

IN THE SUPREME COURT OF FLORIDA
500 SOUTH DUVAL STREET
TALLAHASSEE, FLORIDA 32399
(904) 488-0125

WILLIAM BELL, et al.,

Petitioners,

v.

CASE NO.: 90,321

U.S.B. ACQUISITION COMPANY, INC.,
etc., et al.

Respondents.
_____ /

U.S.B. ACQUISITION COMPANY, INC.,
etc., et al.

Petitioners,

v.

CASE NO.: 90,426

ALLEN G. STAMM, et al.

Respondents.
_____ /

FILED
M. J. WHITE
OCT 28 1997
CLERK, SUPREME COURT
BY _____
Chief Deputy Clerk

REPLY BRIEF OF CROSS-PETITIONER

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PREFACE

U.S.B. ACQUISITION COMPANY, INC. n/k/a U.S. BLOCK CORPORATION and WALTER R. SJORGEN, SR. although technically Petitioners in one of the pending matters before the Court, will refer to themselves as Respondents/Cross-Petitioners in this consolidated matter in order to avoid confusion. References to documents contained in Respondents/Cross-Petitioners' Appendix shall be referred to as (A. ____)

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OTHER AUTHORITIES

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ARGUMENT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL HOLDING THAT REVIEW OF THE APPELLATE ATTORNEY'S FEE AWARD ISSUED BY THE TRIAL COURT COULD ONLY BE REVIEWED BY MOTION PURSUANT TO RULE 9.400(c) EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICTS

As noted in the Cross-Petition, although a trial court's assessment of attorney's fees pursuant to an appellate court's order is properly challenged by Fla. R. App. P. 9.400, it is permissible to raise the challenge as a point on appeal where additional issues other than the assessment of attorney's fees are also raised. See, Underwood v. Elliott, 601 So.2d 317 (Fla. 1st DCA 1992) and Zaremba Florida Company v. Klinger, 557 So.2d 1131 (Fla. 3d DCA 1989). Cross-Respondent does not dispute nor can they dispute this point of law.

As noted in the Cross-Petition, three (3) separate orders arising out of the same action were included in the consolidated appeal below. The three (3) issues on appeal consisted of the review of:

1. the prejudgment interest awarded in the Amended Final Judgment;
2. the amount of attorney's fees awarded trial counsel; and
3. the amount of attorney's fees awarded appellate counsel for LAGANO and BELL.

All three (3) orders arose out of same action and in fact, two (2) of the orders (pertaining to attorney's fees for trial counsel and attorney's fees for appellate counsel) arose out of the same hearing.

To not allow review of the motions by a single appeal prejudices the appellant who must then raise identical arguments in separate appeals with the possibility of inconsistent results. This was the obvious rationale behind Underwood, supra and Zaremba, supra¹ in allowing review of attorney's fees to be included in an appeal containing other issues.

Cross-Respondents do nothing to distinguish the action below with Cross-Petitioners' cited authority other than make the argument that the appellate attorney's fee judgment was separate from the trial counsel judgment and separate from the order awarding prejudgment interest. Cross-Respondents cite no authority in support of their position that separate judgments prevent the exception to Fla. R. App. P. 9.400 from coming into play other than their self-serving statement that the separate judgment was "deliberately designed to separate for review the fees that they awarded", and that any such review of the appellate attorney's fees award would "be expeditiously reviewed by Rule 9.400(c) motion." (Answer Brief of Cross-Respondent, Page 4-5) Cross-Respondent's argument is a distinction without a difference in that the bottom-line rationale behind the cited authority is to prevent parties from having to take multiple appeals which is exactly the end result of Cross-Respondent's position. Cross-Respondent does nothing to dispute the validity of the cases relied upon by Cross-

¹ As well as Magner v. Merrill Lynch Realty/MCK, Inc., 585 So.2d 1040 (Fla. 4th DCA 1991), rev. denied, 598 So.2d 77 (Fla. 1992) and Starcher v. Starcher, 430 So.2d 991 (Fla. 4th DCA 1983).

Petitioners and thus they are deemed to have agreed that it is a correct statement of what the law.

ARGUMENT II

THE FOURTH DISTRICT IN ALLOWING A FIVE (5) DAY MAILING PERIOD FOR CONFERRING JURISDICTION UNDER A RULE 9.400 MOTION, CONFLICTS WITH OTHER DISTRICTS IN THE UNIVERSAL INAPPLICATION OF THE RULE IN INVOKING JURISDICTION OF DISTRICT COURTS

Cross-Respondents acknowledge that there is conflict between the Fourth District Court of Appeal's decision and decisions of other districts of the state on the issue of whether the five (5) day mailing rule applies in conferring jurisdiction to the District Court of Appeal for a Rule 9.400 motion. While Cross-Respondents do not contest the law as stated by Cross-Petitioners in their Cross-Petition, they instead seek a clarification of the ruling below which clarification was expressly denied by the Fourth District. In an apparent conflict between an order awarding attorney's fees signed and dated October 3, 1996 attached to Cross-Respondent's Motion for Review of the Order, and Orders dated October 7, 1996 attached to Cross-Respondent's extraordinary Motion for Clarification filed below, the Fourth District denied the Motion apparently in reliance upon the earlier dated Orders of October 3, 1996 upon which Cross-Respondents initially relied. The Fourth District must have found the earlier Orders to be more persuasive.

Thus, based on these facts, the Fourth District created conflict by expressly stating that the five (5) day mailing rule would apply to a Rule 9.400 motion for review. As argued in the

Cross-Petition, the Fourth District is clearly in conflict with the other Districts of the State of Florida in that the five (5) day mailing rule permitted by 9.420 has been consistently ruled to be inapplicable in conferring jurisdiction of matters to the District Courts. This statement of the law is not challenged by Cross-Respondents.

CONCLUSION

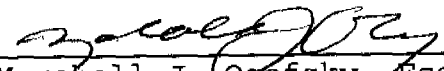
For the foregoing reasons, Cross-Petitioners request the Court enter an Order disapproving the May 12, 1997 decision of the Fourth District Court of Appeal with respect to the conflicts created within the Opinion regarding the Court finding that the only proper review of the post-mandate attorney's fees award was to be by Rule 9.400 motion as opposed to being able to be considered along with other points of appeal arising out of the same action; and disapproving the Fourth District Court of Appeal Opinion which created a conflict among the District Courts of the State of Florida by applying a five (5) day mailing rule in invoking its jurisdiction to consider Petitioner's Motion for Review of Appellate Attorney's Fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U. S. Mail to Basil E. Dalack,

Esq., 1615 Forum Place, Suite 300, West Palm Beach, FL 33401 this
27th day of October, 1997.

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