

FILED

SID J. WHITE

MAY 7 1993

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CLERK, SUPREME COURT

FLANIGAN'S ENTERPRISES, INC.
Petitioner,

By _____
Chief Deputy Clerk

vs.

CASE NO. 81,563 (DCA No. 92-104)

BARNETT BANK OF NAPLES, et al.
Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA

FIFTH DISTRICT

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STATEMENT OF THE CASE AND FACTS

Respondent, BARNETT BANK OF NAPLES ("BARNETT BANK"), adopts the Statement of the Case and Facts of Petitioner, FLANIGAN'S ENTERPRISES, INC. ("FLANIGAN'S"), with the following changes, additions, or clarifications:

1. Prior to trial, the trial Court entered an Order on Plaintiff's Motion for Partial Summary Judgment, and Defendant's Motion for Final Summary Judgment, finding that all the elements of a cause of action under §818.01, Florida Statutes, had been established in the record, and the case proceeded to trial on the following issues:

a. Whether Plaintiff is barred by estoppel or laches from asserting its statutory landlord's lien with respect to the liquor license because of Plaintiff's actions after the liquor license was obtained by Barnett Bank of Naples.

b. What damages, if any, is Plaintiff entitled to recover from Defendant, Barnett Bank of Naples?

2. The trial Court heard testimony in a two-day nonjury trial on September 18 and 20, 1991. Based upon the evidence presented, the trial Court entered its Findings of Fact, finding that BARNETT BANK had established by clear and convincing evidence that Plaintiff's claim was barred by estoppel because FLANIGAN'S failed to properly notify and to timely assert a landlord's lien in negotiations and communications with BARNETT BANK until after BARNETT BANK had changed its position and the ownership of the liquor license had been transferred.

3. Having found that FLANIGAN'S claim was barred by estoppel, the trial Court declined to reconsider its prior ruling

that §818.01, Florida Statutes, applied to the facts of this case. On October 10, 1991, the trial Court entered its Final Judgment in favor of BARNETT BANK.

4. FLANIGAN'S appealed the Final Judgment entered by the trial Court, and BARNETT BANK filed a Cross-Appeal of the trial Court's prior Order summarily ruling that §818.01, Florida Statutes, applied to BARNETT BANK's disposition of the collateral.

5. The Fifth District Court of Appeal per curiam affirmed the Final Judgment of the trial Court with an opinion stating, "We affirm for two reasons: The record adequately supports the trial Court's finding of estoppel, and we also think that section 818.01 provides no basis to assert civil liability against Barnett."

SUMMARY OF ARGUMENTS

The Supreme Court should not exercise conflict jurisdiction to review the Fifth District Court of Appeal's decision because there is no express or direct conflict that exists upon which the Fifth District's decision rests. FLANIGAN'S claims the conflict arises from the Fifth District's application of §818.01, Florida Statutes; however, the Fifth District's decision rests upon its finding that the defense of estoppel was supported by the record. The discussion of the applicability of §818.01, Florida Statutes, was obiter dictum because it was not essential to the result at which the Court ultimately arrived, and "dicta conflict" cannot serve as the basis for conflict jurisdiction.

The Fifth District's decision about the applicability of §818.01, Florida Statutes, does not expressly and directly conflict with the decisions of the Third and Fourth Districts anyway. A conflict exists between two decisions when they are "wholly irreconcilable, which means that a rule of law has been applied to produce a different result in a case which involves "substantially the same controlling facts of the prior case." The purpose of conflict jurisdiction is to stabilize the law by review of decisions which form patently irreconcilable precedents. The Fifth District's decision was based upon facts significantly disparate from those in the decisions of the Third and Fourth Districts. Those cases involved claims by secured creditors against purchasers at public sale of secured collateral. This case involved the assertion by a consensual secured creditor (BARNETT BANK) of the

right to dispose of collateral to satisfy a debt obligation under §679.504, Florida Statutes. This is a material difference which obviates any perceived conflict.

Even if a conflict exists between the decisions of the Fifth District and those of the Third and Fourth Districts, this Court should not exercise conflict jurisdiction because the outcome will not be different even if a different rule of law were applied. BARNETT BANK prevailed in its trial on the defense of estoppel which was affirmed by the Fifth District. Any resolution of a perceived conflict concerning the applicability of §818.01, Florida Statutes, still would not affect the outcome.

ARGUMENTS

I. **THE DISTRICT COURT'S DISCUSSION ABOUT THE APPLICABILITY OF §818.01, FLORIDA STATUTES, WAS OBITER DICTUM AND SHOULD NOT BE CONSIDERED AS A BASIS FOR EXERCISING CONFLICT JURISDICTION.**

Petitioner, FLANIGAN'S, requests this Court to exercise discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(2)(A)(iv) claiming the Fifth District Court of Appeal's decision expressly or directly conflicts with decisions of the Third and Fourth Districts. However, BARNETT BANK submits this would be improper because no express or direct conflict exists upon which the Fifth District's decision rests.

Interpreting Article V, Section 3(b)(3) of the Florida Constitution, this Court has held this portion of the Constitution really defines two separate concepts when considering conflict jurisdiction:

The first is a general grant of discretionary subject-matter jurisdiction, and the second is a constitutional command as to how the discretion itself may be exercised. In effect, the second is a limiting principle dictated to this Court by the people of Florida. While [the Court's] subject-matter jurisdiction in conflict cases necessarily is very broad, [the Court's] discretion to exercise it is more narrowly circumscribed by what the people have commanded

The Florida Star v. B.J.F., 530 So.2d 286, 288 (Fla. 1988). To have conflict jurisdiction, the "opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests" which is the basis of the conflict. Id. (emphasis added).

In the case sub judice, FLANIGAN'S asserts the Fifth District's decision rests upon the application of §818.01, Florida

Statutes; however, the Fifth District's decision, as well as the trial court's Final Judgment, rests upon the fact FLANIGAN'S was estopped from asserting a claim against BARNETT BANK. The trial court prior to trial had already ruled the statute was applicable and proceeded to trial solely on the defenses of estoppel and laches. In fact, BARNETT BANK actually presented its evidence first on these defenses. The Fifth District, consistently with the trial court, addressed the estoppel issue first and found the trial court's finding was supported by the record.

The Fifth District's consideration of the interplay between \$818.01, Florida Statutes, and \$679.504, Florida Statutes, was only at the behest of BARNETT BANK in its Cross-Appeal. The Fifth District could have easily resolved the appeal simply on the estoppel issue without ever having addressed the statutory issue.

Where the portion of the district court's opinion to be reviewed is not essential to the result at which the court ultimately arrived, this Court should consider it "obiter dictum" and not consider it as a basis for exercising discretionary jurisdiction. See Pinkerton-Hays Lumber Company v. Pope, 127 So.2d 441 (Fla. 1961) (Court denied petition for certiorari to review decision based upon patently erroneous principle of law which was superfluous to outcome).

"Dicta conflict" has never been recognized as a basis for recognizing conflicting jurisdiction. The status of "dicta conflict" was seriously questioned by the First District Court of Appeal in the case of State v. Speights, 417 So.2d 1168, 1169, n.

1 (Fla. 1st DCA 1982). In that decision, the Court resorted to certifying a question of great public importance (concerning required allegations in burglary prosecution) because of its doubts about the validity of "dicta conflict."

The Fifth District's opinion about the applicability of §818.01, Florida Statutes, was not essential to the Court's decision. The trial Court had found the defense of estoppel was a complete bar to FLANIGAN'S claim, and but for the Cross-Appeal, that is the only issue which the Fifth District would have considered. The discussion about the statute, while informative, was not essential to the per curiam affirmance. The discussion about the statute, therefore, is obiter dictum and should not be considered a basis for exercising conflict jurisdiction.

II. THE FIFTH DISTRICT'S DECISION ABOUT THE APPLICABILITY OF §818.01, FLORIDA STATUTES, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THE THIRD AND FOURTH DISTRICTS.

Discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(2)(A)(iv) should not be exercised unless there is actually a conflict between decisions. A conflict exists between two decisions when they are "wholly irreconcilable." L.B. Williams v. W.E. Duggan, 153 So.2d 726, 727 (Fla. 1963). The underlying purpose of the conflict jurisdiction is to "stabilize the law by a review of decisions which form patently irreconcilable precedents." Florida Power & Light Co. v. Bell, 113 So.2d 697, 699 (Fl. 1959). In order for there to be a viable conflict, the cases must be "on all fours" factually in all material respects. Id., 113 So.2d at

698. The test is whether a "rule of law is applied to produce a different result in a case which involves 'substantially the same controlling facts as a prior case.'" City of Jacksonville v. Florida First National Bank, 339 So.2d 632, 633 (Fla. 1976)

The Fifth District's decision, stating, "section 818.01 affords no basis for civil or criminal liability against a secured creditor who disposes of collateral, purchases it at sale, and later sells it to a third party, simply because written consent from another secured creditor or lienor was not obtained," is based upon facts which are significantly disparate from those in the decisions of the Third and Fourth Districts. The cases cited by FLANIGAN'S in the Petitioner's Jurisdiction Brief, Littman v. Commercial Bank & Trust Company, 425 So.2d 636 (Fla. 3d DCA 1983) and Ford Motor Credit Company v. Hanus, 491 So.2d 520 (Fla. 4th DCA 1986), involved claims by secured creditors against purchasers at public sale of the secured collateral. Neither case involved the assertion by another consensual secured creditor of the right to dispose of collateral to satisfy a debt obligation under §679.504, Florida Statutes, which affords specific rights to secured parties disposing of collateral. This is a material difference in the case against BARNETT BANK. For this reason, BARNETT BANK submits the statement by the FIFTH DISTRICT acknowledging a conflict with Ford Motor Credit v. Hanus and Littman is not correct.

III. CONFLICT JURISDICTION SHOULD NOT BE EXERCISED ON THIS APPEAL BECAUSE THE OUTCOME WILL BE THE SAME EVEN IF THE COURT REVERSES ANY RULING ON THE APPLICABILITY OF §818.01, FLORIDA STATUTES.

This Court should not exercise discretionary jurisdiction on an apparent conflict where the outcome would not be different even if a different rule of law were applied. In the case of Wainwright v. Taylor, 476 So.2d 669 (Fla. 1985), this Court receded from its earlier acceptance of conflict jurisdiction to review the remedy for challenging the computation of presumptive parole release dates because the petitioner failed to show the outcome would be any different if the error were corrected. This Court stated, "Thus, in the interest of judicial economy, we see no reason to consider a remand for proceedings which uncontestedly would achieve the outcome already accomplished." Id., 476 So.2d at 670.

The same problem exists with FLANIGAN'S request for the Court to exercise conflict jurisdiction. Even if the Court reverses the Fifth District's decision about the applicability of §818.01, Florida Statutes, FLANIGAN'S still will not be able to overcome the defense of estoppel, which means that any appellate review of the statutory issue would not be in the interest of judicial economy.

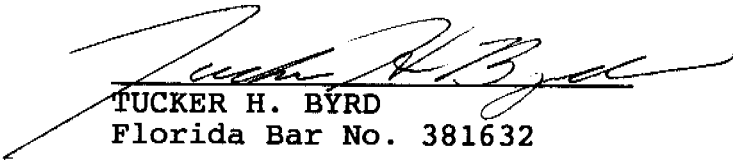
CONCLUSION

This Court should deny Petitioner's request that this Court exercise its discretionary jurisdiction to review the decision of the Fifth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand-delivery to RICHARD E. WHITAKER, ESQ., Two South Orange Plaza, Post Office Box 633, Orlando, Florida 32802, this 5th day of May, 1993.

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