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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,620

THE JUDGES OF THE ELEVENTH
JUDICIAL CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA,
APPELLATE DIVISION,

Petitioners,

vs.

PAMELA JANOVITZ,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

On Review From The Third District Court
Of Appeal of Florida
Case No. 92-2447

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SUMMARY OF ARGUMENT

The decision below by the Third District Court of Appeal that the Petitioner did not have jurisdiction to enter an award of attorney fees 54 days after its mandate issued without first recalling the mandate does not expressly and directly conflict with Masser v. London Operating Co., 106 Fla. 474, 145 So. 72 (1932) because Masser involved taxation of costs under Rule 24 of the Supreme Court Rules which were in effect in 1932 and did not comprehend an award of attorney fees.

In addition, the decision below does not expressly affect a class of constitutional or state officers, in that it does not deprive them of any power and simply confirms existing Florida Law with respect to the jurisdiction of the Appellate Courts.

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ARGUMENT

POINT I

THE DECISION SOUGHT TO BE REVIEWED DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH MASSER V. LONDON OPERATING CO., 106 FLA. 474,145 So. 72 (1932) or FINKLESTEIN v. NORTH BROWARD HOSPITAL DISTRICT, 484 So.2d 1241 (Fla. 1986).

The decision below does not expressly and directly conflict with Masser v. London Operating Company 106 Fla. 474, 145 So.72 (1932) because Masser involved an award of appellate court costs under Supreme Court Rule 24 (Taxation of Costs) which was in effect in 1932 and the present case deals with an award of attorney fees pursuant to Rule 9.400(b) of the present Florida Rules of Appellate Procedure.

Rule 24, which was in effect when Masser was decided in 1932, provided that the Clerk of the Supreme Court was to tax all legal costs against the losing party (A-1). Rule 24 made no mention of appellate attorney fees and in fact this Court in De Bowes v. De Bowes, 12 So.2d 118 Fla. (1943), at 120, specifically held that Rule 24 does not comprehend attorney fees:

> It is not clear how the appellant expects to avail herself of the provisions of Rule 24. In the first place, it does not comprehend counsel fees. DeBowes, at 120.

In addition, just like the decision below, the appellant in De Bowes attempted to obtain an award of attorney fees after the appellate mandate issued. This Court held that the Appellant could not obtain an award of attorney fees because, among other reasons, "This court lost jurisdiction of the case when the mandate was issued and the June term, 1942 closed." DeBowes, at 120.

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Costs were treated in almost a ministerial fashion under Rule 24 of the earlier Supreme Court Rules. An award of attorney fees involves a substantive analysis and must be addressed by the Court before it loses jurisdiction by the issuance of its mandate.

In the instant case the lower court had the power to recall its mandate to enter a proper award of attorney fees, but that power came to an end when the term of the court expired. State Farm Mutual Automobile Ins. Co. 405 So.2d 980 (Fla. 1981).

In State Farm this Court reiterated the longstanding public policy that:

> All things must have end, even a district court's power to correct inconsistencies. The reasons for this form the bedrock of Anglo-American jurisprudence: "There must be an end of litigation. Public policy as well as the interests of individual litigants, demands it, and the rule just announced is indispensable to such a consummation." (citations omitted) State Farm at 982.
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> * * * *
>
> And the 'rule' which determined this end is set out in Lovett and several other Florida cases. An appellate court's power to recall its Mandate is limited to the term during which it was issued. (citations omitted) State Farm at 982-983.

The Appellant's argument that appellate attorney fees and costs should be treated identically in order to establish conflict is not supported by any case law and is in derogation of Rule 9.400 of the Florida Rules of Appellate Procedure which provides separate and distinct methods for a determination of attorney fees and costs.

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Simply put, the Third District's decision in this case does not even remotely conflict with Masser or existing Florida law.

The Third District's decision also does not expressly and directly conflict with this Court's decision in Finklestein v. North Broward Hospital District, 484 So.2d 1941 (Fla 1986). The most obvious reason for the lack of express and direct conflict is that Finklestein involved a post judgment award of costs and fees in the trial court. The instant case involves a post mandate award of attorney fees. A request for Appellate attorney fees is governed by Rule 9.400(b) of the Florida Rules of Appellate Procedure which requires service of a motion for attorney fees no later than the time for service of the reply brief. Clearly, the purpose of the requirement for the service of the motion for attorney fees is so the Appellate Court may decide all substantive issues, including attorney fees, when it enters its decision.

Even in Finklestein, this Court held that the jurisdiction to entertain post judgment fees and costs by a trial court continued only for a "reasonable time." at 1243. The award of attorney fees was not made in this case until 54 days after the mandate issued.

Finally, this Court should not exercise its discretion to review this case because, unlike the trial court in Finklestein, there is already a method available for an appellate court to reacquire jurisdiction after its mandate is issued. That is simply to request a recall of the mandate which is available until the term of Court expires. In this case the party requesting attorney fees had the opportunity to request a recall of the mandate, but it never did.

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POINT II

THE DECISION BELOW DOES EXPRESSLY EFFECT A CLASS OF CONSTITUTIONAL OR STATE OFFICERS

The Appellant's quotation from Spradley v. State, 293 So.2d 697 (Fla. 1974) is conveniently incomplete. The full sentence of this Court's opinion reads:

> To vest this Court with certiorari jurisdiction, a decision must **directly** and, in some way, **exclusively** affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional state officers. Spradley at 701.[1]

The decision below does not directly and exclusively or expressly affect the powers of the judges of the Appellate Court because the Appellate Court below never had the "power" to make an award of attorney fees after the issuance of a mandate. In addition, the decision below involved the jurisdiction of the Appellate division of the Circuit Court and does not expressly and directly affect any particular judge since the decision is in conformity with prior existing case law. In fact, the only party to benefit from any decision in this case would be the party below who applied for an award of attorney fees.

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[1]It is also important to note that Spradley was decided before the most recent amendment to Article 5 Section 3(b)(3) of the Florida Constitution which added the word "Expressly" to the Jurisdictional requirements of that section.

CONCLUSION

The Appellee respectfully requests that this Court decline to accept jurisdiction in this case based upon the argument addressed herein.

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CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent to All Counsel in the lower court actions: BRUCE FREIDLANDER, ESQ., 100 N. Biscayne Boulevard, 20th Floor, Miami, Florida 33132, MICHAEL FINGAR, ESQ., 13899 Biscayne Boulevard, Suite 400, Miami, Florida 33181, and ROY S. WOOD, Jr., ESQ., 111 N.W. 1st Street, #2820, Miami, Florida 33128, this 12th day of May, 1993 by U.S. Mail/Hand Delivery.

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