

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 93,940

FILED

SID J. WHITE

OCT 9 1998

CLERK, SUPREME COURT
By Chief Deputy Clerk

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

vs.

CITY OF DANIA,

Respondent.

DCA No. 97-1657
District Court of
Appeal, Fourth District

RESPONDENT'S BRIEF ON JURISDICTION

E. BRUCE JOHNSON, ESQUIRE
Florida Bar No. 262137
MICHAEL T. BURKE, ESQUIRE
Florida Bar No. 338771
CHRISTINE M. DUIGNAN, ESQUIRE
Florida Bar No. 896500
JOHNSON, ANSELMO, MURDOCH, BURKE
& GEORGE, P.A.
Attorneys for CITY OF DANIA
790 East Broward Boulevard, 4th Flr.
Fort Lauderdale, FL 33301
(954) 463-0100

TABLE OF CONTENTS

Table of Contents	i
Table of Citations	ii
Certificate of Type Size and Style.....	iii
Preface	iv
Statement of the Case and Facts.....	1
Summary of the Argument	2
Argument	3-7
I. NO BASIS EXISTS FOR THIS COURT'S JURISDICTION	
Conclusion	8
Certificate of Service	9

TABLE OF CITATIONS

CASES

City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc., 567 So.2d 955
(Fla. 4th DCA 1990), rev. den., 581 So.2d 165 (Fla. 1991).....5,6

Financial Federal Savings & Loan Assoc. v. Burleigh House, Inc., 336 So. 2d 1145
(Fla. 1976).....3

Hanft v. Phelan, 488 So. 2d 531 (Fla. 1986).....4

Harrison v. Hyster Company, 515 So. 2d 1279
(Fla. 1987).....5

Kennedy v. Kennedy, 641 So. 2d 408 (Fla. 1994).....3

Kincaid v. World Insurance Company, 157 So. 2d 517
(Fla. 1963).....3

Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962).....3

Maturo v. City of Coral Gables, 619 So. 2d 455
(Fla 3d DCA 1993).....5,6

Mystan Marine, Inc. v. Harrington, 329 So. 2d 200
(Fla. 1976).....3

N & L Auto Parts Company v. Doman, 117 So. 2d 410
(Fla. 1960).....3

OTHER AUTHORITIES

Article V, section 3(b) of the Florida Constitution.....3

CERTIFICATE OF TYPE SIZE AND STYLE

Respondent, CITY OF DANIA, certifies that size and style of type used in this brief are 12 point type, 10 pitch.

PREFACE

Petitioner, FLORIDA POWER & LIGHT COMPANY, shall be referred to as "FP&L" or Petitioner. Respondent, CITY OF DANIA, shall be referred to as "CITY" or Respondent.

References to Petitioner's Appendix shall be A-_____ or B-_____.

References to Petitioner's Brief on Jurisdiction shall be Pet. Br. at _____.

STATEMENT OF THE CASE AND FACTS

On October 1, 1995, Petitioner, FP&L, a provider of electrical service, applied to the CITY for a special exception. On March 26, 1996, the CITY Commission reviewed FP&L's application for a special exception at a public hearing. After hearing testimony and receiving evidence both in favor of and against the special exception, the CITY's Commission voted to deny FP&L's application.

FP&L then appealed via petition for writ of certiorari to the circuit court for the Seventeenth Judicial Circuit in and for Broward County. On April 16, 1997, a single judge of the circuit court issued an Order Granting [FP&L's] Writ of Certiorari and Quashing Commission's Denial of Special Exception.

Subsequently, the CITY filed a petition for writ of certiorari in the Fourth District Court of Appeal. After the parties fully briefed the issues, on January 21, 1998, the Fourth District issued its opinion. A unanimous court granted the CITY's request for a petition and quashed the opinion of the circuit court. The district court found that the circuit court departed from the essential requirements of law when it improperly imposed an "especially heavy burden" on the CITY because the special exception sought was for an essential service. The district court also found that the circuit court misapplied the law when it reweighed the evidence presented to the CITY Commission.

After its Motion for Rehearing was denied, FP&L sought review in this Court based upon a purported conflict in the law.

SUMMARY OF THE ARGUMENT

No conflict exists. Therefore, this Court should refuse jurisdiction and deny FP&L's petition for writ of certiorari.

Where a district court opinion contains any grounds which do not create a conflict in the law, no conflict jurisdiction exists. In essence, if grounds exist which would avoid conflict jurisdiction, then this Court will not accept jurisdiction.

Petitioner, FP&L, conveniently and pointedly ignores the fact that in the instant case, the district court's opinion contains two grounds for why the circuit court departed from the essential requirements of law. The district court found that the imposition of an especially heavy burden on the CITY constituted a misapplication of the law. This finding fails to create a conflict of opinion among the district courts of appeal or with this Court, such to warrant certiorari jurisdiction. Significantly, FP&L itself does not argue that this finding creates any conflict. Moreover, the district court's finding that the circuit court departed from the essential requirements of law when exceeded its scope of review does not conflict with this Court or any other district court.

Based upon the foregoing, no basis for conflict jurisdiction exists.

ARGUMENT

I. NO BASIS EXISTS FOR THIS COURT'S JURISDICTION

Certiorari review in the Supreme Court of Florida extends only to the narrow classes of cases enumerated in Article V, section 3(b) of the Florida Constitution. Mystan Marine, Inc. v. Harrington, 329 So. 2d 200, 201 (Fla. 1976). Specifically, this Court has chosen to keep certiorari jurisdiction based upon conflict to an "absolute minimum." N & L Auto Parts Company v. Doman, 117 So. 2d 410, 412 (Fla. 1960).

Conflict jurisdiction is restricted to the limited situation where the case law is "out of harmony" or where there exists "confusion and instability" among the precedent. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962); see also, Kincaid v. World Insurance Company, 157 So. 2d 517 (Fla. 1963). For conflict jurisdiction to exist, the purported conflict must create a "real and embarrassing conflict of opinion and authority." Financial Federal Savings & Loan Assoc. v. Burleigh House, Inc., 336 So. 2d 1145, 1146 (Fla. 1976) (citations omitted).

Importantly, where two cases are distinguishable, there is no conflict. See id. (citations omitted). Consequently, if one of the grounds for a district court decision will avoid a conflict, no conflict jurisdiction exists. See, Kennedy v. Kennedy, 641 So. 2d 408 (Fla. 1994). That is, if the district court's decision contains grounds which arguably may be a basis for certiorari jurisdiction in the Supreme Court of Florida and also contains grounds which do not create a basis for jurisdiction, this Court

will decline to accept jurisdiction. See, Hanft v. Phelan, 488 So. 2d 531, 532 (Fla. 1986).

In the instant case, the district court based its decision on two grounds. The district court held that the circuit court departed from the essential requirements of law when it imposed a higher burden on the CITY:

We find no case law to support the circuit court's conclusion that, because the special exception is for essential services, the City had an "especially heavy burden." ... The circuit court's imposition of a higher burden on the City than that enunciated in Irvine also constituted a departure from the essential requirements of law ...

A-4 (emphasis added). This finding--that the circuit court's imposition of a higher burden constituted a departure from the essential requirements of law--does not conflict with any Florida decision on this point of law. Nor does Petitioner suggest this finding as a basis for conflict jurisdiction. See, Pet. Br., passim. Moreover, the district court specifically stated that this finding constituted grounds for granting the petition and quashing the circuit court's opinion. A-1, A-4. Thus, because the district court based its decision on at least one ground which does not conflict with any Florida decision (nor does Petitioner so assert), this case does not fall within that narrow class of cases in which this Court should accept certiorari jurisdiction based upon a purported "conflict."

The concurring opinion in the order on Petitioner's Motion for Rehearing, upon which Petitioner's rely, actually supports the conclusion that no conflict jurisdiction exists. Pet. Br. at 3, 4-

5, 10. In that concurring opinion, Judge Warner recognized that the district court properly denied rehearing and properly quashed the circuit court opinion

because the [circuit] court imposed an "especially heavy burden" on the city to demonstrate that the special exception does not meet the standards of the zoning ordinance.

B-1. The fact that the concurring opinion states that it is "less clear" about the basis upon which Petitioner now relies for jurisdiction is superfluous. For purposes of this Court's certiorari jurisdiction, if, as here, any of the grounds for the district court's opinion does not create a conflict, then no conflict jurisdiction exists. See supra.

Additionally, where this Court has declined to accept certiorari jurisdiction in a case, that case cannot later be relied upon to serve as a basis for conflict jurisdiction. See, Harrison v. Hyster Company, 515 So. 2d 1279, 1280 (Fla. 1987). Once the Supreme Court of Florida denies review, a case becomes "the law of the land." Maturo v. City of Coral Gables, 619 So. 2d 455, 458 (Fla. 3d DCA 1993) (Gersten, J. concurring).

In the instant case, FP&L includes City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc., 567 So.2d 955, 958 (Fla. 4th DCA 1990), rev. den., 581 So.2d 165 (Fla. 1991), in support of conflict jurisdiction. Pet. Br. at 4-5. However, this Court refused to review Multidyne, presumably on the grounds that no conflict, or other basis, existed for jurisdiction. Having

declined to exercise jurisdiction in Multidyne, the Court also should refuse jurisdiction in the instant case.

Additionally, if a court exceeds its scope of review or misapplies the law to the facts of the case, it departs from the essential requirements of law. See, Maturo, 619 So. 2d at 457. Furthermore,

[s]uch review is entirely consistent with the above cited authorities [including, Educational Development Center, Inc v. City of West Palm Beach Zoning Board of Appeals, 541 So. 2d 106 (Fla. 1989); City of Deerfield Beach v. Valliant, 419 So. 2d 624 (Fla. 1982); St. Johns County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989)¹], and with common sense. (citations omitted). It is our responsibility, as part of the review process, to insure that the Circuit Court has properly applied the law in order to maintain the integrity of the legal system and legal processes.

Id.

In the instant case, the district court recognized the limited nature of its certiorari review, expressly finding that it could consider only whether the circuit court departed from the essential requirements of law. A-1-2. The district court determined that the circuit court departed from the essential requirements of law when it "exceeded its scope of review" and misapplied the law to the facts of the case. A-2. Accordingly, the district court's finding that the circuit court exceeded its scope of review does not conflict with this Court or any other district court on the same issue of law.

¹ All cited by FP&L. Pet. Br. at 3, 4, 5, 9.

Moreover, this Court, nor any district court, has not expressly held that if a circuit court exceeds its scope of review it has not departed from the essential requirements of law. Thus, under this Court's narrow parameters, the precedent is not conflict on this point of law. Accordingly, no basis exists for conflict jurisdiction.

Because the district court's finding that the circuit court departed from the essential requirements of law does not conflict with any other case, the district court's opinion is not "out of harmony" and does not create "confusion and instability" among the precedent. Accordingly, there is no "real and embarrassing conflict" such to justify this Court's jurisdiction.

CONCLUSION

This Court should refuse jurisdiction and deny FP&L's petition for writ of certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to JOHN W. LITTLE, III, ESQ., Steel, Hector & Davis, LLP, 1900 Phillips Point West, 777 South Flagler Drive, West Palm Beach, FL 33401 and JEAN G. HOWARD, ESQUIRE, Florida Power & Light, Law Dept., P.O. Box 029100, Miami, FL 33102-9100, this 8th day of October, 1998.

JOHNSON, ANSELMO, MURDOCH, BURKE & GEORGE
Attorneys for City of Dania
790 East Broward Blvd., Ste. 400
Post Office Box 030220
Fort Lauderdale, Florida 33303-0220
Facsimile: 954/463-2444
Telephone: 954/463-0100 Broward
305/945-2000 Dade
561/640-7448 WPB

BY: 

E. BRUCE JOHNSON
Florida Bar No. 262137
MICHAEL T. BURKE
Florida Bar No. 338771
CHRISTINE M. DUIGNAN
Florida Bar No. 896500