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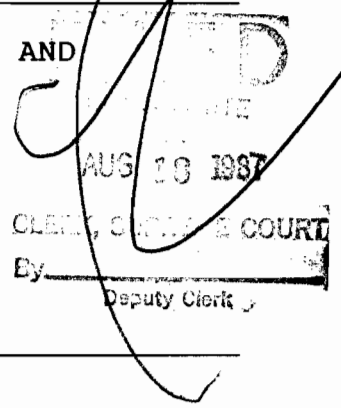
IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,880

PALMETTO FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

vs.

HOWARD E. WULSIN,
Respondent.



On Petition for Discretionary Review
of a Decision of the District Court
of Appeal of Florida, Third District

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND THE FACTS

The respondent, Harold E. Wulsin ("Wulsin") adopts the Statement of the Facts included by the petitioner, Palmetto Federal Savings & Loan Association ("Palmetto Federal"), with the exception of the petitioner's (1) stated disagreement with the Third District Court of Appeal's opinion, (2) improper inclusion of matters omitted from the Third District's opinion, such as the allegation that the Third District Court of Appeal lacked jurisdiction, and (3) improper inclusion of excerpts from the trial court record (such as Wulsin's status as an inferior mortgagee).

In addition, the decision of the Third District that the petitioner asserts is in direct and express conflict with the Fourth District's decision in Amsler v. American Home Assurance Co., 348 So.2d 68 (Fla. 4th DCA 1977), cert. denied, 358 So.2d 128 (Fla. 1978), states in pertinent part:

> First, section 620.26 can be interpreted as a restatement of liability rather than an absolute bar to a lawsuit initiated by a limited partner. ... Second, the Act treats partnerships as aggregates for some purposes and as entities for other purposes. ... Third, the limited partner is like a corporate shareholder or a trust beneficiary to whom a fiduciary duty is owed. We recognize the right of corporate shareholders to bring derivative suits; thus, we acknowledge circumstances when protection of partnership rights would justify similar remedies.

Wulsin v. Palmetto Federal Savings & Loan Ass'n., et al., No. 86-333, slip. op. at 5 (Fla. 3d DCA May 12, 1987).

SUMMARY OF ARGUMENT

The decision of the Third District below does not conflict with the Fourth District's opinion in Amsler. Amsler was a direct action by limited partners, as individuals, asserting partnership rights against the partnership's attorney. The case below is one in which a limited partner seeks to assert defenses on behalf of the partnership in a derivative action. The two cases involve substantially different facts directly influencing the respective holdings. This Court has declined to accept jurisdiction to review such cases.

Second, Amsler is consistent with the decision below. The Fourth District, through its analysis of Section 620.26, Florida Statutes, determined that a limited partner is not a proper party to proceedings by or against a partnership. Amsler v. American Home Assurance Co., 348 So.2d at 71. The Fourth District applied the aggregate theory of partnership as opposed to the entity theory in construing Section 620.26. Id. A limited partner plaintiff lacks standing to institute law suits by or against a partnership. Id.; see also Epstein & Brothers v. First National Bank of Tampa, 92 Fla. 796, 110 So. 354 (1926). The Fourth District's holding in no way conflicts with the Wulsin rule that a limited partner may bring a derivative action on behalf of the partnership. Section 620.26 does not pertain to derivative actions. In fact, Section 620.163, Florida Statutes, which became effective January 1, 1987, expressly provides that a

limited partner may bring a derivative action on behalf of the partnership, "if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." § 620.163, Fla. Stat. (Supp. 1986).

Finally, this Court cannot look beyond the facts contained within the opinions allegedly in conflict to establish jurisdiction. The petitioner relies on facts omitted from the Third District's opinion in order to request a second, plenary appeal in this Court that is prohibited by the Florida Constitution and by the rules of this Court.

Consequently, the petitioner has failed to establish any basis for this Court to exercise jurisdiction, and the petition should be denied.

ARGUMENT

I. No Direct and Express Conflict Exists Between the Opinion of the Fourth District Court of Appeal in Amsler v. American Home Assurance Co. and the Opinion of the Third District Court of Appeal in the Case Below

The petitioner's brief does not demonstrate any conflict between the Third District Court of Appeal and the decision of the Fourth District in Amsler v. American Home Assurance Co., 348 So.2d 68 (Fla. 4th DCA 1977), cert. denied, 358 So.2d 128 (Fla. 1978). The petitioner misstates that the Fourth District held in Amsler that a limited partner may not bring a derivative action under the Florida Uniform Partnership Act. What the Fourth District did hold in Amsler is that a

limited partner, as an individual, may not institute a direct action which depends upon a duty owed to the entire membership of the limited partnership. Amsler v. American Home Assurance Co., 348 So.2d at 71. A general partner, under Section 620.26, is the only proper party to initiate direct actions by or against a partnership. Id. Thus, the claimed conflict is based on a misapplication of Amsler to the instant case and a misstatement of the Fourth District's opinion.

The petitioner argues that Amsler extended the aggregate theory of partnerships to include derivative as well as direct actions by limited partners. Palmetto Federal claims, therefore, that Amsler conflicts with the Third District's ruling below, which approved derivative actions by limited partners in certain circumstances. In order to allege express and direct conflict jurisdiction, the petitioner has recast Amsler in a manner quite contrary to its actual holding. Amsler did not hold that limited partners cannot assert derivative actions on behalf of the limited partnership. The parenthetical quote that is included in the opinion below is fully consistent with Amsler:

> Florida adopts the common law aggregate theory of partnership as opposed to the entity theory .... Any duty which [the defendant] might have owed to plaintiffs would be owed to the entire membership of the limited partnership, and only the general partners would have had the right to institute such action. Wulsin, slip op. at 4-5.

The limited partners in Amsler sought to assert a direct action based on the partnership rights. The Fourth District correctly held that the rights of the entire membership of the limited

partnership must be asserted in a direct action brought by the general partner, and based on partnership rights. The Third District decision below, however, does nothing more than confirm that limited partners may assert the interests of a limited partnership in a derivative action.

Section 620.163, of the Florida Revised Uniform Limited Partnership Act, codifies this interpretation of the Uniform Limited Partnership Act and provides:

> **Right of Limited Partner to Bring Derivative Action** -- a limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

Section 620.163, Fla. Stat. (Supp. 1986). Thus, under the Revised Uniform Limited Partnership Act, a limited partner still cannot bring a direct action on a partnership right. Amsler is still good law in Florida. It neither conflicts with Section 620.163 nor with the decision below because it merely prohibits a direct action, not a derivative action, by a limited partner. In Amsler, the Fourth District never even considered the elements of, or requirements for, a derivative suit by a limited partner.

Moreover, Amsler is distinguishable on its face from the instant case. [1] It concerns a direct action by limited partners seeking to enforce, as individuals, partnership rights

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1 This Court has held that where the case before it is

[Footnote continued on next page].

against the partnership attorney. The opinion does not contain any reference to the general partner's refusal or failure to bring that action.

Wulsin is entirely different, because it deals with a limited partner asserting a partnership right in a derivative action, after the general partners sold the partnership down the river with a release to save their own skins (slip op. at 2, note 1).

Amsler remains good law under the Florida Revised Uniform Limited Partnership Act. New Section 620.163 and the decision in Wulsin permit derivative actions by limited partners only if a general partner refuses to protect the partnership. So long as the general partner acts properly, Amsler and Section 620.163 still preclude actions by limited partners to enforce a right of the partnership.

II. This Court Should Not Look Beyond the Opinion of the Third District Court of Appeal

The petitioner's brief contains extraneous facts which were not a part of the District Court's opinion. The petitioner suggests that the Third District Court of Appeal lacked

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[Footnote continued from previous page].

"distinguishable on its facts from those cited in conflict," no conflict exists for purposes of Article V, Section 3(b)(3) of the Florida Constitution, and this Court will not exercise jurisdiction. Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983). Moreover, this Court has stated that "the decisions [in conflict] must be based practically on the same state of facts and announce antagonistic conclusions." Ansin v. Thurston, 101 So. 808, 811 (Fla. 1958).

jurisdiction to hear the appeal in the first instance and attempts to review the record itself to establish conflict jurisdiction. (Petitioner's brief, at 2). Furthermore, petitioner asserts that the Third District was only able to consider the issue of the limited partner's derivative action by "disagreeing with the trial court's conclusion that no material issues of fact existed as to who was the actual borrower of the loan." (Petitioner's brief, at 4).

The 1980 amendment to Article V, Section 3(b)(3) of the Florida Constitution precludes review of the record itself in establishing conflict jurisdiction. That amendment limited the Court's jurisdiction to decisions which are "expressly and directly" in conflict with other district court of appeal or Supreme Court opinions. The language has been interpreted to prohibit recourse to the record below or even to dissenting or concurring opinions for a finding of conflict jurisdiction. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

The correct rule is stated in Reaves v. State, 485 So.2d 829, 830 n. 3 (Fla. 1986):

> The only facts relevant to our decision to accept or reject [conflict jurisdiction] are those facts contained within the four corners of the decisions allegedly in conflict ... [W]e are not permitted to base our conflict jurisdiction on a review of the record ... Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.

Accordingly, the petitioner's references to facts regarding the Third District's jurisdiction in the first instance and the trial court's conclusion as to who was the actual borrower of the loan, omitted from the District Court's opinion, are improper and cannot be considered by this Court in determining jurisdiction.

The difference between direct actions, as in Amsler, and derivative actions, as in the case below, is material and the Third District properly distinguished the cases.

CONCLUSION

Because no conflict jurisdiction exists based on (1) conflicting rules of law, (2) application of the same rule of law yielding conflicting results on substantially similar facts, or (3) misapplication of precedent, this Court should not review the case below. Moreover, the petitioner's use of facts omitted from the District Court's opinion cannot be considered by this Court to establish conflict jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution. Accordingly, the petition should be denied.

Respectfully submitted,

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