim. For that reason, the opinion in Smith is totally contrary to the prior holdings of this Court. In view of the fact that the Court in Smith misapplied a Rule of Law to the facts, this Honorable Court may exercise its discretionary jurisdiction by denying the petition for certiorari.

The Petitioner seeks to have this Court review this matter on its merits predicating its action on the right to jury trial. It is respectfully submitted that this Court should not entertain this matter on its merits on that basis, unless this Court has first satisfied itself that there is a conflict in the decisions of the Appellate Court below and the First District Court in Smith.

## CONCLUSION


Respondent most respectfully urges this Court to deny review of the decision of the First District Court of Appeal and to exercise its discretionary jurisdiction against granting the relief requested herein.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENTS' BRIEF ON JURISDICTION was furnished by U.S. Mail this \_\_\_\_ day of February, 1983, to: KENNEY, BOSWELL & KAUFMAN, TIMOTHY H. KENNEY, ESQUIRE, Attorneys for Petitioners, P. O. Box 2153, Palm Beach, Florida 33480.

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