ORIGINAL

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC01-2741

CORPORATE EXPRESS OFFICE PRODUCTS, INC.,

Petitioner,

v.

DOUG PHILLIPS, EDWARD R. GOFF, LORI L. FARRELL, f/k/a LORI L. ROBINSON and COMMERCIAL DESIGN SERVICES, INC.,

Respondents.

RESPONDENTS' AMENDED BRIEF ON JURISDICTION

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FIFTH DISTRICT, CASE NO.: 5D01-864

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SUMMARY OF ARGUMENT

This Court does not have jurisdiction to review the appellate court's decision. The decision below does not expressly and directly conflict with *Sears Termite* because those decisions are factually and legally distinguishable. For the same reason, the Court should reject any implicit suggestion of conflict with this Court's decision in *Stewart*. This Court must decline Petitioner's invitation to review this case on an unauthorized basis.

Contradiction of Florida statutory law is not a basis for jurisdiction. The decision below does not declare section 607.1106 to be valid or invalid, as required to provide jurisdiction. Petitioner's reliance on *Celotex Corp.* is unfounded. This Court's decision in *Celotex Corp.* does not stand for the proposition espoused by Petitioner. In any event, the decision below involves different legal and factual issues than those involved in *Celotex Corp.*, which precludes finding express and direct conflict.

Petitioner's arguments urging review by this Court are without merit. Petitioner mischaracterizes the breadth of the decision below, and improperly raises matters not contained in the appellate court's opinion. This case does not present critical or compelling reasons to warrant review by this Court.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE APPELLATE COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *SEARS TERMITE*.

This Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court or of this Court on the same question of law. *See* art. V, § 3(b)(3), Fla. Const. Conflict between decisions must appear within the four corners of the opinion; inherent or implied conflict does not support jurisdiction. *See Dep't of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986). This Court has discharged jurisdiction when it has found that the case at issue was factually distinguishable from cases cited to be in conflict. *See Dep't of Revenue v. Johnston*, 442 So. 2d 950, 951-52 (Fla. 1983). The Court has also found no conflict jurisdiction when the case before the Court and the cited conflicting authority addressed different propositions of law. *See Curry v. State*, 682 So. 2d 1091, 1092 (Fla. 1996). For example, when one case utilizes or construes a statute that the alleged conflicting case does not, the Court has denied review. *See In re Interest of M.P.*, 472 So. 2d 732, 733 (Fla. 1985).

Contrary to Petitioner's suggestion, the appellate court's decision does not expressly and directly conflict with *Sears Termite & Pest Control, Inc. v. Arnold*, 745 So. 2d 485 (Fla. 1st DCA 1999). In that case, Sears Roebuck & Co. purchased

100 percent of the stock in All America Termite and Pest Control, Inc. ("All America"). *See id.* at 486. Subsequent to the stock purchase, All America changed its name to Sears Termite and Pest Control, Inc. ("Sears Termite") *See id.* Prior to the stock purchase, the appellees began their employment with All America, and remained employed until after the name change. *See id.* The court held that neither the name change nor the stock sale affected the corporate existence and identity of the appellees' employer. *See id.* Accordingly, the court held that Sears Termite could enforce the non-compete agreements executed by the appellees. *See id.*

In this case, the appellate court found that Petitioner could not enforce the non-competes after an asset purchase, a stock purchase, two mergers and a name change. (*See* slip op.[1] at 2, 6.) *Sears Termite* only involved a stock purchase and a name change, and did not address the effect of a merger on the enforceability of a non-compete agreement. A merger and a stock purchase are not the same. In a merger, one corporation remains in being, merging into itself other corporations that cease to exist. *See* § 607.1106(1)(a), Fla. Stat. (1998); *see also St. Petersburg Sheraton Corp. v. Stuart*, 242 So. 2d 185, 189 (Fla. 2d DCA 1970). The purchase by one corporation of all the stock of another corporation does not merge the two

[1] The appellate court's slip opinion is set forth in the Appendix to Petitioner's Amended Brief on Jurisdiction.

corporations because both corporations remain in being.[2] *See id.* at 190.

Sears Termite did not construe the language of the non-compete agreements at issue and did not even mention the authorizing statute, section 542.33, Florida Statutes. In this case, the appellate court relied on both. The appellate court found that Phillips and Farrell signed non-compete agreements wherein Bishop was referred to as "the Employer," and Goff signed a non-compete agreement wherein Ciera was referred to as "the Employer." (*See* slip op. at 5.) The appellate court also found that none of the non-compete agreements contained a provision whereby the employee agreed to be bound to "the Employer's" successors or assigns. (*See id.*) The appellate court reasoned that Corporate Express was not "the Employer" identified in the non-compete agreements and the authorizing statute. (*See id.*) The foregoing shows that *Sears Termite* is distinguishable from the appellate court's decision below. As a result, no express and direct conflict exists and this Court does not have jurisdiction. *See supra* p. 2, 1st ¶.

Petitioner does not explicitly contend that the appellate court's decision below expressly and directly conflicts with *Stewart v. Preston*, 86 So. 348 (Fla. 1920). Petitioner's citation of that case, however, could be viewed as an implicit

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[2] Even if a merger is equated to a stock purchase, there is no express and direct conflict with *Sears Termite*. *Sears Termite* did not hold that the purchaser of the stock, Sears Roebuck & Co., could enforce the non-competes. Therefore, the appellate court did not create conflict by holding that the "purchaser" here, Corporate Express, could not enforce the non-competes.

suggestion of such conflict. No such conflict exists because *Stewart* did not involve a stock sale, a series of mergers, non-compete agreements or the authorizing statute, all of which are involved in this case. *See supra* p. 2, 1st ¶.

Petitioner argues that this Court should reverse the decision below because the appellate court's reliance on *Schweiger v. Hoch*, 223 So. 2d 557 (Fla. 4th DCA 1969), was misplaced and erroneous. This Court, however, cannot base its jurisdiction on an appellate court's misplaced or erroneous application of a prior appellate decision. *See* art. V, § 3(b), Fla. Const. Thus, it is disingenuous for Petitioner to urge this Court to accept jurisdiction without constitutional authorization.

II. THIS COURT DOES NOT HAVE JURISDICTION BECAUSE CONTRAVENTION OF FLORIDA STATUTORY LAW IS NOT A BASIS FOR JURISDICTION AND THE APPELLATE COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *CELOTEX CORP.*

Petitioner argues that the appellate court's decision "directly contradicts Florida Statutory law and a prior decision of this Court." (Am. Br. at 8.) This Court does not have jurisdiction where a district court of appeal's opinion "directly contradicts" Florida statutory law. *See* art. V, § 3(b), Fla. Const. This Court can review a decision that declares a statute valid or invalid. *See* art. V, § 3(b)(1), (3), Fla. Const. Review is not authorized here because the decision below does not contain such a declaration regarding section 607.1106, Florida Statutes. (*See* slip

op.)

Petitioner relies on *Celotex Corp. v. Picket*, 490 So. 2d 35 (Fla. 1986), to support its jurisdictional argument. The appellate court's ruling below, however, does not expressly and directly conflict with *Celotex Corp.* In *Celotex Corp.*, the issue was whether the successor was liable for punitive damages awarded based on a tort committed by the predecessor prior to the merger of the two companies. Petitioner misrepresents the holding in *Celotex Corp.* by contending that the merging entity "continues to exist in the surviving corporation." (Am. Br. at 8.) *Celotex Corp.* does not so hold, but simply holds that the merged entity's ***tort liability*** transfers to the surviving corporation. *See id* at 38. This Court relied on language in the merger agreement, and section 607.231, Florida Statutes, regarding liabilities imposed on the successor. *See id.* The quotations that Petitioner disingenuously presents as statements of applicable Florida law (Am. Br. at 8-9) are statements by out-of-state courts relating to a surviving corporation's liability for its predecessor's torts. *See id.*

Unlike the decision below, the *Celotex Corp.* decision did not address whether the surviving corporation can enforce the merging entity's non-compete agreements. Additionally, the statute applicable in this case, section 542.33, Florida Statutes, was not construed in *Celotex Corp.* The appellate court's opinion in this case does not mention the merger agreements or section 607.231, both of

which supported the *Celotex Corp.* decision. Therefore, *Celotex Corp.* is distinguishable from this case and does not provide a basis for this Court's jurisdiction. *See supra* p. 2, 1st ¶.

III. EVEN IF A JURISDICTIONAL BASIS EXISTS, THIS COURT SHOULD DECLINE TO EXERCISE JURISDICTION BECAUSE REVIEW BY THIS COURT IS NOT WARRANTED.

Petitioner implores this Court to accept discretionary jurisdiction based on the "far-reaching" implications of the appellate court's ruling. Specifically, Petitioner asserts that a Florida company will lose the protection of non-compete agreements if "any change" (Am. Br. at 9) occurs in the company's corporate structure. This argument is simply without merit.

The appellate court's decision did not address "any change" in corporate structure, but specifically addressed the effect of an asset purchase, a stock purchase, two mergers and a name change on the enforceability of non-compete agreements. (*See* slip op. at 2, 6.) It is meritless for Petitioner to describe the transactions as "internal 'paper' consolidations" (Am. Br. at 9) because the appellate court's opinion does not contain such a finding. *Cf. Nat'l Adoption*, 498 So. 2d at 889 (jurisdictional basis must appear within the district court's opinion). Petitioner's characterization of the scope of the decision below is overbroad because it goes beyond the specific facts in this case. Additionally, as the appellate court observed, a successor employer retains the protection of a predecessor's non-

compete agreements if it has the employees execute non-compete agreements in favor of the successor. (*See* slip op. at 5-6.) Given that prudent employers can easily avoid running afoul of the district court's decision, review by this Court is not warranted.

Petitioner insists that this Court accept jurisdiction because the appellate court's opinion creates an unjust result in that the "'paper' changes" (Am. Br. at 10) in this case did not change the extent of the former employees' obligations under the non-compete agreements. This argument must be rejected because the appellate court's opinion does not describe the changes to the employers as "'paper' changes" and does not contain any discussion regarding the effect of those changes on the scope of the competitive restraints. *Cf. Nat'l Adoption*, 498 So. 2d at 889 (jurisdictional basis must appear within the district court's opinion).

Petitioner's admission that the opinion below sets forth "new law" (Am. Br. at 10) contradicts its arguments regarding express and direct conflict. Petitioner is simply dissatisfied with the appellate court's decision on a previously undecided issue. In any event, this Court should not review a decision because it is interesting and newsworthy, notwithstanding Petitioner's contention that such

review is needed to "restore credibility to jurisprudence in our state." [3] (*Id.*)

This Court's power to review decisions of the district courts is "'limited and strictly prescribed'" because those courts are not intended to serve as intermediate appellate courts. *Jenkins v. State*, 385 So. 2d 1356, 1357 (Fla. 1980) (quoting *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958)). Instead, in most instances, review by the district courts is "'***final and absolute***.'" *Id.* at 1358 (emphasis added).

> "To fail to recognize that these [district courts] are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy."

Id. The issue addressed by the decision below is not critically important, and no compelling reasons exist for this Court to invoke a power intended to be used sparingly. Accordingly, this Court should not exercise its discretionary jurisdiction.

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[3] Petitioner baldly impugns the appellate court without showing that the decision below lacks credence.

CONCLUSION

For all the foregoing reasons, this Court should deny Petitioner's request for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Amended Brief on Jurisdiction has been furnished by U.S. Mail to Joseph G. Santoro, Esquire and Allan H. Weitzman, Esquire, 2255 Glades Road, Suite 340 West, Boca Raton, Florida 33431-7360 this 14th day of January, 2002.

By: _____
Keith F. White, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondents' Amended Brief on Jurisdiction complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure, and that the font used in this brief is Times New Roman 14-Point.

By: _____
Keith F. White, Esquire