IN THE SUPREME COURT OF FLORIDA

CASE NO: SC02-502

KENNETH FRIEDMAN, M.D.,

Petitioner,

v.

HEART INSTITUTE OF PORT ST. LUCIE, INC.,
a Florida Corporation;
RAYTEL MEDICAL CORP.,
a Delaware Corporation;
and **DAVID WERTHEIMER**,

Respondents.

On Review from the Fourth District Court of Appeal
CASE NO: 4D01-3526

RESPONDENT'S ANSWER BRIEF

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RESPONDENT'S STATEMENT OF THE FACTS AND THE CASE

Respondent/Plaintiff, Heart Institute of Port St. Lucie, Inc. (the "Institute"), filed this lawsuit against Petitioner/Defendant, Dr. Kenneth S. Friedman ("Friedman") regarding, *inter alia*, Friedman's breach of the non-compete and confidentiality provisions in his Employment Agreement (the "Agreement") with the Institute as well as Friedman's unprofessional, unethical and immoral conduct in violation of the Agreement. (R. App. Ex. 1).[1]

On October 11, 1999, the Institute terminated Friedman based upon his continuing erratic, inappropriate and unprofessional conduct. The Institute alleges that after his termination, Friedman violated the Agreement's restrictive covenants by, *inter alia*, treating patients within the restricted 50 mile radius set forth in the Agreement and by misappropriating confidential information belonging to the Institute. (R. App. Ex. 1). The Agreement (which is attached as an exhibit to the Institute's Complaint) provides that the Institute is entitled to $300,000 in liquidated damages from Friedman if he violates the restrictive covenants. (R. App. Ex. 1 at page 11 of Exhibit "A" to

[1]Citations to the Appendix filed by the Respondent in support of this brief will be cited as "R. App. Ex. __"). The Respondent has included documents in its appendix which may appear in Petitioner's appendix. Respondent does so in an abundance of caution because as of the date of this filing, Petitioner had failed to file an appendix in an acceptable form.

the Complaint). On October 18, 1999, the Institute filed this lawsuit seeking damages for Friedman's various breaches of the Agreement, including his violation of the restrictive covenants. (R. App. Ex. 1).

In May 2001, as authorized by the trial court's Order (R. App. Ex. 2), the Institute amended its Complaint to include, as Count IV, a fraudulent transfer claim under Fla. Stat., Chapter 726, et. seq., Florida's codification of the Uniform Fraudulent Transfer Act ("UFTA") (R. App. Ex. 3) based upon information it discovered which is not a part of this record. In Count IV, the Institute alleged that on September 3, 1999, Friedman sold his home for $422,171.13. (R. App. Ex. 3). The Institute alleges that Friedman was aware prior to his termination that his continued employment with the Institute was in serious jeopardy because of his improper behavior which was the subject of numerous previous discussions with the Institute. (R. App. Ex. 3).

Count IV alleges that Friedman, aware of his indebtedness to the Plaintiff, as well as his child support arrearage, fraudulently transferred the proceeds from the sale of his home to his fiancee, Christie LeMieux, to allegedly repay LeMieux for fictitious prior loans totaling only $150,000. (R. App. Ex. 3). The Institute alleges that LeMieux never loaned Friedman $150,000. The Institute alleged that Friedman's fraudulent transfer of the proceeds from the sale of his home to LeMieux defrauded the Institute

as a present creditor in violation of Fla. Stat. §726.106. (R. App. Ex.3 at ¶49-50). In the alternative, the Institute alleged that Friedman transferred the funds to LeMieux to defraud the Institute as a future creditor pursuant to Fla. Stat. §726.105. (R. App. Ex. 3 at ¶51-52). The Institute requested relief under Fla. Stat. §726.108, which provides remedies for fraudulent transfer victims. (R. App. Ex. 3 at ¶53).

On June 7, 2001, Friedman and LeMieux moved to stay Count IV of the Second Amended Complaint (for the purpose of referring to the motion to stay in this Brief, Friedman and LeMieux shall be referred to jointly as "Friedman") . (R. App. Ex. 4). On August 6, 2001, the trial court held a hearing and denied Friedman's motion. (R. App. Ex. 5). (The hearing transcript appears at R. App. Ex. 6). The August 6, 2001 Order is the subject of this appeal.

Thereafter, Friedman petitioned the Fourth District Court of Appeal for a writ of certiorari. On February 6, 2002, the Fourth District Court of Appeal held that the trial court did not abuse its discretion in denying Friedman's motion to stay and denied Friedman's petition. *Friedman v. Heart Institute of Port St. Lucie, Inc.*, 806 So. 2d 625 (Fla. 4th DCA 2002). The court noted that it is not necessary under the UFTA that a creditor have a judgment and noted that the UFTA defines a claim on which a creditor may proceed as "unliquidated, ... contingent, ... unmatured." *Friedman*, 806 So. 2d at 626. The court reasoned that a stay of the UFTA proceedings would

preclude the trial court from granting relief under Fla. Stat. §726.108. *Id*. at 627. This appeal ensued.

SUMMARY OF ARGUMENT

In adopting the Uniform Fraudulent Transfer Act ("UFTA"), the Florida Legislature recognized the need to protect a creditor from an insolvent debtor who, during or in anticipation of litigation, transferred assets to render himself judgment proof. In essence, the law realized that an insolvent debtor may attempt to engage in a variety of transfers of property (both initially and through subsequent transfers by the first transferee) and thereby prevent an ultimately successful litigant from collecting a judgment obtained prior to such transfers.

The overriding purpose of this aspect of the Florida Uniform Fraudulent Transfer Act ("FUFTA") is to permit a creditor to commence and prosecute an action to set aside a fraudulent transfer without having to wait until the end of the underlying case. Without this protection, creditors, including judgment creditors, would be easy targets at the hands of prospective judgment debtors who would have nothing to lose by engaging in fraudulent transfers.

For instance, without the interim remedies provided by the FUFTA, a creditor could bring a claim against a debtor, who in turn could transfer his assets to Party A. After receiving a judgment against the debtor, the creditor would then be forced to bring an action against Party A in order to recover on the judgment. While this subsequent litigation was pending, however, Party A could transfer the assets to Party

B, against whom the creditor would be forced to bring an action when his action against Party A reveals that Party A does not, in fact, possess any assets belonging to the original debtor. Under this scenario, there is potentially an infinite progression of asset transfers that a creditor must pursue in order to collect on a judgment that may have issued years earlier. The Legislature realized the utter unfairness of forcing a creditor to pursue a chain of asset transferees *ad infinitum* in an attempt to collect on a judgment, and provided for interim relief under the FUFTA in order to avoid scenarios as described above.

It is well settled that the FUFTA provides a creditors with remedies prior to the rendering of a final judgment. However, a creditor still must prove entitlement to these remedies by establishing the required elements as to any particular remedy. In order to demonstrate entitlement to a remedy it is necessary for a creditor to undertake discovery of the debtor, and the scope and control over such discovery is firmly vested in the discretion of the trial court. This procedural framework provides a creditor with a right to discovery while allowing the trial court to control unscrupulous litigants and protect the rights of debtors.

In light of this background, the crucial issues on appeal are the remedies available to a claimant under FUFTA and the means by which a claimant may pursue such remedies. The history underlying the UFTA and Florida law governing discovery

indicates that remedies available under the Act should be construed in favor of creditors and that Florida trial courts are fully capable of controlling discovery in fraudulent transfer actions in a manner which fully protects the rights of all parties.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for a trial court's denial of a motion for stay on appeal is abuse of discretion. *U.S. Borax v. Forster*, 764 So. 2d 24 (Fla. 4th DCA 1999); *Hasslacher v. Hasslacher*, 664 So. 2d 993 (Fla. 4th DCA 1995). Under this standard of review, the trial court's ruling should be upheld unless the ruling was arbitrary, fanciful or unreasonable and no reasonable trial judge would have so ruled. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980); *Oviedo v. Ventura Music Group*, 797 So. 2d 634 (Fla. 3d DCA 2001)(trial court has broad discretion to deny a motion for stay of proceedings); *Joya Industries, Inc. v. City of Hollywood*, 789 So. 2d 539 (Fla. 3d DCA 2001). If reasonable persons could differ as to the action taken by the trial court, then there can be no abuse of discretion. *Canakaris*, 382 So. 2d at 1203. For the reasons set forth herein, Friedman cannot meet this high standard and therefore the trial court's ruling should be affirmed.

II. HISTORY OF THE UNIFORM FRAUDULENT TRANSFER ACT

A. The Purpose Of The Florida Uniform Transfer Act Is To Protect Creditors

The Uniform Fraudulent Transfer Act ("UFTA") was approved by the National Conference of Commissioners on Uniform State Laws in 1984 and has been adopted

by forty states, including Florida. *See,* 7A ULA 639, ULA Fraud Transf Refs & Annos (current through 2001). The UFTA is a revision of the Uniform Fraudulent Conveyance Act (UFCA), 7A ULA 427 (1985), promulgated by the Commissioners in 1918, and was renamed in recognition of its applicability to transfers of personal property as well as real property. *See*, 26 Causes of Action 773, §2 (1991); Prefatory Note to ULA Fraud Transf Refs & Annos. The UFTA borrows from the Bankruptcy Code in an effort to make a uniform and predictable set of rules and to make state fraudulent transfer law correspond more closely to federal bankruptcy law. *See*, 26 Causes of Action 773, §2 (1991).

Recognizing that debtors will often try to avoid payment of legitimate debts by concealing or transferring property, the UFTA created a comprehensive framework designed to protect a debtor's assets from being depleted to the prejudice of creditors. *See* 26 Causes of Action 773, §2 (1991). *See also Protocomm Corp. v. Novell Advances Services, Inc.*, 171 F. Supp. 2d 459 (E.D. Pa. 2001); *In re Lease-A-Fleet, Inc.*, 155 B.R. 666 (Bankr. E.D. Pa. 1993). *See generally, Protocomm*, 171 F. Supp. 2d at 464 ("The purpose of fraudulent transfer law is to prevent a debtor from transferring valuable assets for inadequate consideration if such transfer leaves the debtor with insufficient assets to pay honest creditors"). The purpose of fraudulent transfer laws is to protect creditors, not debtors. *See Weil v. Long Island Savings*

Bank, FSB, 77 F. Supp. 2d 313 (E.D.N.Y. 1999); *Gulf Insurance Co. v. Clark*, 20 P. 3d 780, 786 (Mont. 2001); *Levy v. Markal Sales Corp.*, 724 N.E. 2d 1008 (Ill. App. Ct. 2000).

In enacting the UFTA, the Legislature rejected the public policy argument which questioned the efficiency of a creditor being permitted to sue on the underlying claim and a fraudulent transfer at the same time. The UFTA expressly permits a creditor without a judgment to challenge a debtor's transfer as fraudulent. *See Gulf Insurance Co.*, 20 P. 3d at 786 (public policy arguments must be placed in the broader context of remedies available to creditors under fraudulent transfer law); *Moore v. Browning*, 50 P. 3d 852 (Ariz. Ct. App. 2002). This Court should view with disfavor public policy arguments which clearly misconstrue the underlying intent of a uniform act. *See Gulf Insurance Co.*, 20 P. 3d at 786. To that extent, this Court should apply and construe the UFTA to effectuate its general purpose to make the law uniform in the states in which it has been enacted. See ULA Fraud Transf §11. *See also*, Fla. Stat. §726.112 ("Uniformity of application and construction"). Finally, in interpreting the UFTA the plain meaning of its terms controls. *See Demis v. Eggbrecht*, 191 B.R. 851 (Bankr. Mont. 1996).

B. A Party Does Not Need To Obtain A Judgment In Order To Prosecute A Claim Under the UFTA

A major reform under the UFTA was the elimination of a requirement that a creditor obtain a judgment or unsatisfied execution prior to bringing an action to set aside a transfer as fraudulent. *See,* Prefatory Note to ULA Fraud Transf Refs & Annos (1998 Main Volume). Pursuant to the UFTA's explicit language, and the intent underlying its passage, the UFTA operates without regard to when a creditor obtains a judgment. *See*, *Sasco 1997 NI, LLC v. Zudkewich*, 767 A. 2d 469, 474 (N.J. 2001). Indeed, courts throughout the country have uniformly recognized that a party may bring a fraudulent transfer action in the absence of a judgment.[2] Highlighting the

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[2] *See, e.g., Gulf Insurance Co. v. Clark*, 20 P. 3d 780 (Mont. 2001)(UFTA permits a diligent creditor to pursue its ancillary remedy before a judgment is entered); *Tsiatsios v. Tsiatsios*, 744 A. 2d 75, 80 (N.H. 1999)("The plain language of New Hampshire's Uniform Fraudulent Transfer Act does not require that a judgment be entered against the transferor before action may be taken against the transferee"); *Prescott v. Baker*, 644 So. 2d 877 (Ala. 1994)(remedies under Alabama Uniform Fraudulent Transfer Act may be available even though a creditor's claim has not been reduced to a judgment); *Almon v. Byrd*, 336 So. 2d 183 (Ala. 1976)(action to set aside conveyance as fraudulent may be brought even though claim has not yet been reduced to judgment); *Moore v. Browning*, 50 P. 3d 851 (Ariz. Ct. App. 2002)(creditor may bring a claim under UFTA without first having obtained a judgment); *Cortez v. Vogt*, 60 Cal. Rptr. 2d 841 (Cal. Ct. App. 1997)(UFTA permits a creditor to bring suit to set aside a fraudulent transfer before the claim has matured); *Intili v. DiGiorgio*, 693 A. 2d 573 (N.J. Super. Ct. Ch. Div. 1997)(UFTA permits a present or future creditor to seek a remedy prior to judgment); *Protocomm Corp. v. Novell Advanced Services, Inc.*, 171 F. Supp. 2d 459 (E.D. Pa. 2001)(claim may be brought under Pennsylvania Uniform Fraudulent

vacuity of Friedman's position, there are no cases which hold that a court must automatically stay the underlying action every time that a fraudulent transfer claim is brought simultaneously with the underlying claim.

Florida also holds that a pre-existing judgment is not a requirement to the commencement of a fraudulent transfer action. *See, e.g., Varveris v. Alberto M. Carbonell, P.A.*, 773 So. 2d 1275, 1276 (Fla. 3d DCA 2000)(injunction under the

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Conveyance Act by a party who has not yet received a judgment on a legal claim at the time of the transfer at issue); *In re Fleet*, 89 B.R. 420 (Bankr. E.D. Pa. 1988)(holder of a contingent claim which has not been reduced to judgment has standing to bring action under New Jersey Uniform Fraudulent Conveyance Act); *Weisenburg v. Cragholm*, 489 P. 2d 1126 (Cal. 1971)(creditor does not have to reduce claim to a judgment before seeking remedies under Uniform Fraudulent Conveyances Act); *First Trust and Savings Bank of Glenview v. Zimmerman*, 1987 WL 10302 (N.D. Ill. 1987)(creditor can bring an action to set aside a fraudulent conveyance prior to the underlying claim being reduced to judgment) *Lebovitz v. Mudd*, 358 S.E. 2d 698 (S.C. 1987)(finding that fraudulent conveyances claims were properly included in the complaint because the statute was not limited to judgment holders); *United National Real Estate, Inc. v. C.F. Thompson*, 941 S.W. 2d 58 (Tenn. Ct. App. 1996)(creditor may file bill to set aside transfer as fraudulent without first having obtained a judgment); *Emarine v. Haley*, 892 P. 2d 343)(Colo. Ct. App. 1994)(plaintiff could institute proceeding against debtor to set aside a transfer prior to having received a judgment against debtor); *Kirkhart v. Saieed*, 419 S.E. 2d 580 (N.C. Ct. App. 1992)(creditor is entitled to protection from fraudulent transfers even where a debtor transfers the assets prior to the creditor obtaining a judgment against the debtor); *Nytco Leasing, Inc. v. Southeastern Motels, Inc.*, 252 S.E. 2d 826 (N.C. Ct. App. 1979)(creditor is entitled to attack transfer as fraudulent prior to the obtainment of a judgment); *St. Paul Fire & Marine Ins. Co. v. State, Department of Natural Resources, Division of Forestry & Reclamation*, 265 N.E. 2d 814 (Ohio Ct. Common Pleas 1970)(claimant may set aside conveyance as fraudulent even before the claim is reduced to judgment).

FUFTA can be entered before effectuation of personal service); *Cook v. Pompano Shopper, Inc.*, 582 So. 2d 37, 40 (Fla. 4th DCA 1991); *Money v. Powell*, 139 So. 2d 702 (Fla. 2d DCA 1962)(Florida protects contingent creditors against fraudulent transfers as fully as holders of absolute claims). *Cf. Invo Florida, Inc. v. Somerset Venturer, Inc.*, 751 So. 2d 1263 (Fla. 3d DCA 2000)(contemplating that claims for breach of contract and fraudulent transfer would go forward in the same action). As explained above, one of the purposes behind permitting a party to pursue the underlying action and simultaneously seek to set aside a fraudulent transfer is to allow the holder of a judgment a better chance to satisfy it. *See, Intili v. DiGiorgio*, 693 A. 2d 573 (N.J. Super. Ct. Ch. Div. 1997).

In *Cook*, the plaintiffs filed suit for libel and negligence against the Pompano Shopper, Inc. (corporate owner of the Coral Springs News) and the author of two articles which appeared in the News containing allegations relating to plaintiffs' potential involvement with drugs after they were victims of a home invasion robbery. *Cook*, 582 So. 2d at 38. Plaintiffs amended their claim to add counts against the owners of Pompano Shopper for violations of Florida's Uniform Commercial Code–Bulk Transfers Act and the UFTA relating to the owners' sale of Pompano Shopper's assets. *Id.* at 39.

The trial court granted summary judgment in favor of the defendants holding

that the claim could not be maintained until judgment had been obtained on one of the underlying tort claims but the Fourth District Court of Appeal reversed. *See id.* at 40. The court reasoned that a contingent claimant is entitled to the same degree of protection under the UFTA as the holder of an absolute claim and specifically noted that a "claim" under the Act may be brought even though it was contingent and not yet reduced to judgment. *See id.*

In accordance with the intent underlying the FUFTA that creditors should be protected from the fraudulent machinations of debtors, the type of claim under which a party may bring a fraudulent transfer action is defined broadly. As defined in the FUFTA, a claim means "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Fla. Stat. §726.102(3)(emphasis added). This definition evidences the Legislature's intent that Act's protections should apply a wide class of claimants, regardless of the nature and status of the underlying claim.

C. The Florida Uniform Transfer Act Provides A Broad Range of Remedies To Creditors

In order to protect creditors as fully as possible while maintaining the rights of debtors, Florida law affords a myriad of remedies to a creditor seeking to set aside a

fraudulent transfer.[3] The plain language of Fla. Stat. §726.108 provides a trial court with a variety of interim remedies which may be used in preventing a debtor from transferring assets during the course of litigation, including the issuance of an injunction and the appointment of a receiver. *See, e.g., Tabet v. Tabet*, 644 So. 2d 557, 560 (Fla. 3d DCA 1994)(purpose of an injunction is to preserve the status quo

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[3]Fla. Stat. §726.108(1) provides that:

> (1) In an action for relief against a transfer or obligation under ss. 726.101-726.112, a creditor, subject to the limitations in s. 726.109 may obtain:
>
> > (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
> >
> > (b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law;
> >
> > (c) Subject to the applicable principles of equity and in accordance with the applicable rules of civil procedure:
> >
> > > 1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
> > >
> > > 2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
> > >
> > > 3. Any other relief the circumstances may require.

in order to prevent the occurrence of irreparable harm before a dispute is resolved). Because the statutory language is clear and unambiguous, the interim remedies the Legislature provided must be given effect when a creditor seeks the relief afforded by the statute. *See City of Miami Beach v. Galbut*, 626 So. 2d 192, 193 (Fla. 1993)("A statute's plain and ordinary meaning must be given effect unless to do so would lead to an unreasonable or ridiculous result");*Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001)(where statutory language is clear and unambiguous the only construction necessary is to give effect to the plain meaning of its words).

With regard to a creditor whose claim has not been reduced to a judgment, these enumerated remedies serve to preserve the status quo and prevent a debtor from making a fraudulent transfer. Similarly, these remedies protect a creditor from being made a victim of acts of the debtor for a second time.

These remedies are cumulative and do not require that a creditor have obtained a judgment against the debtor-transferor or to have a matured claim in order to attempt to avoid the transfer as fraudulent. *See* ULA Fraud Transf §7, cmts (4) and (6). The UFTA makes its remedies available to all creditors as defined under the Act, and, significantly, has eliminated the distinction made in the original Act between remedies available to holders of matured claims and holders of unmatured claims. *See*, Prefatory Note to ULA Fraud Transf Refs & Annos (1998 Main Volume). Based on

its plain language and the policy which underlies it, the purpose of the UFTA is to provide interim relief to contingent creditors with a corresponding right of discovery in order that such relief may be obtained in accordance with the law.

The remedies that the FUFTA provides to victims of fraudulent transfers and the Florida Rules of Civil Procedure governing discovery must be read together so that the intent of the FUFTA is realized. Under Florida law a party has a wide range of options in how it conducts discovery. In accordance with the broad range of discovery devices made available under the Rules, a party "may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action..." Fla. R. Civ. P. 1.280(b). Additionally, the methods of discovery may be used in any sequence unless the court orders otherwise, on motion for the convenience of the parties and witnesses and in the interest of justice. *See* Fla. R. Civ. P. 1.280(d).

The FUFTA authorizes a trial court to issue an injunction against further disposition of assets by a debtor or a transferee prior to the issuance of a final judgment. Fla. Stat. §726.108(1)(c)(1). In order to obtain an injunction a creditor must demonstrate: (1) a clear legal right or interest in the subject matter of the suit; (2) likelihood of irreparable harm because the unavailability of a remedy at law; and (3) substantial likelihood of success on the merits. *See Diamond v. Interstate Trading Corp.*, 606 So. 2d 631, 632 (Fla. 3d DCA 1992); *De Leon v. Aerochago, S.A.*, 593

So. 2d 558, 559 (Fla. 3d DCA 1992). Proving these elements is almost impossible for a creditor without undertaking relevant discovery. Additionally, the risk of an unscrupulous FUFTA litigant is reduced because a party seeking an injunction is required to post a bond to cover damages. Fla. R. Civ. P. 1.610(b).

The relief sought by Friedman, an absolute bar on discovery in contingent claimant cases under the FUFTA, would in effect invalidate a contingent creditor's remedies and corresponding discovery rights which have been made plainly available under the FUFTA and the Florida Rules of Civil Procedure.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FRIEDMAN'S MOTION FOR A STAY OF DISCOVERY REGARDING THE FUFTA CLAIM

A. The Right of Privacy Did Not Mandate A Stay

Friedman asserts that the trial court abused its discretion, and that the Fourth District incorrectly affirmed the decision, based upon an argument concerning the right to privacy under the Florida Constitution. Friedman's argument ignores the direct relevancy of financial discovery to the Institute's claims and further ignores the discretion of the court to manage discovery. While a right to privacy exists, this right was never intended to provide an absolute bar to all governmental intrusion into an individual's private life. *See Winfield v. Division of Pari-Mutuel Wagering, Department of Business Regulation*, 477 So. 2d 544 (Fla. 1985). Additionally, by his

participation in the litigation process (Friedman is a counter-claimant as well), Friedman has entered an area with the inherent potential for an invasion of individual privacy. *See Berkeley v. Eisen*, 699 So. 2d 789 (Fla. 4th DCA 1997), citing to *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533 (Fla. 1987).

The right to privacy under Florida law is not absolute and is subject to a balancing test of competing interests. *See Berkeley*, 699 So. 2d at 791 ("The party seeking discovery of confidential information must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information"). It is the trial court's province to weigh the competing interests in deciding whether to limit the scope of discovery to protect the right of privacy. *Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A. v. Mullin*, 602 So. 2d 955 (Fla. 3d DCA 1991).

Because the financial information sought by the Institute is relevant to the issue of whether Friedman effectuated a fraudulent transfer of his assets to LeMieux, such information should not be withheld from the Institute based on any claim to a right of privacy. *See Mogul v. Mogul*, 730 So. 2d 1287 (Fla. 5th DCA 1999)(the financial information of private persons is not entitled to protection by the right of privacy where there is a relevant or compelling reason to compel disclosure). Where financial information is relevant to a pending claim, as in the instant case, there is a much

lessened chance of irreparable harm to a person compelled to disclosure such information. *See Mogul*, 730 So. 2d at 1290.

Friedman's arguments hinge largely upon the nefarious schemes of "unscrupulous litigants." In raising the specter of a hypothetical unscrupulous litigant, Friedman ignores the ramifications of his argument. Acceptance of Friedman's argument would be a boon to judgment debtors attempting to fraudulently transfer their assets in that it would hinder and delay judgment creditors' efforts to reach money to which they are entitled. In essence, Friedman has overlooked that UFTA is concerned with protecting creditors from unscrupulous ***debtors***. In *Alterra Healthcare Corp. v. Estate of Shelly*, 827 So. 2d 936 (Fla. 2002), in a concurring opinion, Justice Pariente recently warned against a missaplication of the right to privacy:

> Further, I also agree that trial courts can and should make appropriate provisions in orders compelling discovery to protect against the unnecessary disclosure of confidential or private information...I write to emphasize, however, that ***the courts also must be alert to the possibility of a litigant raising a claim of the privacy rights of others as a subterfuge to prevent the disclosure of relevant information***...Thus, while being sensitive that unrestricted disclosure may in a given case implicate an individual's reasonable expectation of privacy, ***courts must remain vigilant in preserving our discovery rules' basic framework, which envisions 'broad discovery in order to advance the state's important interest in the fair and efficient resolution of disputes'.***

Alterra Healthcare Corp., 827 So. 2d at 947-48(emphasis added).

Further, Friedman's argument presumes rampant unethical behavior by attorneys in derivation of their responsibilities Code of Professional Responsibility. Friedman's argument assumes that attorneys will participate in concocting a frivolous claim with their client. This Court should adopt the converse assumption and presume that attorneys will act in accordance with their professional responsibilities and that the trial courts are fully capable of dealing with unscrupulous litigants. Friedman places no weight upon the remedies provided by Fla. Stat. §57.105. This statute provides the remedy for dealing with the hypothetical unscrupulous litigant. Under §57.105, attorneys and parties who bring frivolous claims face exposure for their acts. Friedman also overlooks the well-settled causes of action designed to address and deter the unscrupulous litigant: malicious prosecution and/or abuse of process.

Even if this Court were to find that Friedman has a legitimate expectation of privacy in the financial materials at issue, such materials are relevant to the fraudulent transfer claim and furthermore the trial courts of this State are endowed with the tools to make discovery of these materials as unintrusive as possible. As the Court is aware, discovery in civil cases must be relevant to the subject matter of the case and reasonably calculated to lead to admissible evidence. *See Allstate Insurance Co. v. Langston*, 655 So. 2d 91 (Fla. 1995). Further, Friedman's argument assumes that trial

courts are utterly incapable of balancing the competing interests presented when a party seeks discovery of financial material in a fraudulent transfer action. Trial courts have broad discretion to fashion the scope of discovery such that all competing interests are addressed and usually do so with a more intimate and detailed knowledge of the facts than the appellate courts. *See, e.g., SCI Funeral Service of Florida, Inc. v. Light*, 811 So. 2d 796 (Fla. 4th DCA 2002)(scope and limitations of discovery are within broad discretion of trial court); *National Healthcorp Limited Partnership v. Close*, 787 So. 2d 22 (Fla. 2d DCA 2001)(appellate court must recognize superior vantage point of trial judge in measuring reasonableness of trial judge's discretion); *National Security Fire & Casualty Co. v. Dunn*, 751 So. 2d 777 (Fla. 5th DCA 2000); *Baker v. Eckerd Corp.*, 697 So. 2d 970 (Fla. 2d DCA 1997)(discovery order will be set aside only where it constitutes an abuse of discretion causing irreparable damage).

This Court has recognized the important role the trial court plays in exercising its discretion in discovery as it pertains to the right of privacy. As this Court stated in *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533, 535 (Fla. 1987):

> Thus, the discovery rules provide a framework for judicial analysis of challenges to discovery on the basis that the discovery will result in undue invasion of privacy. This framework allows for broad discovery in order to advance the state's important interest in the fair and efficient

> resolution of disputes while at the same time providing protective measures to minimize the impact of discovery on competing privacy interests (emphasis added).

Cf. Gulf Insurance Co., 20 P. 3d at 788 (reasonable discovery of a fraudulent transfer is a discretionary ruling and should be adjudicated on a case-by-case basis). Friedman provides no evidence that the trial court abused its broad discretion in this regard.

B. *Rosen* is Inapplicable

Rosen v. Zoberg, 680 So. 2d 1050 (Fla. 3d DCA 1996) is the case law upon which Friedman primarily relies in support of his arguments. *Rosen* presented a unique factual circumstance which is starkly different than that of the instant case. In *Rosen*, the subject fraudulent transfer claim was brought in a separate subsequent action. *Rosen* 680 So. 2d at 1051. A prior action containing the underlying claims had been stayed due to the defendants' insurer's indefinite receivership proceedings. *Id.* The *Rosen* court merely held that it would be wasteful to conduct a separate trial on the fraudulent transfer claim while prosecution of the underlying claims was stayed because the trial could ultimately be rendered unnecessary. *Rosen* was unique because it involved a stay upon a stay, a circumstance not present here. In the instant case, the Institute brings all of its claims in the same action. There is no prior, separate action and no pre-existing stay of the underlying claims. Therefore, the concerns about judicial economy raised in *Rosen* do not apply. In fact, as noted by the trial judge in

the instant case, it would be wasteful *not* to have all the claims proceed together in this lawsuit.[4] (R. App. Ex. 6 at p. 12-18).

Rosen simply does not stand for the broad proposition which Friedman contends. Subsequent Third District decisions make this clear and contemplate that a fraudulent conveyance claim may proceed in the same action as the underlying claims. *See, e.g., Invo Florida, Inc. v. Somerset Venturer, Inc., supra.* The trial court clearly did not abuse its discretion or depart from the essential requirements of the law by following Florida law, including the law pronounced in *Cook v. Pompano Shopper, Inc., supra*, in denying Friedman's motion to stay.

[4]The trial judge indicated disapproval of the "waste of judicial resources" reasoning in *Rosen*. The trial judge agreed that Rosen II should not go forward if Rosen I was stayed. However, the trial judge also noted that the "waste of judicial resources" argument did not seem to support the result. The trial judge noted that in trying all claims together "I'm taking half a day as opposed to picking a new jury as for a fraudulent transfer case." (R. App. Ex. 6 at pp. 17-18).

CONCLUSION

Without the remedies provided for in the FUFTA, only wealthy creditors would have the resources to pursue a never-ending chain of asset transferees, and creditors with fewer resources would never be able to enjoy the benefit of their duly-obtained judgments. In order to minimize the burden on judgment creditors the FUFTA reflects a policy providing for the prompt resolution of cases without a staggered, drawn out approach to litigation. Accordingly, a creditor who utilizes the provisions of the FUFTA will have a remedy in hand at the time of judgment without the need to resort to additional litigation.

Friedman's arguments ignore the policy reasons behind the FUFTA providing creditors with immediate remedies, which in turn necessitate discovery, in order to protect the debtors from wrongfully dissipating assets. Friedman also ignores the role of the trial judge in managing discovery, including the rights of privacy of the litigants, in his discretion. Friedman has not carried his high burden of demonstrating that the trial court abused its discretion in denying the motion to stay.

For reasons stated in this Brief, this Court should affirm the ruling of the Fourth District Court of Appeal and deny Friedman's motion to stay the fraudulent transfer claim brought by the Institute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief along with Respondent's Appendix was mailed to: Robert W. Wilkins, Esq., Berrocal & Wilkins, P.A., 801 Maplewood Drive, Suite 22-A, Jupiter, Florida 33458 and David B.B. Helfrey, Esq., Helfrey, Simon & Jones, P.C., 120 South Central Avenue, Suite 1500, St. Louis, Missouri 63105 on this ___ day of January, 2003.

_____

Doron Weiss

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Answer Brief is typed in New Times Roman 14-point font and complies with the font requirements set forth in Fla. R. App. P. 9.210(a)(2).

Doron Weiss

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