JML:lk
#L481-1033(d):2/21/83

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 63,242

JOSEPH T. LANCE AND CROSS KEY WATERWAYS, INC.,

Petitioners,

vs.

CHARLES H. WADE, FRANK C. HERRINGER, and all others similarly situated, and the HOMEOWNERS ASSOCIATION OF CROSS KEY WATERWAYS, INC.,

Respondents,

_____/

FILED

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CLERK SUPREME COURT

By _____
Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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## I

## STATEMENT OF THE CASE

Petitioners seek to invoke the discretionary jurisdiction of this court on the grounds of express and direct conflict of decision. Respondents adopt the symbols and designations of the Petitioners as their own. All emphasis will be the Respondents' unless otherwise indicated.

Plaintiffs are owners in the subdivision located in Monroe County known as Cross Key Waterways. Plaintiffs alleged in their complaint that the Defendants intentionally misrepresented, in written and oral statements, that the roads and streets in their subdivision would be paved. The Defendants, in their answer, denied the essential allegations of the complaint.

Plaintiff produced more than sufficient proof of the elements of fraud to the satisfaction of the trial court which denied

the Defendants' Motion for Directed Verdict at the close of Plaintiffs' case. Plaintiffs' and Defendants' Motions for Directed Verdict at the close of the evidence were also denied. The court charged the jury in common law fraud. The jury returned a verdict in this cause in the amount of fifty thousand ($50,000.00) dollars compensatory and sixty thousand ($60,000.00) dollars punitive as to Defendant, LANCE, and two hundred thousand ($200,000.00) dollars compensatory and three hundred thousand ($300,000.00) dollars punitive as to Defendant, CROSS KEY WATERWAYS, INC. The final judgment was duly entered by the court upon the verdict. Defendants' Motion for New Trial and Motion for Judgment Notwithstanding the Verdict were denied by court Order dated December 17, 1980. Defendants timely perfected an appeal to the District Court of Appeal, Third District.

On January 4, 1983, the District Court of Appeal issued it's decision in this cause. A majority of the court, relying upon this court's decision in Frankel vs. City of Miami Beach, 340 So.2d 463 (Fla. 1976), held that a class action sounding in fraud may be brought where the Plaintiff class is engaged in a cooperative enterprise, has a joint pecuniary interest and does not have a choice of remedies which may be subject to separate and distinct defenses (A. 1). The majority of the court was of the opinion that having met the Frankel criteria, this cause could proceed as a class action (A.2). The decision of the trial court was affirmed.

Defendants timely petitioned for rehearing which was denied by Order of the District Court of Appeal, Third District, dated January 24, 1983 (A.6).

By notice served, February 4, 1983, Defendants sought to invoke this court's discretionary jurisdiction on a ground of express and direct conflict with decision of another District Court of Appeal or the Supreme Court on the same question of law. A review of the Defendants' (Petitioners') brief on jurisdiction reflects that Defendants claim conflict with the following cases: Osceola Groves vs. Wiley, 78 So.2d 700 (Fla. 1955); Avila South Condominium Association, Inc. vs. Kappa Corporation, 347 So.2d 599 (Fla. 1976); Cherin vs. Southern Star Land and Cattle Company, Inc. 390 So.2d 104 (Fla. 3 DCA 1980); Costin vs. Hargraves, 283 So.2d 375 (Fla. 1 DCA 1973); and Hendler vs. Rogers House Condominium, 234 So.2d 128 (Fla. 4 DCA 1970).[1]

[1]Whether or not the decision of the District Court of Appeal surrendered in the present case conflicts with Cherin vs. Southern Star Land and Cattle Company, Inc., supra. is immaterial since conflict jurisdiction of this court requires that the decision sought reviewed expressly and directly conflict with the decision of another District Court of Appeal or of the Supreme Court in the same question of law. Fla. R. App. P. 9.030(a)(2)(a)(IV). Defendants did not seek rehearing en banc by the Third District to resolve any alleged intra-District conflict.

## II

## JURISDICTIONAL POINT INVOLVED ON APPEAL

THE SUPREME COURT DOES NOT HAVE JURISDICTION TO HEAR THIS CAUSE UNDER FLA. R. APP. P. 9.030(a)(2)(a)(IV) IN THAT THERE DOES NOT EXIST AN EXPRESS AND DIRECT CONFLICT OF DECISIONS BETWEEN THE DECISION RENDERED BY THE DISTRICT COURT OF APPEAL, SUB JUDICE, AND OTHER DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL.

## III

## ARGUMENT

In order to vest this court with jurisdiction, Defendants must demostrate that the decision rendered by the District Court of Appeal, sub judice, expressly and directly conflicts with the decision of another District Court of Appeal or the Supreme Court on the same point of law. Jenkins vs. State, 385 So.2d 1356 (Fla. 1980); Dodi Publishing Company vs. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980). Such a conflict may be shown where the opinion of the lower court discusses the legal principle which the court applied in reaching it's decision. Ford Motor Company vs. Kikis, 401 So.2d 1341 (Fla. 1981). Measured by this standard, the Defendants have failed to establish a direct and express conflict of decision and therefore this court lacks jurisdiction to entertain the present cause. Petition for Review ought be denied.

Initially, the majority below went to great lengths to distinguish each and every case which Defendants contend is in conflict was the decision rendered below. The majority opinion harmonizes each such case with it's decision. Therefore, there is no express and direct conflict of decisions. Thus, no conflict jurisdiction is present in this cause.

In Osceola Groves, Inc. vs. Wiley, 78 So.2d 700 (Fla. 1955), the Defendants subdivided three hundred ninety four (394) acres into one acre units and sold the units to numerous persons who signed leases and similar contracts for sale. In the sales contracts, the Defendants promised to plant each tract with citrus trees and to cultivate and maintain the trees. In the leases, Defendants agreed to maintain the units and to market the crops. In 1948, the Defendants breached the lease agreement, raised the maintenance charges and took returns from the land that should have gone to the owners. Plaintiff sued individually and on behalf of all of the purchasers for fraud. This court refused to allow the case to proceed as a class action because the parties were legally distinct, each member of the class was afforded the choice of remedies and no community of interest was present. The Supreme Court reversed the Order of the trial court and refused to allow the case to proceed as a class action.

This court in Frankel vs. City of Miami Beach, 340 So.2d 463, 469 (Fla. 1976), had occasion to revisit the decision in

Osceola Groves. In Frankel, this court noted that Osceola Groves does not bar a fraud situation in all circumstances.[2] Rather, this court stressed that in order for a class action to be brought for fraud, the members of the class must:

1. Be engaged in a cooperative enterprise;

2. Have a joint pecuniary interest;

3. Not have a choice of remedies which may be seperate and distinct.

This court, in Frankel, went on to hold that the foregoing requirements apply only in class actions alleging fraud and not in class actions based upon other causes of action. This court expressly overruled decisions applying the three fraud requirements to non fraud class actions.

In the present case, the District Court of Appeal applied the three prong test enunciated in Frankel and found each prong applicable to this cause. Ergo, the majority of the District Court of Appeal reasoned that on the facts of this case, a class action for fraud is both permissable and appropriate. The decision sought reviewed does not state a class action for fraud may be had in any case. What it does say is that a class action for fraud is appropriate in this matter because all three prongs of the Frankel test are met. Therefore, no express and direct

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[2] Significantly, nowhere in Osceola Groves is a blanket rule laid down that class actions for fraud are per se impermissable. In the brief, Defendants have maintained that Frankel has been overruled by Avila South Condominium Association, Inc., vs. Kappa Corporation, infra.. Nowhere in Avila is it indicated that Frankel is overruled and Defendants contention is incorrect.

conflict of decisions exist between the decision of the District Court of Appeal, sub judice, and any of the cases sited by the Defendants in their brief on jurisdiction.

Defendants next rely on Avila South Condominium Association, Inc. vs. Kappa Corporation, 347 So.2d 599 (Fla. 1977) as support for the proposition that there exists a direct and express conflict of decision. Facts constituting fraud are not set out in the opinion of this court. Nevertheless, it appears clear that the fraud alleged in the complaint concerns the individual units purchased by the members of the class.[3] If the fraud involved each separate premise owned by the individual owners, then it is obvious that the Frankel test is not met as there is no cooperative enterprise, joint pecuniary interest or no choice of remedies. If the fraud involves the recreational lease, the common elements of the recreational lease are not owned by the class and again no cooperative enterprise or joint pecuniary interest is shown.[4] Therefore, there is no conflict in the decision of the District Court, sub judice, with the decision of the Supreme Court in Avila South since the Frankel test was not met by the Plaintiff class in Avila South. Consequently, the decision of the District

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[3] In the opinion Justice Hatchet, writing for the majority, states: "Appellee-Respondents maintain that Counts 3 and 4 should have been dismissed all together because the 'Plaintiffs affirmatively accepted the premises' and because it was not alleged in either Count that anyone was 'precluded from seeing the actual premises prior to closing the purchase'" id at 603-604.

[4] This is to be contrasted with the present case where the Plaintiff class was suing concerning the non paving of the road, which was owned by the class itself.

Court is not in conflict with Avila and an express and direct conflict of decision does not lie.

Any reliance for an express and direct conflict by Defendants upon Hendler vs. Rogers House Condominium, Inc., 234 So.2d 128 (Fla. 4 DCA 1970), is misplaced. In Hendler, a class action was not permitted because the named Plaintiff was a lease holder and not a unit owner and therefore lacked interest coextensive with the members of the class who were the unit owners of the condominium. Furthermore, there was no joint pecuniary interest existing among the members of the class since there was no showing that the interest sued upon was jointly owned. In the present case, as noted by the District Court of Appeal in it's opinion, the class owned the roads which were the subject of the fraudulent representations. Therefore, as correctly noted by the District of Appeal below, Hendler is distinguishable and not in conflict. Hendler clearly did not meet all elements of the Frankel test and therefore is not in conflict with the present case which does meet all criteria of the Frankel test.

The last case alleged by the Defendants, to be in conflict with the decision of the District Court of Appeal, is Costin vs. Hargraves, 283 So.2d 375 (Fla. 1 DCA 1973).[5] In Costin, owners of property brought a class action seeking declaratory relief as to the status of certain beach property. The District Court

[5]Both Costin and Hendler preceeded this court's decision in Frankel.

of Appeal there stated that there was no showing of a cooperative enterprise or of a joint pecuniary interest and therefore held that a class action for fraud could not be maintained.[6] In the present case, as noted in the lower court's opinion, both a cooperative enterprise and a joint pecuniary interest are present. Therefore, the District Court of Appeal, correctly distinguished Costin from the present case. No conflict jurisdiction is present.

## IV

## CONCLUSION

Under any test there is not direct and express conflict of decisions. Petition for review will not lie and ought be denied.

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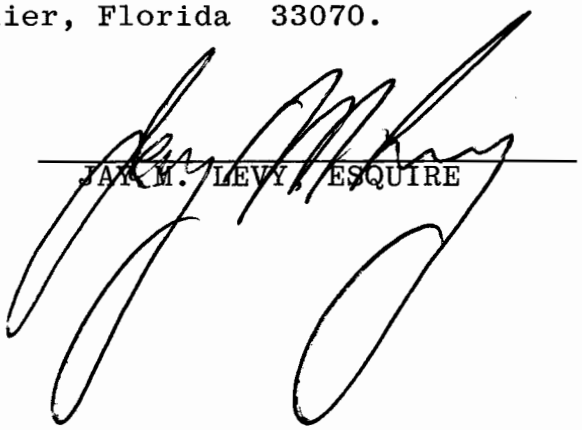
[6] Significantly, the District Court of Appeal did not hold that under any circumstances a class action for fraud could not be brought.

V

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Respondents was mailed this 25th day of February, 1983 to: JEFFREY E. LEHRMAN, ESQUIRE, 2699 South Bayshore Drive, Suite 900 F, Miami, Florida33133, and to KARL BECKMEYER, ESQUIRE, P.O. Drawer 535, Tavernier, Florida 33070.



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