IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,731

JUAN VICENTE PEREZ SANDOVAL

and

SANDY BAY INVESTMENTS COMPANY, S.A.

Petitioners

v.

BANCO DE COMERCIO, S.A., C.A., INVERSIONES CREDIVAL, C.A. AND SOCIEDAD FINANCIERA DE COMERCIO, C.A.

Respondents

RESPONDENTS' ANSWER BRIEF ON DISCRETIONARY JURISDICTION

Respectfully submitted,

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INTRODUCTION

Respondents, BANCO DE COMERCIO, S.A., C.A., INVERSIONES CREDIVAL, C.A. and SOCIEDAD FINANCIERA DE COMERCIO, C.A., pursuant to Florida Rule of Appellate Procedure 9.120, respectfully file their Answer Brief to Petitioners' Initial Brief on Discretionary Jurisdiction. As the following arguments and authorities will show, this Court lacks jurisdiction to review the decision of the District Court of Appeal, Third District, under Article V, Section 3(b)(3), Florida Constitution.

STATEMENT OF THE CASE AND OF THE FACTS

In their Initial Brief, Petitioners have ignored crucial facts having an important bearing on the validity of their arguments. Accordingly, pursuant to Rule 9.210(c), Respondents will set forth the facts omitted in the Initial Brief.

Among the crucial facts that Petitioners chose to ignore in their factual recitation is that prior to trial, the parties executed and filed, on or about July 11, 1988, an extensive Joint Pretrial Stipulation, as amended (the "Stipulation") [A. 2]. Under the Stipulation, the parties agreed that the sole issue to be tried by the trial court was the liability of the Petitioners to the Respondents as a result of the transaction being challenged by the Respondents below. The parties further agreed that Venezuelan law governed the substance of the issues of liability and the obliga-

tions owed by the Petitioners to the Respondents.[1/] The parties also specifically stipulated that the trial court should decide:

> Whether Venezuelan law provides that the prevailing party in this action is entitled to recover its fees and costs

[A. 2].

Subsequently, at trial, the Respondents again raised the issue of attorneys' fees:

> MR. COFFEY: Your Honor, there are just a couple of preliminary matters I would like to refer to.
>
> Consistently with my understanding of Florida law, in the event this Court determines, upon the determination of the issues in the main case that either side is entitled to attorney's fees, it is my understanding that that would be separately visited at that time and it won't be necessary to try the issues in the main case.
>
> THE COURT: That will be reserved for future disposition.

[A. 5-6]. Respondents' counsel never objected to the reservation of the issue for a later time.

Another important fact omitted by Respondents is that the case below was not a breach of contract case. It was an action filed by intervened Venezuelan financial institutions against the defendants below, JUAN VICENTE PEREZ SANDOVAL and SANDY BAY

1/ The Stipulation provides, in pertinent part: "As to rules of law, the parties agree that Venezuelan law controls the substance of the issues of liability and obligations with respect to the so-called Sandy Bay transaction." [A. 2].

INVESTMENTS COMPANY, S.A., for their violations of Ordinal 1, Article 153, of the Venezuelan General Law Governing Banks and Other Credit Institutions, as well as Article 266 of the Venezuelan Commercial Code. Plaintiffs' recovery of $12.5 million in damages against the defendants was predicated on the trial court's finding that the uncontroverted facts presented at trial established violations of those laws.

In its final judgment, the trial court again expressly reserved jurisdiction to consider post-trial motions filed by Respondents for an award of costs, fees, and prejudgment interest in accordance with Venezuelan law. In the Order entered on March 14, 1990, the trial court found that the right to attorneys' fees is a substantive right, and that defendants, SANDOVAL and SANDY BAY, were "totally defeated" as provided under Venezuelan law and, therefore, were required by Venezuelan statutory law to pay the plaintiffs' costs and attorneys' fees. [A. 7]. The Third District Court of Appeal affirmed the trial court's decision in all material respects. After unsuccessfully seeking rehearing, Petitioners sought review by this Court.

SUMMARY OF ARGUMENT

Under Article V, Section 3(b)(3) of the Florida Constitution, this Court lacks jurisdiction to review the decision of the Third District Court of Appeal. It is evident that the decision below is consistent with the precedents in this Court and other districts on the sole issue considered by the district court, i.e., "Whether a prevailing party may recover attorneys' fees

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authorized in a statute by a motion filed within a reasonable time after entry of a final judgment, even though the prevailing party did not plead such entitlement in its complaint." Moreover, the specific facts of this case make the decision below distinguishable from any of the authorities cited in supposed conflict by the Petitioners. Accordingly, this Court should deny the Petition for lack of jurisdiction.

ARGUMENT

I. THE DECISION OF DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, WAS CONSISTENT WITH THOSE OF THIS COURT AND OF OTHER DISTRICT COURTS

Pursuant to Article V, Section 3(b)(3), Florida Constitution, this Court "may review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law." This Court has defined "conflict" as either: (1) the adoption by the district court of a new rule of law that conflicts with the rule of law adopted by this Court or another district court; or (2) the use by the district court of an existing rule of law to produce a different result in a case involving controlling facts substantially similar to those in a prior case. Mancini v. State, 312 So.2d 732 (Fla. 1975).

The test is not whether the Supreme Court necessarily would have arrived at a different conclusion than the district court, but whether the district court decision on its face so collides with a prior decision of the Supreme Court or of another district court

of appeal on the same point of law as to create an inconsistency or a conflict among precedents. Kincaid v. World Insurance Co., 157 So.2d 517 (Fla. 1963). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). Accordingly, the Court lacks conflict jurisdiction if the cause on appeal is distinguishable on its facts from those cited in conflict. Department of Revenue v. Johnson, 442 So.2d 950 (Fla. 1983).

In this instance, there is no express and direct conflict between the decision below and the decisions cited by Petitioners. The Third District's holding was that a party seeking attorneys' fees under statute need not plead entitlement to such fees in its complaint. [A.2]. None of the decisions cited by Petitioners conflict with this proposition.

Blount Bros. Realty Co. v. Eilenberger, 124 So. 41 (Fla. 1929), Brite v. Orange Belt Securities Co., 182 So. 892 (Fla. 1938), Close v. Webster, 132 So. 814 (Fla. 1931) and C&C Wholesale, Inc. v. Fusco Management Corporation, 564 So.2d 1259 (Fla. 2d DCA 1990), stand only for the proposition that attorneys' fees claimed pursuant to a contract must be pled, although proof of those fees may be presented for the first time post-judgment. It is undisputed that Respondents never based their claim for fees on a contract; rather, their claim was based on applicable provisions of the Venezuelan Code of Civil Procedure, which provides, in pertinent part:

> Article 274 - The party who is totally defeated in a proceeding or in an incident of a trial shall be ordered to pay the court costs.

As acknowledged by Petitioners below, "court costs" includes attorneys' fees.

Florida courts have traditionally distinguished between contract and statute when determining whether a claim for attorneys' fees must be made in a party's pleadings. There is no requirement in Florida that a claim for fees under a statute must first be made in the complaint or answer. Such claim may be made for the first time in a timely post-judgment motion. See, e.g., Downs v. Stockman, 555 So.2d 867 (Fla. 4th DCA 1990); Altamonte Hitch and Trailer Service, Inc. v. U-Haul Company of Eastern Florida, 498 So.2d 1346 (Fla. 5th DCA 1986); Brown v. Gardens By The Sea South Condominium Association, 424 So.2d 181 (Fla. 4th DCA 1983); Ocala Music & Marine Center v. Caldwell, 389 So.2d 222 (Fla. 5th DCA 1980).

The Third District Court of Appeal rejected the distinction between statutory and contractual claims long ago and held that even a failure to request contractual attorneys' fees in a pleading does not defeat entitlement when the issue is presented in a timely post-judgment motion. Protean Investors, Inc. v. Travel Etc., Inc., 519 So.2d 7 (Fla. 3d DCA 1987); Marrero v. Cavero, 400 So.2d 802 (Fla. 3d DCA), review denied, 411 So.2d 383 (1981). This Court's recent decisions in Cheek v. McGowan Elect. Supply Co., 511 So.2d 977 (Fla. 1987) and Finkelstein v. North Broward Hosp. Dist.,

484 So.2d 1241 (Fla. 1986), support abandonment of the distinction and adoption of a uniform rule allowing all such claims to be presented for the first time by a timely post-judgment motion. Downs, 555 So.2d at 868; Protean Investors, 519 So.2d at 8.

Although the Downs court certified the question as one of great public importance, the present case is a completely inappropriate one in which to consider the issue whether the distinction ought to be abandoned. This case presents only the very narrow question of pleading statutory entitlement, and there is no question but that it is unnecessary in Florida. There is, therefore, no conflict with other existing decisions.

II. THE PRESENT CASE IS FACTUALLY DISTINGUISHABLE FROM ANY CASE CITED IN PURPORTED CONFLICT

The only other case cited by Petitioners as allegedly in conflict with the opinion below in this matter was Price v. Boden, 39 Fla. 218, 22 So. 657 (1897). Price stands merely for the proposition that a default judgment cannot grant relief greater than that demanded in the complaint. Id. at 658. The reason for such a rule is obvious: due process considerations prohibit it, because due process requires fair notice.

This is not a case where the defendants were defaulted. Nor can the Defendants/Petitioners claim surprise or lack of notice. Thus, Price can present no conflict, because it did not rule on the same question of law at issue here. Art. 5, § 3(b)(3), Fla. Const.

As the District Court noted below, Petitioners expressly stipulated that one of the issues for the trial court's considera-

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tion was "whether Venezuelan law provides that the prevailing party in this action is entitled to recover its fees and costs." [A.2]. Petitioners' entry into the Stipulation vitiates any alleged "surprise" Petitioners claim to have suffered due to the absence of a demand for fees in the original pleadings. The Petition completely ignores the existence of this Stipulation.

This case is similar to the situation that was before the Fourth District Court of Appeal in Brown. 424 So.2d at 183. The prevailing parties in Brown did not plead a contractual right to fees in their answer. Id. at 182. The demand for fees was formally presented for the first time after entry of final judgment. Id. However, in Brown, as in this case, a pretrial stipulation listed as an issue: "'Are any of the parties entitled to recovery of attorneys' fees and, if so, in what amount.'" Id. at 183. As here, the court in Brown agreed, on the record, to reserve the issue of determining attorneys' fees until after resolution of the merits. Id. Accordingly, even though the claim in Brown was based on an unpled claim for attorneys' fees based on contract, the trial court reversed the subsequent denial of fees because of defendants' failure to plead them, reasoning:

> It is manifest from the foregoing outline of events that appellees and the trial court at all pertinent times knew, recognized and acquiesced, without objection or suggestion of surprise, prejudice or disaccommodation, that appellants were claiming fees and the contract basis for that claim . . . . As matters stood, appellants were affirmatively lulled into believing that their claim was known, alive and that the same would be adjudicated. Based on these facts, appellees should not be

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heard or permitted to now object to appellants' failure to formally plead.

Id. (emphasis supplied).

Thus, not only is the decision below consistent with existing decisions of this Court and other district courts on the right to recover attorneys' fees, but it also is factually distinguishable from any supposed conflicting decisions mandating a prior pleading. Petitioners' express acquiescence to post-judgment consideration of attorneys' fees eliminated any issue as to whether or not prior pleading was required. The existence of distinguishable facts precludes a conflict. Department of Revenue v. Johnson, 442 So.2d 950 (Fla. 1983). Further, there has not been and could not be any showing made reflecting a conflict of such magnitude that such decision would have the effect of overruling the earlier decisions. Kyle v. Kyle, 139 So.2d 885 (Fla. 1965). Absent such showing, there can be no conflict and no jurisdiction of this Court.

CONCLUSION

Based upon the foregoing arguments and authorities, this Court should deny the Petition for Discretionary Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by mail to: ARNALDO VELEZ, ESQ., Taylor, Brion, Buker & Greene, Attorneys for Petitioners, Fourteenth Floor, 801 Brickell Avenue, Miami, Florida 33131-2900, this 5th day of December, 1990.

RAQUEL A. RODRIGUEZ

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