IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,872

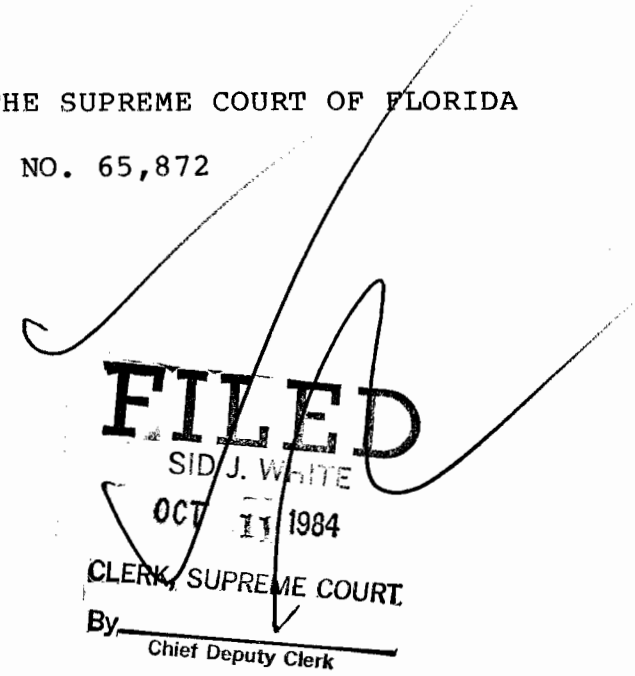
HELEN MELAMED,

Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC., et al.,

Respondents.



RESPONDENT, MERRILL LYNCH, PIERCE, FENNER & SMITH INC.'S ANSWER BRIEF TO INVOCATION OF DISCRETIONARY JURISDICTION

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INTRODUCTION

The opinion which is the subject of this proceeding is an order by the Fourth District Court of Appeal reversing the trial court's denial of Respondents' motions to compel arbitration.[1] In ordering the trial court to enter an order compelling arbitration the Court held as follows:

> (1) Co-Respondent, Sheen, a former Merrill Lynch employee, is entitled to arbitration because within the respondeat superior doctrine;
>
> (2) fraud and punitive damages claims are subject to arbitration;
>
> (3) a claim under §12(2) of the Federal Securities Act of 1933 is not arbitrable but its pendency is no bar to arbitration on the other counts;
>
> (4) the arbitration agreement evidences a transaction involving commerce for purposes of the Federal Arbitration Act, thus the Federal Arbitration Act applies to this cause;

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1. The opinion of the Fourth District Court of Appeals to which this proceeding is directed is found in Petition's Appendix at pages 243-250 and is reported at 9 Florida Law Weekly 1535. The opinion will be referred to herein as "Melamed III" because it is the third reported decision by the Fourth District in this action reversing the trial court's denial of Respondents' Petitions to Compel Arbitration: Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981) ("Melamed I") (the Federal Arbitration Act supersedes inconsistent state law); Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 425 So.2d 127 (Fla. 4th DCA 1982) pet. for rev. den. 433 So.2d 519 (1983) ("Melamed II") (where one party raises an issue as to the making of the agreement to arbitrate the trial court is required to hold an evidentiary hearing prior to ruling on the motion); and the opinion which is the subject of this proceeding, Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 9 Fla.L.Wkly. 1535 (Fla. 4th DCA July 13, 1984) reh. den. (August 22, 1984) ("Melamed III").

(5) (a) arbitration agreements are binding and enforceable to claims arising under the Florida Securities Laws; and (b) Respondents did not waive their right to arbitrate the Chapter 517 claim.

Petitioner now seeks review of the order below by invoking this Court's discretionary jurisdiction. Petitioner has filed an unorthodox "Amended Notice of Appeal" whereby she in essence institutes two separate proceedings before this Court - (1) an appeal of right directed to the Fourth District's holding that §517.241(2), Fla.Stat. (1983) is invalid; and (2) an attempt to obtain discretionary review of the Fourth District's opinion by alleging conflict with a potpourri of decisions.

Not only is the notice unorthodox, but Petitioner's jurisdictional brief is extremely unusual. Petitioner's "argument" on the issue of whether she does in fact have an appeal of right is entirely superfluous. The Rules of Appellate Procedure do not provide for jurisdictional briefs on appeals. Where appellate jurisdiction exists, the appellant simply files a brief on the merits pursuant to Rule 9.110(j).

Similarly, Petitioner's argument relating to discretionary jurisdiction evinces complete ignorance of the basic constitutional and appellate principles governing discretionary conflict review. The Brief is replete with argument on the merits of the opinion below. Additionally, Petitioner string cites cases which purportedly conflict with Melamed III without any consideration for whether the opinions even addressed the same issues of law.

ARGUMENT

As a preliminary matter it should be noted that only an express and direct conflict with an opinion of another District Court of Appeal or with this Court on the same question of law can justify the invocation of discretionary conflict jurisdiction by this Court. Moreover, the Rules of Appellate Procedure forbid argument on the merits of the opinion below. Throughout Petitioner's jurisdictional brief both of those essential standards are ignored. Instead, Petitioner makes arguments as to the propriety of the Fourth District's opinion and from that argument seeks to manufacture conflict on wholly irrelevant grounds.

In only one instance does Petitioner cite any opinion which might legitimately give rise to conflict jurisdiction. In Point I Petitioner argues that Melamed III conflicts with the Third District's opinion in Young v. Oppenheimer & Co., 434 So.2d. 369 (Fla. 3d DCA 1983). However, even in arguing that this opinion conflicts, Petitioner fails to discuss the precise issues of law which could give rise to conflict jurisdiction but attempts to argue the merits of the opinion below. Were it not for the fact that subsequent to Petitioner's jurisdictional Brief, this Court published its not yet final opinion in Oppenheimer & Co. Inc. v. Young, 9 Fla.L.Wkly. 420 (Fla. Sept. 27, 1984) it would be arguable that conflict jurisdiction does not exist. To the extent this Court in Young, held that claims under Chapter 517 are not arbitrable, Melamed III does conflict with this Court's opinion.

The Committee Note to Rule 9.120 of Appellate Procedure indicates that a short statement may be made as to why this Court should exercise its jurisdiction where conflict jurisdiction exists. It is respectfully submitted that this Court in Young misconstrued the import of the recent United States Supreme Court opinions and that it would be helpful to present certain matters to this Court not addressed in Young. Young gives an overbroad reading to Wilko v. Swan, 346 U.S. 427 (1953). Wilko does not state that arbitration of all interstate securities related litigation is inappropriate but only that a predispute agreement to arbitrate would not be enforced where claims were brought pursuant to the Securities Act of 1933. When the Florida Legislature adopted the remedies available under the federal securities laws the Florida Securities Act was not transformed from a state enactment into a federal enactment. In Southland Corp. v. Keating, __U.S.__ 104 S.Ct. 852 (1984), the Supreme Court of the United States said that the Federal Arbitration Act supersedes any inconsistent state law. If the Florida Securities Act is read to prohibit arbitration for any reason it is inconsistent with the Federal Arbitration Act and therefore it is superseded pursuant to the Supremacy Clause.

In applying the Federal Arbitration Act, federal courts have consistently recognized that Florida state securities law claims and any common law claims are arbitrable. See, e.g., Merrill Lynch Pierce Fenner & Smith Inc. v. Haydu, 675 F.2d 1169, 1172

(11th Cir. 1982) (Florida Securities Act claims fall outside the Wilko rule and are arbitrable). Therefore, it is important to consider and rectify the conflict created by virtue of Young and Melamed III.

Other than Young the matters raised in support of discretionary jurisdiction are all irrelevant and provide no support whatsoever for the invocation of discretionary jurisdiction. Thus, if this Court determines not to exercise its discretionary jurisdiction on the basis of the conflict with Young no other basis exists.

Point II of the Petition argues that the District Court's ruling that claims of fraud and punitive damages are subject to arbitration conflicts with Klosters Rederi A/S v. Arison Shipping Co., 280 So.2d 678 (Fla. 1973), Shearson Hammil & Co. v. Vouis, 247 So.2d 733 (Fla. 3d DCA 1971) and Young v. Oppenheimer & Co., Inc., 434 So.2d 369 (Fla. 3d DCA 1983) aff'd 9 Fla.L.Wkly. 420 (Fla. Sept. 28, 1984). However, this argument fails to provide a basis for review under this provision for two reasons. First, Melamed III does not "expressly" conflict with these decisions "on the same question of law" as required by the Rule. Furthermore, the opinion below also does not "directly" conflict with the cases cited, as also required under the Rule.[2]/

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2. Petitioner's attempted criticism of Melamed III's citations to Post Tensioned Engineering Corp. v. Fairways Plaza Associates, 412 So.2d 871 (Fla. 3d DCA 1982), Sabates v. International Medical Centers Inc., 450 So.2d 514 (Fla. 3d DCA 1984), and Merrill Lynch Pierce Fenner & Smith Inc. v. Westwind Transportation Inc., 442 So.2d 414 (Fla. 5th DCA 1983) goes to the merits and not to jurisdiction and therefore, although unfounded, will not be further addressed at this time.

Rule 9.030(a)(2)(A)(iv), which Petitioner attempts to invoke, grants the Supreme Court jurisdiction to review district court decisions which "expressly and directly conflict with a decision of another district court of appeal or the Supreme Court on the same question of law... ." (Emphasis added). Under the clear language of the Rule the conflict with another decision must be "express", as well as "direct". See Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980); Committee Comments to Rule 9.030(a)(2)-(A)(iv) reprinted in In re Emergency Amendments to Rules, etc., 381 So.2d 1370, 1374-75 (Fla. 1980).

Clearly, Melamed III does not expressly conflict with Klosters, Vouis or Young on the issue of whether fraud and punitive damage claims are arbitrable. In order for the conflict to be express, Melamed III would have had to refer to these cases as standing for a contrary proposition or, at the very least, acknowledge that a contrary view exists. Because there are no such references in Melamed III on this issue there can be no express conflict.

Furthermore, the fact is that there is also no "direct" conflict with the cases cited by Petitioner. In Klosters arbitration was sought pursuant to the Florida Arbitration Code, Chapter 682, Fla.Stat., whereas Melamed III was concerned with the issue of whether such claims would be arbitrable under the Federal Arbitration Act. Therefore, entirely different issues of law were presented. Moreover, Klosters does not hold that fraud and punitive

damage claims are not arbitrable. Rather, Klosters held that arbitration was not available under all the facts and circumstances of that case, particularly because the plaintiff's claims for an accounting had been substantially accomplished by the time arbitration was requested and because the defendant affirmatively waived its right to arbitrate by filing a counterclaim demanding a jury trial. 280 So.2d at 681. Subsequent cases have recognized that Klosters is to be limited to the particular facts and circumstances of that case. See, e.g., Post Tensioned Engineering Corp. v. Fairways Plaza Associates, 412 So.2d 871, 875 n.7 (Fla. 3d DCA 1982).

Similarly, there is no direct conflict on this issue with Young[3]/ or Vouis. The Vouis decision was repudiated in Young except as to its holding that Florida Securities Act are not arbitrable. 434 So.2d at 371 n.2. Young also expressly limits itself to holding that Florida Securities Act claims are not arbitrable and clearly rejects any broader holding, such as is suggested by Petitioner. Id. Thus, there is no "direct" conflict on this issue of law between Melamed III and Klosters, Vouis and Young.

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3. This discussion refers to the District Court decision in Young. In affirming Young, this Court did not address the specific issue whether fraud and punitive damage claims are arbitrable so that this Court's opinion in Young also does not directly conflict with Melamed III on this point.

Accordingly, lacking both "direct" as well as "express" conflict "on the same issue of law" - i.e. arbitrability of fraud and punitive damage claims - there is no basis for review under Rule 9.030(a)(2)(A)(iv).

In Point III Petitioner most conspicuously fails to satisfy the burden of demonstrating an express and direct conflict with another court on the same question of law. Relying on incomplete excerpts from the record,[4]/ Petitioner attempts to argue that Defendants conceded that no arbitration would be appropriate on any of the remaining counts as long as the 1933 Securities Act Count remained. First, this is clearly not an issue of law. Moreover, without arguing the merits of the particular ruling, it should be pointed out that the Fourth District specificaly rejected Petitioner's twisting of the facts. In any event, this contention clearly does not constitute an express and direct conflict on a particular issue of law with Bould v. Touchette, 349 So.2d 1181 (Fla. 1977) or any of the other numerous opinions string cited by Petitioner. This is an overt attempt by

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4. Many of the purported statements of "fact" found in Petitioner's brief present only one side of the events and are thus in essence argument. The essential matters to consider are the language of the Court's opinion and whether anything held by the Court below in reality conflicts with any other opinion by this Court or another District Court of Appeal. Petitioner's purported "statement of facts" is incomplete and completely out of context. Respondents will not even dignify this purported statement with any reponse and is certain that the Court herein will likewise ignore all argument on the merits as inappropriate and offensive.

Petitioner to argue the merits of the Fourth District Court of Appeal's opinion and should not be given any attention whatsoever by this Court.

As her final attempt to persuade this Court to accept jurisdiction, Petitioner contends that the District Court's conclusion that Respondents had not waived their right to arbitration of the Florida Securities Act claim conflicts with the decision of this Court in Klosters Rederi A/S v. Arison Shipping Co., 280 So.2d 678 (Fla. 1973), the decision of the First District Court of Appeal in Bickerstaff v. Frazier, 232 So.2d 190, 191 (Fla. 1st DCA 1971) and the decisions of the Third District Court of Appeal in Lyons v. Krathen, 368 So.2d 906 (Fla. 3d DCA 1979); and Lapidus v. Arlen Beach Condominium Association, 394 So.2d 1102 (Fla. 3d DCA 1981).[5]/ In all these cases, the question of waiver arose in the context of the Florida Arbitration Code and thus was decided under Florida law and under the particular facts of each case.

The issue of waiver of arbitration under the Federal Arbitration Act is a matter of federal law. "[T]he Federal Arbitration Act establishes that, as a matter of federal law, any doubts concering the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construc-

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5. Petitioner's reliance upon the Fourth District Court of Appeal decision in Marthame Sanders & Co. v. 400 West Madison Corp., 401 So.2d 1145 (Fla. 4th DCA 1981) is utterly without merit. Even if it were conceded that Marthame conflicts with Melamed III, an intra-district conflict does not vest this Court with jurisdiction. See Fla.R.App.P. 9.030.

tion of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., __U.S.__, 103 S.Ct. 927, 941-42 (1983). The District Court having expressly found the Federal Arbitration Act applicable properly applied the controlling federal law to the issue of waiver and held the trial court erred in finding a waiver of arbitration.

The District Court's conclusion that any purported delay does not constitute a waiver of arbitration absent allegations of undue advantage or prejudice does not conflict with the decisions cited by Petitioner on the same question of law. Each decision cited by Petitioner applies the Florida Arbitration Code and the laws of Florida in resolving the issue of waiver. Melamed III arises out of the application of an entirely different law, the controlling federal law. Thus, there cannot be conflict on the same question of law and therefore, this Court should decline to accept discretionary jurisdiction on the issue of waiver.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief to Invocation of Discretionary Jurisdiction was mailed this 10th day of October, 1984 to MICHAEL EASLEY, ESQ., 701 Forum III, 1675 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401, and F. KENDALL SLINKMAN, ESQ., 501 Forum III, 1665 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401.

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