IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,045

C. U. ASSOCIATES, INC., a Florida corporation, and AETNA CASUALTY AND SURETY COMPANY, a Connecticut corporation,

Petitioners,

-vs-

R. B. GROVE, INC., a Florida corporation,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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-vs-	)
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RESPONDENT'S REPLY BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

The Petitioners totally omitted filing of a Statement of the Case and Facts in its Brief on Jurisdiction. Respondent, therefore, submits its Statement of the Case and Facts. The trial court below entered a Final Judgment against Petitioners after a non-jury trial and awarded reasonable attorneys fees and costs under Chapter 713 of the Florida Statutes to Respondent (RA-1). The trial court subsequently entered its Order interlineating the judgment and awarding taxable costs and attorneys after Petitioners filed a Motion for Rehearing. An Order denying rehearing as to attorneys fees and costs was entered by the trial court (RA-5) and the appeal to the Third District in the case sub judice took place. The Opinion of the District Court of Appeals

affirming the trial court below (RA-7) was filed. Petitioners seek discretionary review by this Court pursuant to Article V, Section (3) (b) (3) Fla. Const.

POINT ON APPEAL

IS THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE EXPRESSLY AND DIRECTLY IN CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR THIS COURT ON THE SAME QUESTION OF LAW?

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE IS NOT EXPRESSLY AND DIRECTLY IN CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR THIS COURT ON THE SAME QUESTION OF LAW.

Therefore, this Court lacks jurisdiction of this matter pursuant to Article V, Section (3) (b) (3), Fla. Const., in that the instant decision of the Third District Court of Appeals is not in express and direct conflict with a decision of another District Court of Appeals on the same question of law.

This Court has pronounced that the District Court of Appeals "are and were meant to be courts of final appellate jurisdiction", Lake v Lake, 103 So 2d 639 (Fla. 1958). In the Lake v Lake decision this Court succinctly stated:

> "The quality of justice may not be gaged by the treatment accorded one litigant without regard to his adversary. Justice should be done, but not over done.

> When a party wins in the trial court, he must be prepared to face his opponent in the appellate court, but if he succeeds there, he should not be compelled a second time to undergo the expense and delay of another review." Ibid, 103 So 2d 639 (Fla. 1958), at pg. 642.

The Petitioners seek jurisdiction of this Court through its discretion, alleging that it is "in express and direct conflict" with decisions in the Fourth District, Monde Investments No. 2, Inc. R. D. Taylor-Made Enterprises, Inc., 344 So 2d 871 (Fla. 4th DCA 1977), and the Second District, S.C.M. Associates, Inc. v Rhodes, 395 So 2d 632 (Fla. 2d DCA 1981). No such intra jurisdictional conflict exists and the decision of the Third District below does not create an inconsistency amongst the precedents.

The issue before the District Court of Appeals was whether the judgment of the trial court erroneously awarded R. B. GROVE, INC. attorneys fees and costs as the prevailing party under Florida Statute 713.29. The Third District Court took the view that:

> "A claimant who succeeds in establishing a mechanics lien and receives a judgment in its favor in any amount whatsoever is necessarily the 'prevailing party' under Section 713.29, without regard to whether the judgment recovered exceeds, equals or is less than any prelitigation offer. Arcadia Development Corp. v Rinker Materials Corp., 419 So 2d 1142, 1144 (Fla. 3d DCA 1982), rev denied, 431 So 2d 988 (Fla. 1983)."

The Third District clearly stated its position, which is not inconsistent with either the decision in the Monde Investments case or S.C.M. Associates case and stated succinctly:

> "In essence, then, a party prevails and is entitled to fees and costs when he receives a favorable judgment, and it is irrelevant that he turn down a more favorable prelitigation offer or that his victory in court is pyrrhic. What is relevant, however, to the prevailing party's entitlement to fees and costs is whether the non-prevailing party has served an Offer of Judgment pursuant to Florida Rules of Civil Procedure 1.442 more favorable to the prevailing party than the judgment actually obtained . . . Thus, if the appellant herein wanted to prevent or mitigate the assessment of fees and costs against it, or itself wanted to recover such fees and costs, it could have renewed its prelitigation offer in the form of a Rule 1.442 Offer of Judgment after litigation began. That not having occurred, final judgment must be affirmed in all respects." (Appendix, page 3)

Neither the Monde Investments case nor the S.C.M. Associates case decided by the Fourth and Second Districts respectively, in construing the provisions of Florida Statutes 713.29 either referred to nor was decided upon Rule 1.442. Petitioners argue that Respondent was rewarded by being the prevailing party in litigation. This reward was created by the Legislature of the State of Florida with the enactment of Florida Statute 713.29. Petitioners lost below and attempt to diminish the award R. B. GROVE, INC. was granted judgment for by frustrating the very purpose of Chapter 713.29.

The Court should note that in the Monde Investments case the factual situation was different than in the instant decision of the Third District. In Monde, Hardrives provided paving for which a ten percent (10%) retainage in the amount of $3,944.60 had been withheld by Monde and the Fourth District Court of Appeals indicated he was required to accept his proportional share of the ten percent (10%)

retained amount, which was the exact amount offered but not tendered before litigation commenced, nor renewed by an Offer of Judgment after litigation commenced. In S.C.M. Associates, an offer at a closing to S.C.M. was refused and the closing never took place. Rhodes received a judgment of less than that which was offered. That case is factually distinguishable from the instant case.

This Court has clearly set forth the criteria for conflict in its decision, both in Mancini v State, 312 So 2d 732 (Fla. 1975) and in Nielson v City of Sarasota, Fla., 117 So 2d 731 (Fla. 1960). This Court held that the Writ of Certiorari was improvidently issued and it was without jurisdiction, that "our jurisdiction can not be invoked merely because we might disagree with the decision of the District Court nor because we might have made a factual determination if we had been trier of fact", Kincaid v World Insurance Co., 157 So 2d 517 (Fla. 1963). In Nielson, this Court cited with authority Ansin v Thurston, 101 So 2d 808 (Fla. 1958) in stating this Court's Certiorari jurisdiction to review "decisions of the District Court of Appeals are limited and strictly prescribed". In addition, the Court stated:

> "When our jurisdiction is invoked pursuant to this provision of the Constitution, we are not permitted the judicial luxury of upsetting a decision of a court of appeals merely because we might personally disagree with the so-called 'justice of the case' as announced by the court below. In order to assert our power to set aside the decision of a court of appeal on the conflict theory, we must find in that decision a real, live and vital conflict within the limits above announced." Ibid, 117 So 2d 731, at pg. 735.

there is no inconsistency or conflict amongst the precedents, either in the Monde decision from the Fourth District, the S.C.M. decision from the Second District or the case sub judice. The effect of the Third District Court of Appeals decision in this case, based upon its facts, does not expressly and directly conflict with the Monde Investments case and the S.C.M. Associates case.

Petitioners argue the Third District's decision is contrary to the policy of the Florida courts. A materialman, under Chapter 713 of the Florida Statutes, must follow specific steps to perfect his lien against an owner. R. B. GROVE, INC. accomplished this, filed its Claim of Lien, which Petitioners bonded out. Had payment been forthcoming from Petitioners, no litigation would have been necessary in connection with Respondent's Claim of Lien. "Where's the Beef!" If you pay your bills before litigation, there is no litigation.

The instant decision of the Third District is not inconsistent with the concept of making the Respondent "whole" under Chapter 713.29 of the Florida Statutes. The public policy argument of the Petitioners should be dismissed by this Court based upon the authority of Kyle v Kyle, 139 So 2d 885 (Fla. 1962) where it held "Where the two cases are distinguishable in controlling factual elements or if points of law settled by two cases are not the same, no conflict arises". The Monde Investments and S.C.M. Associates decisions do not create a conflict sufficient to warrant this Court taking jurisdiction. The decision of the Third District Court of Appeals sub judice is a correct statement of law as to the factual posture of this case.

CONCLUSION

This is not a well disguised attempt at another appeal. Petitioners had their day in court and have had one appeal. Justice delayed is justice denied. Respondent asserts this Court lacks jurisdiction over this matter pursuant to Article V, Section (3) (b) (3) of the Florida Constitution in that the decision of the Third District Court of Appeals does not expressly and directly conflict with the decisions of the Fourth and Second District Courts of Appeal. The discretionary petition for Certiorari should be denied and this Court should decline to accept jurisdiction of this case.

Respectfully submitted,

Fred A. Harrison, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foreging was mailed to STEVEN W. DAVIS, Esquire, Attorney for Petitioners, 1108 Kane Concourse, Bay Harbor Islands, Florida 33154, this 8th day of November, A. D. 1984.

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By _____