

IN THE SUPREME COURT OF FLORIDA

WILLIAM G. BELL, ET AL.,

Petitioner,

v.

JANET SNYDER,

Respondent.

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FILED  
DEBBIE CAUSSEAU

JAN 12 2000

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Case No. 1999-92

Appeal from the District Court of Appeal  
Second District of Florida  
Case Nos. 98-00191 and 98-00853

**RESPONDENT'S BRIEF ON JURISDICTION**

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**I. TABLE OF CONTENTS.**

	<b>PAGE</b>
II. CERTIFICATE OF SIZE, TYPE AND STYLE .....	ii
III. TABLE OF CITATIONS .....	iii
IV. STATEMENT OF CASE AND FACTS .....	1
V. SUMMARY OF ARGUMENT .....	2
VI. ARGUMENT .....	3
VII. CONCLUSION .....	8
VIII. CERTIFICATE OF SERVICE .....	9

**II. CERTIFICATE OF TYPE, SIZE AND STYLE**

Counsel for respondent certifies that this Brief on Jurisdiction is typeset to 14 point (proportionally spaced) Times New Roman.

### III. TABLE OF CITATIONS.

#### Cases

<u>Epstein v. Epstein</u> , 966 F. Supp. 260 (S.D.N.Y. 1997) .....	6
<u>First American Corp. v. Al-Nahyan</u> , 948 F. Supp. 1107 (D.D.C. 1996) .....	6
<u>Health &amp; Rehabilitative Services v. National Adoption Counseling Service, Inc.</u> , 498 So. 2d 888 (Fla. 1986) .....	5
<u>In re M.P.</u> , 472 So. 2d 732 (Fla. 1985) .....	3
<u>Lohr v. Byrd</u> , 522 So. 2d 845 (Fla. 1988) .....	2-4
<u>McArthur Dairy, Inc. v. The Original Kielbs, Inc.</u> , 481 So. 2d 535 (Fla. 3 <sup>rd</sup> DCA 1986) .....	4, 5
<u>Reaves v. State</u> , 485 So. 2d 829 (Fla. 1986) .....	5
<u>Satz v. Perlmutter</u> , 362 So. 2d 160 (Fla. 4 <sup>th</sup> DCA 1978), <u>Aff'd</u> , 379 So. 2d 359 (Fla. 1980) .....	3
<u>United Pacific Insurance Co. v. Berryhill</u> , 620 So. 2d 1077 (Fla. 5 <sup>th</sup> DCA 1993) .....	5
<u>Vining v. Martyn</u> , 660 So. 2d 1081 (Fla. 4 <sup>th</sup> DCA 1995) .....	5

#### Statutes

Fla. Stat. §772.11 (1995) .....	2-6
Fla. Stat. §812.037 (1995) .....	4

**IV. STATEMENT OF CASE AND FACTS**

The facts of the case are as reflected in the opinion of the district court, a copy of which is attached to the petitioner's brief on jurisdiction.

**V. SUMMARY OF ARGUMENT.**

Jurisdiction in this Court does not lie because the decision below does not expressly and directly conflict with any decision of this Court or of the district courts of appeal. The issue of treble damages awarded against an estate under section 772.11, Fla. Stat. (1995)(Florida's civil theft statute), was one of first impression before the district court. No conflict can exist because no court in Florida has ever considered this issue.

Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988), presents no conflict. That case concerned only whether common law punitive damages could be awarded against an estate. Lohr did not address whether statutorily-created treble damages could be awarded against an estate. Judicially-created rules concerning judicially-created damages simply have no bearing on legislatively-created rules concerning statutory treble damages.

The court below did not hold that punitive damages were remedial. Rather, the court held that the civil theft law was remedial. This is in accord with, not in conflict to, decisions of the district courts addressing the issue.

Finally, this case presents no question of significance or importance to justify exercise of this Court's discretionary jurisdiction.

## VI. ARGUMENT.

Before the district court's decision below, no court in Florida had considered the issue of whether treble damages under section 772.11, Fla. Stat. (1995), could be awarded against an estate. Without a prior Florida decision on point, there can be no conflict of decisions. Satz v. Perlmutter, 362 So. 2d 160, 164 (Fla. 4<sup>th</sup> DCA 1978)(Anstead, J., concurring specially)("Everyone agrees that this is a case of first impression in the appellate courts of Florida. Hence, there is no case in conflict with this decision that would give rise to conflict certiorari jurisdiction in the Supreme Court."), aff'd, 379 So. 2d 359 (Fla. 1980).

Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988), presents no conflict. Clearly, Lohr concerned whether common law punitive damages could be awarded against an estate. This Court did not address in Lohr the application of statutory treble damages under Florida's civil theft law. One case concerning judicially-created punitive damages and another case concerning legislatively-created remedies for civil theft are jurisdictionally dissimilar.

This Court denies conflict review even when seemingly similar concepts conflict where one issue is a product of common law and the other is a product of statute. In re M.P., 472 So. 2d 732 (Fla. 1985)("Because we find the [statutory] issue in this case clearly distinguishable from the [common law] issues decided in In

the Interest of D. B., we deny review.”). Of course, the Second District below clearly distinguished Lohr based upon the distinctions between common law and statutory law:

The trial court’s position fails upon a critical examination of the differences between judicially-created punitive damages and legislatively-created treble damages.

Slip op. at 6.

It does not help petitioner’s argument for conflict jurisdiction that the lower court held section 772.11 to be “remedial.” That holding is in accord with all Florida court’s who have had occasion to address the issue. See cases cited at page six of the lower court’s order. Even the statute itself states that the various sections of the law “shall be construed in light of their purposes to achieve their remedial goals.” §812.037, Fla. Stat. (1995)(emphasis added). Moreover, “remedial” statutes can be “punitive,” as the civil theft law is an example. The terms are not mutually exclusive. Contrary to petitioner’s argument, the Second District below never said that treble damages were not punitive. Rather, the court simply classified the entire civil theft law as remedial.

The cases cited by petitioner are inapposite. None of the cited cases even address the remedial issue. For example, McArthur Dairy, Inc. v. The Original Kielbs, Inc., 481 So. 2d 535 (Fla. 3<sup>rd</sup> DCA 1986), was decided under an older



version of the civil theft law—a version which did not exclude on its face (as does the present version) the award of both punitive and treble damages. The McArthur court held, even under the prior version, that both types of damages could not be recovered in the same case. Significantly, the court never addressed whether treble damages under the statute were remedial. The remaining two cases cited by petitioner, Vining v. Martyn, 660 So. 2d 1081 (Fla. 4<sup>th</sup> DCA 1995), and United Pacific Insurance Co. v. Berryhill, 620 So. 2d 1077 (Fla. 5<sup>th</sup> DCA 1993), are the same. Both hold that treble damages are “in the nature of” punitive damages. The cases do not hold that the civil theft law is not remedial.

Petitioner’s resort to legislative history, petitioner’s brief at 5, is beyond the four corners of the district court’s opinion and cannot be considered for jurisdictional purposes. Reaves v. State, 485 So. 2d 829 (Fla. 1986)(conflict of decisions must arise from “four corners of the majority decision”); Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986)(same). Nevertheless, contrary to petitioner’s statement, petitioner’s brief at 5, “the Act” was never “amended to delete any reference to punitive damages.” In fact, section 772.11 continues to “reference” punitive damages:

In no event shall punitive damages be awarded under this section.

In making this unmistakable “reference,” the Legislature acknowledged that punitive damages under the common law and treble damages under section 772.11 were simply not the same. The lower court noted this fact in reaching its holding.

The civil theft statute expressly provides that “[i]n no event shall punitive damages be awarded under this section. “ §772.11, Fla. Stat. (1995). However, the statute also provides for and mandates an award of treble damages upon a finding of liability. If treble damages are no more than a “form of punitive damages,” as the trial court concluded, the statute would contain an inherent inconsistency.

Slip op. at 7.

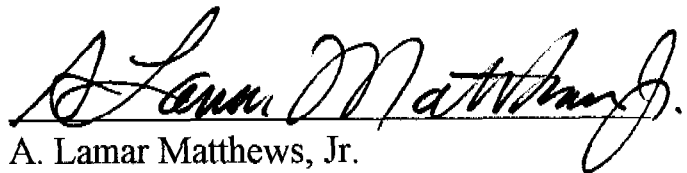
As a last matter, it should be noted that there are no policy considerations which demand exercise of this Court’s discretionary jurisdiction. First, it is submitted that the Second District reached the correct decision—one that is in accord with the majority of other jurisdictions which have addressed the issue under other similar treble damages statutes. See Epstein v. Epstein , 966 F. Supp. 260 (S.D.N.Y. 1997); First American Corp. v. Al-Nahyan, 948 F. Supp. 1107 (D.D.C. 1996). Further, as is evidenced by the lack of precedent in Florida on this issue, civil theft claims are not routinely brought against estates, presumably because such claims require proof of felonious intent by clear and convincing evidence. This fact,

along with the ability to recover attorney fees against a plaintiff upon a finding that the claim was raised without substantial fact or legal support, serves to impede the filing of such civil theft claims. With a correct ruling by the Second District and with limited applicability, no important issue is presented which would justify exercise of this Court's discretionary jurisdiction.

**VII. CONCLUSION.**

The opinion below does not expressly and directly conflict with any other Florida appellate decision and no important issue is presented. Accordingly, jurisdiction should be denied.

Respectfully submitted,



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**VIII. CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 10<sup>th</sup> day of January, 2000 to: John J. Waskom, Esquire, Icard, Merrill, et al., 2033 Main Street, Suite 600, Sarasota, FL 34237, Robert E. Turffs, Esquire, 2055 Wood Street, Suite 206, Sarasota, FL 34237, and Steven L. Brannock, Esq., Holland & Knight LLP, P.O. Box 1288, Tampa, FL 33601.

A handwritten signature in cursive script, reading "A. L. Matthews, Jr.", written over a horizontal line.