

**IN THE SUPREME COURT OF FLORIDA**

EUGENE HAM, III v. PORTFOLIO RECOVERY ASSOCIATES, LLC,

**Case No. SC18-2142**  
DCA Case No. 1D17-3112  
LT. Case No. 2015 SC 000770

LAURA FOXHALL v. PORTFOLIO RECOVERY ASSOCIATES, LLC,

**Case No. SC18-2143**  
DCA Case No. 1D17-3113  
LT. Case No. 2015 SC 000819

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Petitioners

\_\_\_\_\_  
Respondent

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## **STATEMENT OF THE CASE AND FACTS**

Respondent seeks this Court's jurisdiction to review *Ham v. Portfolio Recovery Associates, LLC*, and *Foxhall v. Portfolio Recovery Associates, LLC*, -- So. 3d --, 2018 WL 6253294 \*1 (Fla. 1st DCA Jan. 7, 2019) (collectively "*Ham*")<sup>1</sup>, based on certified conflict with the Second District's opinion in *Bushnell v. Portfolio Recovery Associates, LLC*, 255 So. 2d 473 (Fla. 2d DCA 2018). This Court has jurisdiction. See Art. V, § 3(b)(4), Fla. Const.

In the underlying case, Portfolio Recovery Associates, LLC ("Portfolio"), as assignee from GE Capital Retail Bank, brought suit to recover unpaid credit card debt from Eugene Ham and Laura Foxhall (collectively, the "debtors"), asserting one count for common law "account stated" as its sole theory of liability. [A 4] The debtors denied the complaint's allegations, raised several affirmative defenses, and requested reciprocal attorney's fees under section 57.105(7), Florida Statutes, based on the attorney's fee provision in the credit contract. [*Id.*] The case proceeded to trial, and the court found for the debtors, concluding Portfolio had not provided ample evidence to support its claim. [A 5]

After final judgment, the debtors pursued their claims for reciprocal attorney's fees. [*Id.*] Portfolio opposed the fee motion in relevant part because its

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<sup>1</sup> References to *Ham* are to the slip opinion included in Petitioner's appendix. References are to the page number in Petitioner's appendix, preceded by "A."

complaint was not based on breach of contract but instead on “account stated.”

[*Id.*] The trial court initially granted attorney’s fees to the debtors, finding the account stated theory was inextricably intertwined with the credit card contract and could not be separated. [*Id.*] However, the court later reversed its holding after the Circuit Court, First Circuit, issued an intervening, binding, and conflicting appellate decision. [See A 5-6 (citing *Portfolio Recovery Assoc., LLC v. Grunewald*, No. 2016 AP 000024 (Fla. 1st Cir. Ct. Apr. 21, 2017))]

In *Grunewald*, the court held that reciprocal attorney’s fees are not available under section 57.105(7) when a creditor proceeds under an account stated cause of action. [A 5-6] In reversing its earlier judgment in light of *Grunewald*, the Circuit Court certified a question of great public importance to the First District Court of Appeal. It asked (in short) whether an assignee seeking to collect a debt under an account stated cause of action can be liable for attorney’s fees under section 57.105(7) based on the underlying credit card contract. [A 7]

The First District held that section 57.105(7) does not form the basis for attorney’s fees when a creditor pursues a cause of action under an account stated theory. [A 9] It explained that a claim for account stated requires only “(1) an agreement between the parties as to the amount owed, (2) an agreement that the amount owed was due, and (3) an express or implicit promise to pay that amount.” [A 8] The court made clear that an account stated claim is not based on any written

instrument but is separately enforceable based on the promise to pay. [A 10]

The Court acknowledged the debtor’s argument that the account stated claims would not exist “but for” the credit card contracts. [A 9] It concluded, however, that Portfolio’s claim did not rely on those contracts, and thus no basis for fees existed. [*Id.*] The court aptly noted that “[t]o rule otherwise would undermine Portfolio’s ability to choose its cause of action.” [*Id.* (citing *Feinberg v. Naile*, 561 So. 2d 1307, 1308 (Fla. 3d DCA 1990) (“A plaintiff is not guaranteed success in the choice of remedies, only an opportunity to proceed under a theory which has been pled.”)]]

The First District recognized that its opinion conflicts with the Second District’s opinion in *Bushnell*, 255 So. 2d 473, and it, accordingly, certified conflict to this Court. [A 11]

### **SUMMARY OF ARGUMENT**

Portfolio agrees with the debtors that this Court should grant review based on certified conflict between the First District’s opinion in *Ham* and the Second District’s opinion in *Bushnell*. The question here—whether fees can be awarded under a contractual provision when a creditor sues to collect under a common law account stated theory and not under the contract—merits this Court’s review because the cases expressly and directly conflict on the identical legal issue and are based on indistinguishable facts. In addition, this issue is in need of resolution

because it has arisen multiple times and is thus likely to be repeated. [See, e.g., A6, n. 4] In fact, this issue is central to at least four cases currently pending here.<sup>2</sup>

Portfolio disagrees with the debtors that this case conflicts with this Court's opinion in *Caufield*.<sup>3</sup> This case questions whether reciprocal attorney's fees are recoverable under a contract when a creditor sues a debtor under a common law claim for account stated and not for breach of the underlying contract. *Caufield*, on the other hand, addresses whether a party who is sued for fraudulent misrepresentation in the sale of property is entitled to prevailing party attorney's fees under a fee provision contained in the purchase and sale agreement. The facts and issues presented in *Caufield* are wholly distinguishable from the facts and issues here. This Court does not have jurisdiction based on conflict with *Caufield*, and it should not grant review on that basis.

### **REVIEW STANDARD**

This Court may review decisions of district courts that are certified by the district court to be in direct conflict with a decision of another district court of appeal. See Art. V, § 3(b)(4), Fla. Const.

This Court may also review decisions of district courts of appeal that

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<sup>2</sup> In addition to these consolidated cases, see also *Portfolio Recovery Assoc., LLC v. Bushnell*, SC18-1593; and *Grunewald v. Portfolio Recovery Assoc., LLC*, SC19-28.

<sup>3</sup> *Caufield v. Cantele*, 837 So. 2d 371 (Fla. 2002).

expressly and directly conflict with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law. *See* Art. V, § 3(b)(3), Fla. Const. But to accept review based on conflict that has not been certified, the conflict must appear within the four corners of the opinion and cannot be based merely on divergent philosophies applied to cases with distinguishable facts. *See e.g., Hill v. Hill*, 778 So. 2d 967, 967-68 (Fla. 2001) (declining to accept jurisdiction upon “implied” conflict); *Dep’t of Health and Rehab. Servs. v. Nat’l Adoption Counsel. Serv., Inc*, 498 So. 2d 888, 889 (Fla. 1986) (holding implied conflict is not a basis for jurisdiction and stating “[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision”).

## **ARGUMENT**

### **I. THE FIRST DISTRICT’S DECISION IN *HAM* CONFLICTS WITH THE SECOND DISTRICT’S DECISION IN *BUSHNELL V. PORTFOLIO RECOVERY ASSOCIATES, LLC*.**

This Court should accept jurisdiction to settle the conflict between this case and *Bushnell*. In *Bushnell*, under facts nearly identical to this case, the Second District answered the following (rephrased) certified question affirmatively:

IS AN ACCOUNT STATED CAUSE OF ACTION TO COLLECT ON AN UNPAID CREDIT CARD ACCOUNT AN ACTION “WITH RESPECT TO THE CONTRACT” SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY’S FEES UNDER § 57.105(7), FLORIDA STATUTES (2015)?

Relying on this Court’s opinion in *Caufield v. Cantele*, 837 So. 2d 371 (Fla. 2002), it held that the claim for account stated and the credit card contract were “inextricably intertwined.” *Bushnell*, 255 So. 2d at 477. Although it acknowledged that a claim for account stated need not involve “an explicit agreement [and] can be based on a debtor’s failure to object to an account statement,” it nonetheless held that the holding in *Caufield* involving a fraudulent misrepresentation claim was persuasive. *Id.* It reasoned that the amount due in *Bushnell* was based on the debtor’s failure to pay under the credit card contract, and, if no credit card contract existed, the amount due would not have accrued. Reversing the trial court, the Second District concluded that “in an action for account stated brought to collect the amount due under a credit card agreement, the reciprocity provision in section 57.105(7) applies to a properly pleaded request for attorney’s fees made pursuant to the terms of the agreement.” *Id.* at 477-78.

In contrast, in *Ham*, the First District reached the opposite conclusion. In addressing the same set of facts, the First District in *Ham* held that the prevailing party was not entitled to attorney’s fees in an action for account stated, regardless of the credit card contract. [*See* A 9]. The First District recognized that to hold otherwise would necessarily and improperly deprive the claimant of its choice of remedies. [*Id.*]

In so holding, the First District distinguished this Court’s opinion in

*Caufield*. It explained this case is unlike *Caufield* because (1) *Caufield* concerned fraudulent misrepresentation, not account stated, and (2) the fraudulent misrepresentation claim in *Caufield* “required proving the existence and the breach of the contract” whereas the claim for account stated here “exists independent of the underlying contract, requires no evidence of breach of the contract, and can exist in the absence of any contract at all.” *Id.*

The Second District’s opinion in *Bushnell* thus expressly and directly conflicts with the First District’s opinion here in *Ham*. This Court should grant review to resolve the conflict.

## **II. THIS CASE DOES NOT CONFLICT WITH *CAUFIELD V. CANTELE*.**

Contrary to the debtors’ claim, this case does not conflict with this Court’s deeply divided (4-1-2) opinion in *Caufield*, 837 So. 2d 371, and this Court cannot accept jurisdiction based on conflict with *Caufield*. In that case, the Caufields entered into a contract to sell the Canteles a mobile home park. 837 So. 2d at 373. The Canteles subsequently filed suit against the Caufields alleging fraudulent misrepresentations based on undisclosed defects later discovered on the property. *Id.* The complaint also contained a prayer for attorney’s fees. *Id.*

After the Canteles voluntarily dismissed their complaint, the Caufields moved for attorney’s fees and costs under a contract provision “which entitled the prevailing party to costs and attorney’s fees in connection with any litigation

‘arising out of’ the contract.” *Id.*

The district court declined to award fees reasoning, “fees may only be awarded under a contractual provision where the parties to the contract clearly manifest their intention that attorney’s fees cover the specific situation for which fees are claimed.” *Id.* at 378. It concluded that a “fraudulent misrepresentation” claim arises outside the contract and not from any contract provision. *Id.*

This Court reversed, narrowly holding in *Caufield* that “claims of fraudulent misrepresentation concerning the subject matter of the contract do ‘arise out of the contract.’” *Id.* This Court explained, “fraudulent misrepresentations [are] a tort stemming from or arising out of the failure of one party to carry out its contractual duty to reveal defects in the property. Had there been no contract, the ensuing misrepresentation would not have occurred.” *Id.* at 378.

This case is distinguishable from *Caufield* because the tort claim in *Caufield* required first proving that a contract existed and then that it was breached. In contrast here, the account stated claim, which Portfolio pursued under its prerogative to choose its remedies, is an claim independently existing outside the contract. “Account stated” is not based on any contract but on a separately enforceable legal agreement arising from the debtors’ implied promise to pay the accounting rendered by the bank. *See Grunewald, supra*, (holding an account stated cause of action is “independent of the original credit contract” and not an

action “with respect to the contract” subject to section 57.105(7), Florida Statutes); *Pujol v. Capital One Bank (USA)*, 23 Fla. L. Weekly Supp. 517a (Fla. 15th Cir. Ct. Sept. 21, 2015) (an account stated cause of action is “a separately enforceable legal agreement”).

As the district court correctly recognized here, “Florida courts have long recognized a[n independent] cause of action for account stated requiring only (1) an agreement between the parties as to the amount owed, (2) an agreement that the amount owed was due, and (3) an express or implicit promise to pay that amount.” [A 8 (citing *Everett v. Webb Furniture Co.*, 124 So. 278, 279 (Fla. 1929))] “An action for account stated is based on the agreement of the parties to pay the amount due upon the accounting, and not any written instrument.” [*Id.*] (quoting *Farley v. Chase Bank, U.S.A.*, 37 So. 3d 936, 937 (Fla. 4th DCA 2010) (internal quotations omitted)). For those reasons “it is not necessary, in order to support a count upon account stated, to show the nature of the original debt or to prove the specific items constituting the account.” *Id.*

In sum, *Caufield* concerns a fraudulent misrepresentation claim arising from the parties’ purchase and sale agreement and the sellers’ duty to disclose defects in the property. Thus, attorney’s fees were available under the contract. Here, however, Portfolio brought its claim under a common law account stated theory, which is based on a new promise to pay and is separately enforceable without any

written contract under which the debt may have originated. No statutory or contractual fees are recoverable in actions for account stated.

As an additional point, *Caufield* concerns whether a party is entitled to fees under a bilateral prevailing party fee provision contained within a real property purchase and sale agreement that is triggered by “any litigation arising out of the contract.” 837 So. 2d at 378. *Ham*, in contrast, discusses whether a party is entitled to fees under section 57.105’s reciprocal fee provision when the party brings a claim for account stated and not breach of contract. The cases are not dealing with the same issue. As a result, *Caufield* does not conflict with *Ham*. And this Court cannot accept jurisdiction on that basis.

### **CONCLUSION**

This Court should accept jurisdiction based on the certified conflict with *Bushnell*. This Court cannot accept jurisdiction based on any implied conflict with *Caufield*, however, because *Caufield* does not expressly and directly conflict with *Ham* on any legal issue.

Respectfully submitted,

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**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

/s/ Diane G. DeWolf

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4th day of February 2019 a true and correct copy of the foregoing has been electronically uploaded to the Supreme Court of Florida's e-Portal and a true and correct copy was furnished to all parties below.

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