

IN THE SUPREME COURT  
STATE OF FLORIDA

MANUEL ANTONIO GOVAYRA,

Defendant, Petitioner

vs.

DONALD S. STRAUBEL,

Plaintiff, Respondent.

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CASE NO. 64

**FILED**

SID J. WHITE

APR 26 1984

CLERK, SUPREME COURT

Chief Deputy Clerk

PETITION TO INVOKE DISCRETIONARY  
JURISDICTION TO REVIEW A DECISION  
OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

HALL AND O'BRIEN, P.A.  
RICHARD F. O'BRIEN, III  
Suite 200, Brickell Conours  
1401 Brickell Avenue  
Miami, Florida 33131  
Telephone: (305) 374-5030  
Attorneys for Respondent



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**STATEMENT OF THE CASE AND FACTS**

The Respondent, DONALD S. STRAUBEL, will not restate the statement of the case and facts and agrees fundamentally with the statement of the case and facts as presented by the Petitioner. However, the statement of the case and facts does contain references to matters in the record not currently before this Court on a petition to invoke the discretionary jurisdiction of this court.

Issue Presented For Review

Whether the decision in the instant case expressly and directly conflicts with the decision of the Second District Court of Appeal in Bogart v. F.B. Condominiums, 438 So.2d 856 (Fla. 2d DCA 1983.)

## ARGUMENT

WHETHER THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN BOGART v. F.B. CONDOMINIUMS, 438 So.2d 856 (Florida 2d DCA 1983).

The decision of the Third District Court of Appeal in the instant case does not expressly or directly conflict with the decision of the District Court of Appeal of the Second District in Bogart v. F.B. Condominium, decided on August 31, 1983. and reported in 438 So.2d 856 (Fla. 2d DCA 1983). Thus, this Court does not have jurisdiction pursuant to Article 5. Section 3-b(3), of the Florida Constitution. The decision in the instant case is not in open, embarrassing conflict such as to collide with the decision in Bogart, supra, and there is no conflict created between presidents for this court to resolve. See Kincaid v. World Insurance Co., 157 So.2d 517 (Fla. 1963). An examination of the opinion of the Third District Court of Appeal in the instant case shows that the Third District Court of Appeal followed Bogart and disagreed with the Respondent's position that once he filed and served the notice for trial pursuant to Florida Rules of Civil Procedure 1.440(b) advising the trial court that the case was at issue and ready for trial that he was relieved of any or all further responsibility to take action in the case. The Third District Court of Appeal specifically relied upon and cited Bogart v. F.B. Condominiums, Inc., 438 So.2d 856 (Fla. 2d

DCA, 1983) in reaching its decision. The Third District Court of Appeal likewise rejected the contention of the Respondent that the case was controlled by Visuna v. Metropolitan Transit Authority, 353 So.2d 183 (Fla. 3d DCA, 1977) which the Third District Court of Appeal distinguished because in Visuna the court had continued the trial on its own motion.

The Third District Court of Appeal in the instant case decided the appeal below on a very narrow ground. The court below agreed with Respondent's contention that he had been misled into his post-continuance inaction by the language of the court order continuing the case. (See Petitioner's Appendix at 5). It is only under the peculiar circumstances of the instant case that the Court found that the language of the order continuing the trial was sufficiently ambiguous to relieve counsel of the burden of further noticing the case for trial. See Neff Machinery, Inc., v. Allied Electrical Company, 258 So.2d 314 (Fla. 3d DCA 1972).

It is on this crucial point--the exact language of the trial court order granting a continuance--that Bogart v. F.B. Condominiums, Inc., 438 So.2d 856 (Fla. 2d DCA 1983) is distinguishable from the instant case. In Bogart the Second District Court of Appeal stated with regard to trial counsel's reliance upon the order:

If Appellants were relying upon the court's reference to the setting of a trial date during the fourth quarter of 1978, this was dispelled when the trial was not set during that time period. Id. at 857.



The Second District and Third District are applying the same law; it was applied to different facts, however, and a different result was obtained. Nevertheless, a different result does mean that there exists a conflict in interpretation of the law in the State of Florida which must be resolved by the Supreme Court of Florida. The Third District Court of Appeal agreed with the Second District Court of Appeal's decision of Bogart v. F.B. Condominium, Inc., 438 So.2d 856 (Fla. 2d DCA, 1983) in stating that reliance upon ambiguous orders is a dangerous game. (Petitioner's Appendix at 6) However, the Petitioner overlooks the crucial distinction in the facts between Bogart and the instant case.

In Bogart, the Second District Court of Appeal reasoned that any ambiguities created by the language of the trial court's order continuing the case should have been dispelled when the trial court did not reset the matter for trial at the designated time, pursuant to the court's order. (Petitioner's brief at 5)

In the instant case, the Third District Court of Appeal could not find a time frame for the continuance as existed in Bogart. The order in the instant case was completely ambiguous and neither the court nor counsel could have fashioned a reasonable time frame within which the court would set the trial. Therefore, no dismissal for lack of prosecution was allowed by the Third District Court of Appeal because no rational time could be set within which either the court or trial

counsel had to act because the court's order was ambiguous as to the duty to reset and at what time the trial was to be reset.

Far from being an embarrassing and open conflict, the Third District Court of Appeal has followed the decision in Bogart v. F.B. Condominiums, Inc., supra, and has harmonized that decision with other decisions of the Third District. Therefore, the Supreme Court of Florida should refrain from exercising discretionary jurisdiction.

CONCLUSION

The decision of the District Court of Appeal of the Third District in Straubel v. Gobayra, is neither in direct nor express conflict with the decision of the District Court of Appeal of the Second District in the case of Bogart v. F.B. Condominiums, Inc., 438 So.2d 856 (Fla. 2d DCA, 1983). Because no direct and express conflict exists, this court should decline exercising its discretionary jurisdiction.

Respectfully submitted,

HALL AND O'BRIEN, P.A.  
Attorneys for Respondent  
Suite 200, Brickell Concours  
1401 Brickell Avenue  
Miami, Florida 33131  
Telephone: (305) 374-5030

By:   
RICHARD F. O'BRIEN, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed to Victor E. Rocha, Esquire, Law Offices of Leland E. Stansell, Jr., P.A., 903 Biscayne Building, 19 West Flagler Street, Miami, Fla. 33130 this 24<sup>th</sup> day of April, 1984.

By:   
RICHARD F. O'BRIEN, III

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