

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED

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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

L. ROSS, INC., a
Florida Corporation,

Petitioner,

CASE NO. 66,607

-vs-

R. W. ROBERTS CONSTRUCTION
COMPANY, INC., TRANSAMERICA
INSURANCE COMPANY, B. E. McCALL
and THOMAS ADAIR,

Respondent.

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CITATIONS

American Cast Iron Pipe Company vs. Foote Brothers Corporation, 4, 5 and 6
458 So.2d 409, (Fla. 4th D.C.A. 1984)

Bowman vs. Employers Mut. Liability Ins. Company of Wis., 5
261 So.2d 821 (Fla. 1972).

Gibson v. Maloney, 5, 6
231 So.2d 823, (Fla. 1970),
Cert. Den. 398 U.S. 951, 90 S.Ct. 1871, 26 L.Ed.2d 291,
Appeal after Remand 263 So.2d 632,
Cert. Den. 410 U.S. 984, 93 S.Ct. 1505, 36 L.Ed.2d 180.

Kyle vs. Kyle, 5
139 So.2d 885 (Fla. 1962)

Rhome vs. State, 4
293 So.2d 761, (Fla. 3rd D.C.A. 1974)

OTHER AUTHORITIES:

Article V, §3(b)(3), Fla. Const. 4, 5

Fla. R. App. P. 9.120(d) 6

§627.756, Florida Statutes. 1

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, TRANSAMERICA INSURANCE COMPANY, adopts the Petitioner's Statement of the Case and of the Facts with the exceptions noted herein.

The record on appeal indicates that a final judgment was entered against Respondent pursuant to stipulation of counsel without a jury. (ROA 3) A hearing was held before the Trial Court on December 14, 1983, at which time the only issue to be resolved by the Trial Court between Petitioner and Respondent was the amount of attorneys' fees. (ROA 3,4) At this hearing, argument was made by counsel for Petitioner and counsel for Respondent as to whether the former or the revised § 627.756, Fla. Stat. was applicable to the action, and further argument was made as to whether Petitioner had segregated its attorney's time for work performed pursuant to Petitioner's claim against Respondent as opposed to time expended by Petitioner's counsel upon matters unrelated to the claims made against Respondent and the applicable defenses raised by Respondent. (ROA 1-27) As to the issue of whether the former or revised §627.756, Fla. Stat. was applicable, the Trial Court reserved ruling. (ROA 25) There is no other indication in the record on appeal as to the Trial Court's ruling on this particular question of law. The record does not indicate any further pleadings or hearings after the date of the above referenced hearing. On December 4, 1983, without

further proceedings, the Trial Court set the amount of reasonable attorneys' fees at SIX THOUSAND EIGHT HUNDRED NINE AND 95/100 DOLLARS, (\$6,809.95), and entered the final judgment reflecting said amount (ROA 125) on a form provided by Petitioner's counsel.

ISSUE ON APPEAL

WHETHER THERE IS A CONFLICT BETWEEN THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL AND ANOTHER DISTRICT COURT OF APPEAL, AND NOT A MERE CONFLICT OF OPINIONS OR REASONS THEREFOR, WHEREBY THE SUPREME COURT OF FLORIDA MAY APPROXIMATELY EXERCISE ITS DISCRETIONARY JURISDICTION UNDER ARTICLE V, §3(b)(3), FLA. CONST.

ARGUMENT

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL FOR FLORIDA AND ANOTHER DISTRICT COURT OF APPEAL, ONLY A CONFLICT OF OPINIONS AND REASONS FOR THE DECISION, THEREFORE, THIS IS NOT AN APPROPRIATE CASE FOR EXERCISE OF THE SUPREME COURT'S DISCRETIONARY JURISDICTION UNDER ARTICLE V, §3(b)(3), FLA. CONST.

Article V, §3(b)(3), Fla. Const. provides that the Supreme Court of Florida:

May review any decision of a district court of appeal...that expressly and directly conflicts with a decision of another district or of the supreme court on the same question of law.

Although the Fifth District Court of Appeal for Florida in the case sub judice has acknowledged direct conflict with American Cast Iron Pipe Company vs. Foote Brothers Corporation, 458 So.2d 409, (Fla. 4th D.C.A. 1984), any grant of certiorari by the Supreme Court is necessarily limited to specific situations, and it is within the discretion of the Supreme Court to exercise. Rhome vs. State, 293 So.2d 761, (Fla. 3rd D.C.A. 1974). It is Respondent's position, as to jurisdiction before the Supreme Court, that it is neither necessary or desirable for the Supreme Court to exercise its discretionary jurisdiction under Article V, §3(b)(3), Fla. Const. in the case sub judice.

It is well settled that a conflict of decisions rather than a conflict of opinions or reasons supplies the basis of jurisdiction for

review by certiorari by the Supreme Court according to Article V, §3(b)(3), Fla. Const. Gibson v. Maloney, 231 So.2d 823, (Fla. 1970), Cert. Den. 398 U.S. 951, 90 S.Ct. 1871, 26 L.Ed.2d 291, Appeal after Remand 263 So.2d 632, Cert. Den. 410 U.S. 984, 93 S.Ct. 1505, 36 L.Ed.2d 180. The decision of the Fourth District Court of Appeal for Florida in American Cast Iron Pipe Company vs. Foote Brothers, supra, was to overturn the Trial Court's award of attorneys' fees limited to twelve and one half percent (12 1/2%) of the recovery and to require instead reasonable attorneys' fees. Id. The decision of the Fifth District Court of Appeal for Florida in the case sub judice was to uphold the judgment of the Trial Court which had awarded "\$6,809.95 as reasonable attorneys' fees" therein. (ROA 125) Applying Gibson v. Maloney, supra, therefore, the apparent conflict of opinions or reasons for these similar decisions is not a basis for review by this court under its discretionary review power under Article V, §3(b)(3), Fla. Const.

Direct conflict between decisions of district courts of appeal is essential to establishing jurisdiction of the Supreme Court to review such decisions under Article V, §3(b)(3), Fla. Const. Bowman vs. Employers Mut. Liability Ins. Company of Wis., 261 So.2d 821 (Fla. 1972). Where two cases are distinguishable in controlling factual elements, no conflict arises such as would authorize the Supreme Court to review a decision of a district court of appeal on the ground that it conflicted with other decisions on the same point of law. Kyle vs. Kyle, 139 So.2d 885 (Fla. 1962). When comparing decisions to determine the

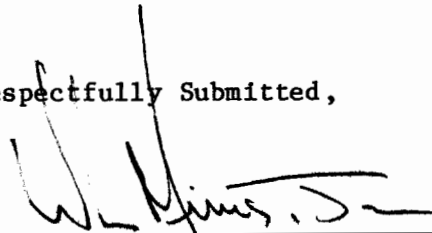
presence or absence of the conflict necessary for review by certiorari, it may be necessary to consult the record to some extent. Gibson vs. Maloney, supra. The trial court in American Cast Iron Company vs. Foote Brothers, supra, apparently made an express ruling in the context of a summary judgment against the bond surety that the twelve and a half percent (12 1/2%) statutory cap on attorneys' fees applied. Id. at 409. In the case sub judice, to the contrary, the parties stipulated as to a final judgment being entered against the bond surety, and the Trial Court subsequently awarded "\$6,809.95 as reasonable attorneys' fees" (ROA 125) therein without an express ruling by the Trial Court that it meant to award anything other than "reasonable" attorneys' fees. The existence of these factual differences between American Cast Iron Pipe Company vs. Foote Brothers, supra, and the case sub judice, is fatal to the establishment of jurisdiction in the Supreme Court under Article V, §3(b)(3), Fla. Const.

Finally, in accordance with Fla. R. App. P. 9.120(d), Respondent shall not address the substantive arguments made by Petitioner in its Jurisdictional Brief on the merits of the case.

CONCLUSION

For the reasons set forth in this Jurisdictional Brief, the Respondent respectfully maintains that the case sub judice is not an appropriate case or a necessary case for the Supreme Court to exercise its discretionary review under Article V, §3(b)(3), Fla. Const.

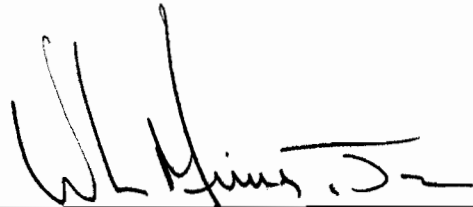
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF has been furnished by U.S. Mail to FREDERICK B. KARL, JR., ESQUIRE and CHARLES E. DAVIS, ESQUIRE, 170 E. Washington Street, Orlando, Florida 32801, this 15th day of March, 1985.



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