

CASE NO: 67,777

IN THE SUPREME COURT OF FLORIDA

FILED

OCT 20 1966

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CLERK, SUPREME COURT

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BARNETT BANK OF WEST FLORIDA,

Petitioner,

v.

W. RICHARD HOOPER,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

DONALD H. PARTINGTON  
ROBERT D. HART, JR.  
Clark, Partington, Hart, Hart  
and Johnson  
715 South Palafox  
Post Office Box 12585  
Pensacola, FL 32573  
Counsel for Respondent

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Jenkins v. State,  
385 So.2d 1356 (Fla. 1980)

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Milohnich v. First National Bank of Miami Springs,  
224 So.2d 759 (Fla. 3d DCA 1969)

1, 2, 3, 4

OTHER AUTHORITY

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv)

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STATEMENT OF THE CASE  
AND  
STATEMENT OF THE FACTS

The history of this case and the facts of this case are sufficiently set forth in petitioner's brief and in the decision of the First District Court of Appeal.

SUMMARY OF ARGUMENT

The decision of the First District Court of Appeal and the decision of the Third District Court of Appeal in Milohnich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969) are not in express and direct conflict on the same question of law. Each recognizes a general duty of non-disclosure by banks of confidential customer information. The Third District recognized that the rule was qualified and that there were exceptions to the rule, but declined to rule on those exceptions. The First District decision correctly announced an exception to the rule of non-disclosure based on the facts before it. There is no conflict and this court does not have jurisdiction.

ARGUMENT

The Barnett Bank seeks to invoke discretionary review of the decision of the District Court of Appeal, First District. Barnett claims express and direct conflict between the decision below and Milohnich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969).

Barnett is required to establish that the First District's decision expressly and directly conflicts with Milohnich on the same question of law. Jenkins v. State, 385 So.2d 1356 (Fla. 1980), Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

In Milohnich, the Third District was concerned only with the question of a bank's liability to a customer for negligently, willfully, intentionally or maliciously disclosing information about that depositor's account to someone else who was not a customer of the bank. The Third District expressly recognized that the duty of non-disclosure is not absolute. It is only qualified. Because the qualifications were not before the Third District, the Third District did not rule on the question of law concerning qualifications to the bank's duty of non-disclosure. The Third District expressly held it was not dealing with the cases involving disclosure in factual situations other than those alleged in the complaint before the court in Milohnich at the time of its decision. After recognizing that there were exceptions to the general rule of non-disclosure, the court squarely held:

These issues are not before us.

224 So.2d at 762.

Here, the First District recognized the general rule of non-disclosure announced in Milohnich. The First District, following ample precedent, correctly held that the general rule dealing with non-disclosure to non-customer third parties does not control when the transaction is not routine or arms length and the bank is dealing with a loan to one customer "engineered by a bank

customer known to be at least seriously delinquent, and very likely guilty of fraud in his dealings with the bank". (First District opinion at page 10.)

Both the Third District and First District courts have agreed on the same question of law and both have agreed that there are qualifications or exceptions to the same rule of law. The Third District did not deal with qualifications to the general rule because these issues were not before it. The First District properly ruled on a qualification to the general rule based on the facts before it. The two courts are in agreement; not in conflict.

Barnett suggests the First District apparently misconstrued the obligations imposed on a bank by the regulations under the Equal Credit Opportunity Act.

That regulation was never presented to the trial court or argued to the First District Court of Appeal until Barnett raised it after the First District's opinion in a petition for rehearing. It is improper to suggest an appellate court "misconstrued" a regulation not in the record or cited to the court as a basis for seeking jurisdiction in this Court. Suffice it to say and without arguing the matter, the regulation cited by Barnett did not preclude Barnett from either disclosure to Dr. Hooper or refusing to make the loan within the context of the First District's decision.

Reference to that regulation has no place in the jurisdictional brief submitted to this Court.

The arguments of Barnett at pages 9 and 10 of its brief are directed to the merits of the case, were each unanimously rejected by the First District in its thoughtful opinion, are inappropriate in a jurisdictional brief and should be disregarded by this Court. The First District's decision does not and should not confuse any bank; it might be embarrassing to Barnett, but that is no reason for this Court to find jurisdiction when none exists.

CONCLUSION

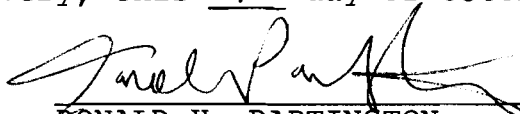
Jurisdiction in this Court must be based upon an express and direct conflict on the same question of law. There is no such conflict between the Third District decision in Milohnich and the First District's decision in this case. The petition for discretionary review should be denied.



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DONALD H. PARTINGTON  
ROBERT D. HART, JR.  
Clark, Partington, Hart, Hart  
and Johnson  
715 South Palafox  
Post Office Drawer 12585  
Pensacola, [FL 32573  
904/434-3273  
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Robert P. Gaines, Post Office Box 12950, Pensacola, FL 32576, by U. S. Mail delivery, this 29<sup>th</sup> day of October, 1985.



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DONALD H. PARTINGTON