IN THE SUPREME COURT OF FLORIDA

BRIAN JONES and SUZETTE JONES,
his wife,

Petitioners,

vs

ETS OF NEW ORLEANS, INC.

Second DCA Case: 98-00625

Supreme Court Case: 96,287

RESPONDENT'S BRIEF ON JURISDICTION

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CERTIFICATION OF TYPE SIZE AND STYLE

The type size of this Brief is Times New Roman 14 point.

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STATEMENT OF CASE AND FACTS

This case involves a petition to the Supreme Court of Florida for discretionary jurisdiction based upon asserted conflict between the Second District Court of Appeal's decision below, reported at 24 FLW D1172 (Fla. 2d DCA May 12, 1999), and certain appellate precedents offered by the Petitioners. This Brief addresses the jurisdictional issue only.[1]

Respondent, ETS of New Orleans, Inc., believes that the facts of this case are fairly recited in the Second District's decision and objects to the inclusion of opinion and argument in the Petitioners' Statement of the Case and Facts.

SUMMARY OF ARGUMENT

None of the authorities cited by the Petitioners expressly or directly addressed the question presented to the Second District in the case at bar. Therefore, no "conflict" jurisdiction exists in the Supreme Court of Florida.

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[1] The merits issue which Petitioners wish this Court to consider is whether the term "court costs," as used in Fla. Stat. §440.39(3)(a), includes "taxable costs" or "all costs." The Second District construed the statutory term as "taxable costs."

ARGUMENT

ISSUE (restated): IS THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL IN CONFLICT WITH EITHER SUPREME COURT OR DISTRICT COURT PRECEDENT?

I. The Supreme Court Precedents Offered by Petitioners Never Addressed the Issue at Bar.

In their jurisdictional Brief, the Petitioners assert that the decision of the Second District Court of Appeal conflicts with this Court's decisions in Nikula v. Michigan Mutual Insurance Company, 531 So.2d 330 (Fla. 1988), and Manfredo v. Employer's Casualty Insurance Company, 560 So.2d 1162 (Fla. 1990).[2] However, the issue addressed by the Second District -- **whether Florida Statutes §440.39 contemplates inclusion of "taxable costs," as opposed to all costs, in determining equitable distribution of workers' compensation liens** -- was not addressed in either Nikula or Manfredo.

As the Second DCA identified in its opinion:

> The question before us is whether, within the context of [section 440.39(3)(a)], "court costs" means "taxable costs"

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[2] See Petitioners' Brief on Jurisdiction at 2, 3, 4-5, 6, 7. This case does not involve a question certified to be of great public importance, nor any other form of appellate, discretionary, or original jurisdiction.

or "all costs" incurred on behalf of the employee.[3]

Was this question addressed, or even raised, in Nikula or Manfredo?

Nikula involved a question certified by the Fourth District as one of great public importance (in short): How does a court calculate a workers' compensation lien when the injured workers' recovery is reduced by comparative negligence? 531 So.2d at 330. In answering that question, the Supreme Court held:

> under the 1981 version of the statute the carrier's lien shall be based upon the ratio of settlement amount to full value of damages.

Id. at 330-31. NOWHERE does the Nikula decision address what costs should be included in the lien calculation.[4] In fact, Nikula involved a different law than that at issue in this case: the 1981 version of §440.39 did not include the provision requiring the lienor to pay its pro rata share of costs and attorney's fees. That provision was included in the 1983 amendments to the statute. See Nikula, 531 So.2d at 332 n.1.

Manfredo, like Nikula, involved a lien calculation but did NOT address the issue of what "costs" should be included in that calculation. In fact, the issue

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[3] 24 FLW D1172, at D1173.

[4] Indeed, the Nikula decision only includes the word "costs" one time, in the Court's recitation of the statute. 531 So.2d at 331. The dissenting opinion uses the word "costs" only three times, in each instance reciting statutory provisions without inquiry into what the term means. Id. at 332-33.

currently at bar was neither decided by nor presented to any court in Manfredo -- not at trial, on appeal, or before the Supreme Court. Rather, the parties **stipulated** to the cost figures to be utilized in the calculation:

> The parties stipulated that the amount of legal fees and costs was $409,500. The trial court then calculated ... the ratio of the stipulated fees and costs to the gross amount of the settlement.... Manfredo, 560 So.2d at 1164.[5]

Because there was no dispute over costs in Manfredo, there is **no conflict** between Manfredo and the case at bar, which DOES involve a cost dispute.[6] In fact, the Manfredo decision, like Nikula (but unlike this case), also resulted from a question certified by the District Court: Whether Nikula implicitly overruled Brandt v. Phillips Petroleum Co., 511 So.2d 1070 (Fla. 3d DCA 1987).

II. The District Court Decisions Offered by Petitioners Never Addressed the Issue at Bar.

It is curious that the Petitioners would offer Brandt as authority in this case.[7] While it is accurate that in Brandt the Third DCA utilized the term "recovery

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[5] The opinion further states: "The record reflects that attorney's fees were 40% of the recovery, or $360,000, and that costs were $49,500 (because Manfredo's attorney absorbed half the costs)." Manfredo, 560 So.2d at 1162 n.1.

[6] In fact, the Manfredo decision was the result of a question certified by the District Court as one of great public importance: Did Nikula implicitly overrule Brandt v. Phillips Petroleum Co., 511 So.2d 1070 (Fla. 3d DCA 1987).

[7] See Petitioners' Brief on Jurisdiction at 5-6.

costs," it is futile to consider Brandt as persuasive because:

1. The Brandt court used "recovery costs" to refer to "attorney's fees and costs" together, not "costs" alone.

2. The Brandt decision did not define "costs" nor address whether that statutory term meant "taxable costs" or "all costs."

3. Brandt was implicitly overruled by Nikula and expressly disapproved by the Supreme Court in Manfredo.[8]

Although one may debate whether Brandt retains ANY precedential value, it is indisputable that Brandt cannot form the basis of "conflict" jurisdiction in this case because the Third District opinion in no way conflicts with the Second District decision in the case at bar.

The Petitioners offered only Brandt and two other District Court decisions in support of their position. As has been demonstrated, Brandt did not address the distinction between "taxable costs" and "all costs." What of the other two authorities?

Williams Heating and Air Conditioning Co. v. Williams, 551 So.2d 559 (Fla.

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[8] See Manfredo, 560 So.2d at 1163, 1164, 1165. Respondent also takes issue with Petitioners' assertion that Manfredo "adopts the 'expenses' or 'recovery costs' terminology" of Brandt. Upon close inspection of the Supreme Court opinion, the undersigned is unable to find any reference whatsoever to those terms in Manfredo.

5th DCA 1989), involved whether an employer/carrier should be entitled to any lien when a notice of lien is not filed and the plaintiff/employee does not recover the full value his damages. The Fifth District allowed the lien on two grounds: (1) all of the parties had actual notice of the carrier's lien; and (2) the carrier's right to recovery is not statutorily predicated upon full recovery by the employee from the tortfeasor. Williams did not involve any dispute over what are "court costs."[9]

The recent decision of City of Hollywood v. Lombardi, 24 FLW D1848 (Fla. 1st DCA Aug. 5, 1999), is the final authority offered by Petitioners. To be fair, the Petitioners place only weak reliance on Lombardi, asserting that Lombardi offers a "similar rationale" to that gleaned from Williams.[10] However, although the First District addressed six issues in the Lombardi case,[11] none of those issues

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[9] The Williams opinion repeatedly recites that the employee's costs of recovery (attorney's fees and costs) were $10,388.75. Nowhere does the opinion suggest how much of that sum was attributable to costs versus fees.

[10] See Petitioners' Brief on Jurisdiction at 6.

[11] The employer/carrier presented four issues in Lombardi: (1) whether penalties and interest were due on late payments; (2) whether a lien reduction on future workers' compensation benefits should be applied before or after applying a 100% AWW cap; (3) whether the JCC abused discretion in denying a credit for overpayments; and (4) whether attorney's fees and costs were due. The employee/claimant presented two appellate issues: (1) whether a carrier's equitable distribution should be limited to a percentage of a percentage of the claimant's net recovery; and (2) whether the JCC erred in permitting an offset on workers' compensation (as opposed to pension) benefits.

related to the sole issue addressed by the Second District in the case at bar: whether the term "court costs" means "taxable costs" or "all costs." In fact, Lombardi does not address equitable distribution of a lien at all; rather, the decision involves an appeal of an concerning workers' compensation benefits entered by a Judge of Compensation Claims, not by a circuit court. 24 FLW at D1849.

In their Brief, the Petitioners assert that "Every other District Court interpreting the same language approved the carrier's obligation for their prorata share of the reasonable and necessary recovery costs (expenses) in making the recovery -- not just 'taxable costs.'"[12] It is unknown why the Petitioners refused to address the case authority relied upon by the Second District, MacArthur Farms v. Peterson, 586 So.2d 1273 (Fla. 1st DCA 1991). That case held that it was error for a Judge of Compensation to construe the word "costs" as anything but its generally accepted meaning, "taxable costs." Regardless, in considering whether the Supreme Court may accept jurisdiction over this case on the basis of asserted "conflict," it is undeniable that neither Brandt nor Williams nor Lombardi addressed

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The challenging nature of the issues presented in the Lombardi case is evidenced by the court's certification of TWO issues as having great public importance. 24 FLW at D1849, D1850. In the case at bar, the Second District declined to certify any question. See Appendix "A".

[12] See Petitioners' Brief on Jurisdiction at 5.

the issue presented to and answered by the Second District in this case.[13]

III. No Conflict Jurisdiction Exists Without Express and Direct Conflict Between Appellate Courts.

The Petitioners final attempt is to direct this Court's attention towards a preferred policy argument, extracted from cases in which the courts did not consider what the term "court costs" means in §440.39. Perhaps such efforts might be relevant if this Court were considering the merits of the issue at bar. However, in a jurisdictional brief "[i]t is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue."[14]

Rather, the sole jurisdictional question is whether there exists an express and direct conflict between the decision of the Second District and that of another Florida appellate court considering the same issue.

The seminal case on "conflict" jurisdiction is Jenkins v. State, 385 So.2d

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[13] Moreover, Petitioners offer no support whatsoever for their assertion that there exists "forty years of decisions interpreting similar language contrary to the interpretation now placed thereon by the second district." See Petitioners' Brief on Jurisdiction at 3; see also Petitioners' Brief at i, 2, 4, 7-8. The authorities cited by Petitioners, inapposite though they may be, at best offer only twelve (12) years of common law.

[14] Committee Notes to 1977 Amendment, Fla. R. App. P. 9.120.

1356 (Fla. 1980). In Jenkins, this Court held that the decisions allegedly in conflict must address the same legal issue; speculation or argument concerning dictum or dissent is an insufficient basis for jurisdiction:

> The pertinent language ... leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court **on the same question of law.**
>
> * * *
>
> As stated by Judge Adkins..., "(i)t is conflict of decisions, **not conflict of opinions or reasons** that supplies jurisdiction for review by certiorari."

385 So.2d at 1359 (emphasis added).[15]

Commentary on "conflict" jurisdiction further confirms this law:

> It is not enough to show that the district court decision is effectively in conflict with other appellate decisions.

P. Padovano, Florida Appellate Practice §§ 2.10 and 3.10; see also § 21.2.

In the case at bar, none of the Petitioners' case authorities "expressly and

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[15] The Supreme Court further emphasized the requirement of "express" conflict by stressing the ordinary dictionary definitions of those terms:

> The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." Webster's Third New International Dictionary (1961 ed. unabr.). Jenkins, 385 So.2d at 1359.

directly" address whether, in §440.39, "court costs" means "taxable costs" or "all costs." Therefore, absent a certification of great public importance (a request denied by the Second District), this Court has no jurisdiction over this case because no conflict between appellate courts exists.[16]

CONCLUSION

The sole issue is jurisdictional: Does the Second District's opinion conflict with existing Supreme Court or District Court precedent? Because the precedents cited by Petitioners did not address the meaning of the term "court costs" as used in Florida Statutes §440.39(3)(a), no express or direct conflict exists, and Supreme Court jurisdiction may not attach.

Respondent respectfully requests that the Court refuse jurisdiction over this cause.

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[16] Petitioners erroneously assert that "The Second District opinion indicates their determination is a matter of first impression." Petitioners' Brief on Jurisdiction at 5. Upon close inspection of the instant decision, the undersigned is unaware of any such assertion by the Second District. Regardless, if this is truly a case of first impression, then it would be logically impossible for "conflict" jurisdiction to attach.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. MAIL to Gerald R. Herms, Esquire, 200 Pierce Street, 3A, Tampa, Florida 33602; and L. Barry Keyfetz, Esquire, 44 W. Flagler Street, Suite 2400, Miami, Florida 33130 on this 27th day of September, 1999.

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APPENDIX OF RESPONDENT, ETS OF NEW ORLEANS, INC.

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IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

JULY 7, 1999

ETS OF NEW ORLEANS, INC.,	)	
	)	
Appellant(s),	)	
	)	
v.	)	Case No. 98-00625
	)	
BRIAN JONES, et ux.,	)	
	)	
Appellee(s).	)	

BY ORDER OF THE COURT:

Counsel for appellees having filed a petition for rehearing, motion for rehearing en banc and motion for certification to the Supreme Court in the above-styled case, upon consideration, it is

ORDERED that the motion is hereby denied.

Appellant's petition for rehearing is denied.

Joint motion to withdraw opinion dated May 12, 1999 and vacate order awarding appellees attorney's fees dated May 28, 1999 is denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

JAMES BIRKHOLD, CLERK

c: M. Mitchell Newman, Esq.
Gerald R. Herms, Esq.
L. Barry Keyfetz, Esq.
Honorable Richard L. Ake
Robert A. Levine, Esq.

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