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810 J. WHITE

FEB 11 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79253

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

JONES BOATYARD, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CONFLICT JURISDICTION

Respectfully submitted,

✓ DAVID J. HERR, ESQ.
RODRIGUEZ, HERR, ARONSON
& BLANCK, P.A.

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I. INTRODUCTION

The Respondent, JONES BOATYARD, INC., was the Appellant/Defendant below and the Petitioner, METROPOLITAN DADE COUNTY, was the Appellee/Plaintiff below. For purposes of this brief, the parties will be referred to simply as Petitioner and Respondent.

All references to the appendix to Petitioner's Brief will be by the abbreviation "A.". Respondent attaches its own appendix consisting of a copy of Petitioner's Notice of Florida Statute 768.79 Offer of Judgment. All references to Respondent's appendix will be by the abbreviation "R.A."

II. STATEMENT OF THE CASE AND FACTS.

Solely for this jurisdictional brief, Respondent accepts the Petitioner's Statement of the Case and Facts, to the extent stated. However, Petitioner omits a salient fact. Respondent wishes to augment Petitioner's statement of the case and facts and points out that the Notice of Florida Statute 768.79 Offer of Judgment by METROPOLITAN DADE COUNTY in the amount of \$19,999.00 was the only Offer of Judgment made by METROPOLITAN DADE COUNTY; the Notice of Florida Statute 768.79 Offer of Judgment was never amended or corrected; and the Notice of Florida Statute 768.79 Offer of Judgment states that it was propounded exclusively pursuant to F.S. §768.79. R.A.

III. SUMMARY OF ARGUMENT.

The Petition to Invoke this Court's Discretionary Jurisdiction to review the decision of the Third District Court of Appeal should be denied. The cases cited by Petitioner as a basis for this Court to exercise discretionary jurisdiction: A.G. Edwards & Sons, Inc. v. Davis, 559 So.2d 235 (Fla. 2d DCA 1990) and Hammerle v. Bramalea, 547 So.2d 203 (Fla. 4th DCA 1989) do not present an express and direct conflict on the same question of law as the result reached by the Third District Court of Appeal below.

IV. ARGUMENT.

- A. **THE THIRD DISTRICT'S DECISION IN THIS CASE DOES NOT CREATE AN EXPRESS AND DIRECT CONFLICT ON THE SAME QUESTION OF LAW WITH DECISIONS OF THE SECOND AND FOURTH DISTRICT COURTS OF APPEAL WHICH INVOLVED A SEPARATE AND DISTINCT STATUTORY OFFER OF JUDGMENT MECHANISM.**

No conflict to invoke the discretionary jurisdiction of this Court exists. This Court's discretion to review decisions of the District Courts of Appeal exists only where the District Court of Appeal opinion addresses a question of law that expressly and directly conflicts with the decision of another District Court of Appeal or the Supreme Court addressing substantially the same facts and the same question of law. The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988); Reaves v. State, 485 So.2d 829 (Fla. 1986); Dept. of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983); Mancini v. State, 312 So.2d 732 (Fla. 1975); Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). The 1980 amendment to Article V of the Florida Constitution narrowly circumscribed this Court's discretion to exercise conflict

jurisdiction. "Express" and "direct" conflict is absolutely required. See, The Florida Star, supra; Committee Notes, Rule 9.030, Fla.R.App.P., §(a)(2)(A)(iv).

The Notice of Florida Statute 768.79 Offer of Judgment relied upon by Petitioner was propounded exclusively pursuant to F.S. §768.79. Florida Statute §768.79 by its terms does not apply to Offers of Judgment where the underlying cause of action accrued prior to its effective date of July 1, 1986. Mundano v. St. Paul Fire & Marine Ins. Co., 543 So.2d 876, 877 (Fla. 4th DCA 1989).

Chapter 768, F.S., "NEGLIGENCE" is divided into three parts. Part III "DAMAGES" contains §§768.71 through 768.81. §768.71 entitled "Applicability; conflicts," provides in part:

- (2) This part applies only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date.

Petitioner's statement of the case and facts concedes that Petitioner's cause of action arose in August of 1985. Hence, the statute relied upon exclusively by Petitioner its Notice of Florida Statute 768.79 Offer of Judgment does not by its own terms apply to Petitioner's cause of action against the Respondent.

Petitioner cites A.G. Edwards & Sons, Inc. v. Davis, 559 So.2d 235 (Fla. 2d DCA 1990) and Hammerle v. Bramalea, 547 So.2d 203 (Fla. 4th DCA 1989) contending the decision by the Third District Court of Appeal reversing the award of attorneys' fees to Petitioner pursuant to F.S. §768.79 constitutes a sufficient basis for this Court to exercise discretionary jurisdiction. The District Court of Appeal decisions in A.G. Edwards & Sons, Inc.,

supra, and Hammerle, supra, involved a separate and distinct statutory offer of judgment and therefore do not create an express and direct conflict on the same question of law with the Third District's decision.

A.G. Edwards & Sons, Inc., supra, involved a settlement offer propounded pursuant to F.S. §45.061 (1987). Chapter 45 of the Florida statutes does not contain any expression by the legislature regarding when that statutory section is intended to have effect. This contrasts with F.S. §768.79. F.S. §768.71 clearly states that Part III of Chapter 768 applies only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date. A.G. Edwards & Sons, Inc. did not discuss nor involve Chapter 768 of the Florida statutes in any fashion.

Similarly, Hammerle, supra, cited by Petitioner construed of an offer of settlement made pursuant to F.S. §45.061 (1987). Once again, the Fourth District did not discuss or consider Chapter 768 of the Florida statutes rendering its decision in Hammerle.

Obviously, there is a salient distinction between F.S. §45.061 and F.S. §768.79. The distinction is further highlighted by the Court's decision in Mundano v. St. Paul Fire & Marine Ins. Co., 543 So.2d 876 (Fla. 4th DCA 1989). In Mundano, the same Court that decided Hammerle less than thirty days later held that taxation of fees and costs pursuant to F.S. §768.79 was not proper where the accident and injury upon which the lawsuit was based occurred prior to July 1, 1986. The Court expressly noted that the

statute on which the offer was based provided that it did not apply to causes of action arising on or after July 1, 1986. This is the identical statute upon which Petitioner based its Offer of Judgment below.

Where the points of law settled by the cases cited as a basis for this Court's jurisdiction are not the same, no conflict can arise. Kyle v. Kyle, 139 So.2d at 887; Kincaid v. World Ins. Co., 157 So.2d 517, 518 (Fla. 1963).

The express language and intent of the 1980 Amendment to the Florida Constitution provided:

The Supreme Court . . . may review any decision of a District Court of Appeal . . . that expressly and directly conflicts with the decision of another District Court of Appeal or of the Supreme Court on the same question of law. (emphasis supplied)

Florida Constitution of 1968, Art. V, §3(b)(3) (1980).

This Court has "narrowly circumscribed" discretion to actually review the merits of a District Court's decision. The Florida Star, supra. The intent of the Florida Constitution is that the Supreme Court of Florida should refuse to exercise its discretion where the opinion below establishes no point of law contrary to a decision of this Court or another Florida District Court of Appeal. The Florida Star v. B.J.F., supra.

The test of jurisdiction under Article V, §3(b)(3), Fla. Const., is not whether the Supreme Court necessarily would have arrived at a different conclusion than that reached by the District Court of Appeal, but whether the District Court decision so collides with a prior decision of the Supreme Court or of another

Florida District Court on the same point of law that an inconsistency or conflict among precedent is created. Kincaid v. World Ins. Co., 157 So.2d at 518. (emphasis supplied).

This Court has routinely declined to exercise discretionary jurisdiction where the underlying decision is distinguishable on its facts from those cases cited in conflict. Dept. of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983); Mancini v. State, supra; Kyle v. Kyle, supra.

The opinion by the Third District Court of Appeal does not present the requisite express and direct conflict on the same question of law with either A.G. Edwards & Sons, Inc. or Hammerle. Both Edwards and Hammerle involve different statutory Offer of Judgment devices. Moreover, the statute construed in Edwards and Hammerle, F.S. §45.061, did not define the time parameters for its application in contrast to the statute involved in this case, F.S. §768.79. Thus, the underlying decision by the Third District Court of Appeal is distinguishable on its facts from the cases cited by Petitioner as allegedly in conflict.¹

CONCLUSION

It is respectfully submitted that, for the reasons stated

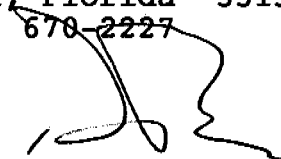
¹ It is noted that the opinion of the Third District Court of Appeal makes reference to a perceived direct conflict with A.G. Edwards & Sons, Inc. It is respectfully submitted that this does not suffice to create the "express" and "direct" conflict on the "same question of law" which is required before the Supreme Court can permissibly exercise its narrowly circumscribed discretion to actually review the merits of the Third District's decision. The Florida Star, supra. It is further respectfully submitted that this statement in the Third District's opinion is the result of a mistaken or inaccurate analysis of the holding in A.G. Edwards & Sons, Inc., supra, since F.S. §768.79 was not involved in that case.

herein, the Petitioner fails to demonstrate that the decision of the Third District Court of Appeal expressly and directly conflicts with A.G. Edwards & Sons, Inc. or Hammerle on the same question of law so as to invoke this Court's discretion to review the Third District's decision. Therefore, the Petition to Invoke this Court's Discretionary Jurisdiction should be denied.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true and correct copy of the foregoing was served via mail this 10th day of February, 1992, on: Evan Grob, Asst. County Attorney, Office of County Attorney, Metro-Dade Center, Suite 2810, 111 N.W. First Street, Miami, Florida, 33128.

RODRIGUEZ, HERR, ARONSON
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DAVID J. HERR
FLA BAR NO. 310761

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Notice of Florida Statute 768.79
Offer of JudgmentR.A.

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA

METROPOLITAN DADE COUNTY,

GENERAL JURISDICTION DIVISION
CASE No. 87-46428 CA 29

Plaintiff,

vs.

JONES BOATYARD, INC.,
a Florida corporation,

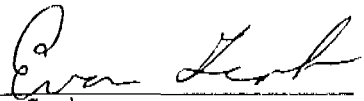
Defendant.

NOTICE OF FLORIDA STATUTE 768.79
OFFER OF JUDGMENT

COMES NOW, the Plaintiff, METROPOLITAN DADE COUNTY,
by and through its undersigned counsel and pursuant to
Florida Statute 786.79 hereby files notice that this day
Plaintiff has served an offer of judgment in the amount
of \$19,999.00 as contemplated by the aforesaid statute
upon the Defendant, Jones Boatyard, Inc.

I HEREBY CERTIFY that a true and correct copy of the
foregoing instrument was mailed to: David J. Horr, Esquire,
Mitchell, Harris, Horr and Associates, P.A., 2650 Biscayne
Blvd., Miami, FL 33137 and to Robert W. Blanck, Esq.,
Hayden and Milliken, P.A., 5915 Ponce de Leon Boulevard,
63 Plumer Building, Miami, Florida 33146 this 29 day
of November, 1989.

ROBERT A. GINSBURG
DADE COUNTY ATTORNEY
Metro Dade Center
Suite 2810
111 N.W. 1st St.
Miami, FL 33128-1993
(305) 375-5151


Evan Grob
Assistant County Attorney

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