IN THE SUPREME COURT OF FLORIDA

CASE NO.: SCO2-502

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

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This case is one of first impression for this Court, addressing how a trial court should proceed on a motion to stay the proceedings of a contingent Florida Uniform Fraudulent Transfer Act ("FUFTA") claim (involving invasive discovery directed towards third parties), pending resolution of an underlying earlier-filed dispositive contract claim. There is a split among the lower courts on this matter.

Christie LeMieux is a non-party to the underlying contract litigation described below. Respondent has not alleged that she has had any contractual, financial, business or other relationship with the Respondent/Plaintiff Heart Institute of Port St. Lucie, Inc. ("HIPSL") or otherwise has any role in that contract litigation. HIPSL only alleges that Christie Lemieux is the transferee of an alleged fraudulent transfer of cash.

For fifteen years, Petitioner/Defendant Kenneth Friedman, M.D. had been a cardiologist physician serving patients who depended on his personal professional services at the outpatient clinic of HIPSL, since the clinic's founding in 1984, earning at times in excess of $300,000 per year. (RA-Exh A (employment agreement at page 3), PA-Tab 3, and PSA-Exh B) [1] At the time HIPSL began its lawsuit below, HIPSL

[1] At the time this brief is being served, the District Court has not prepared the record or an index to the record. Citations herein are to the respective appendices

was owned by Raytel Medical Corporation, and David Wertheimer, MD, was the President of HIPSL. (RA-Exh A)

With no prior notice, HIPSL informed Petitioner Friedman on October 11, 1999 that he was to be terminated without cause, involuntarily by HIPSL, but would remain an employee through January 11, 2000 and would receive his full benefits, including salary, through that date. (RA-Exh A)

On or about October 18, 1999, HIPSL filed a breach of contract lawsuit against Petitioner, based in large part upon an alleged breach by Petitioner of a 1996 (amended in 1997) employment agreement's covenant not to compete against HIPSL (hereinafter, the contract dispute case shall be referred to as "*HIPSL-CONTRACT*"). (RA-Exh A) The *HIPSL-CONTRACT* complaint also alleged that the covenant restricts Petitioner's right to serve any patients within a 50-mile radius for a restrictive term of two (2) years. The *HIPSL-CONTRACT* complaint also alleged that the last date of employment was to be January 11, 2000, which had not occurred at the time the complaint was filed. Petitioner answered the complaint and set forth counter-claims and affirmative defenses.

HIPSL filed a Motion for Temporary Injunction against Petitioner to prevent him

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filed in the District Court. Petitioner's Appendix is cited as "PA." Respondent's Appendix is cited as "RA."Petitioner's Supplemental Appendix is cited as "PSA".

from seeing his patients. (PA-Tab 3) A hearing on the injunctive relief was held on November 4, 1999. In an order dated December 6, 1999, the trial judge denied the injunctive relief finding, among other things, that "the right of an individual patient for continued medial care and treatment by the physician of his or her choice is an important public policy consideration that outweighs Plaintiff's need for temporary injunctive relief." (PA-Tab 3) As of the current time, the *HIPSL-CONTRACT* dispute remains pending.

On November 16, 1999, counsel for HIPSL informed Petitioner that HIPSL would use self-help and withhold all remaining salary owed to "offset against damages incurred by Heart and Family Institute…there will be no funds paid…until this litigation is resolved." (PSA-Exh A)

Despite HIPSL having withheld extensive amounts already owed to Petitioner to offset any alleged potential damages in *HIPSL-CONTRACT*, on or about April 30 2001, one and a half years after filing the *HIPSL-CONTRACT* case, HIPSL filed a Florida Uniform Fraudulent Transfer Act ('FUFTA"; Fla. Stat. §726.101, et. seq.) claim (this cause of action shall hereinafter be referred to as "*HIPSL-FUFTA*"). In the *HIPSL-FUFTA* claim, HIPSL proclaimed itself a future potential creditor of Petitioner based solely on the allegations of the *HIPSL-CONTRACT* claim, and did so in the form of a Count IV amendment to its original complaint. (PA-Tab 6) The

amended complaint also added non-party Christie LeMieux, as a co-defendant solely as part of the FUFTA claim. The ***HIPSL-FUFTA*** claim alleged that Ms. LeMieux received fraudulently transferred cash proceeds in September 1999 from the sale of Petitioner's house. The ***HIPSL-FUFTA*** action also targeted Petitioner for the transfer of those proceeds. Petitioner and LeMieux denied the claims, setting forth affirmative and other defenses. The ***HIPSL-FUFTA*** action sought relief against third-party LeMieux, including:

> a)"appointment of a receiver to take charge of LeMieux's assets and bank accounts, freezing her assets and permitting her to withdraw reasonable living expenses during the pendency of this action;"
> b)"injunction against any transfer of the subject funds by LeMieux to any third parties;"
> c)"attachment of LeMieux's assets in an amount sufficient to secure payment of $422,171.13."[2]
>
> (PA-Tab 6, page 3)

After filing ***HIPSL-FUFTA***, HIPSL sought to focus significant litigation resources prosecuting that FUFTA claim. With the relevance of the information sought based solely on the ***HIPSL-FUFTA*** claim, HIPSL served on LeMieux and Petitioner, extensive discovery requests that sought personal financial and private

[2] The $422,171.13 is easily calculated, based on these facts in the record before this court, to be significantly in excess a the total net estimated amount (after accounting for withheld salaries and amounts owed Petitioner) alleged to be owed by Petitioner to HIPSL.

information from third party LeMieux and Petitioner Friedman, including information that is protected by Florida's constitutional right to privacy. Article I, §23, Fla. Const. (PA-Exh 8) Since filing the *HIPSL-FUFTA* action, Respondents HIPSL and Wertheimer have focused their litigation efforts on its prosecution, while the *HIPSL-CONTRACT* dispute continues to remain pending since 1999.

Based on the only Florida appellate case addressing the matter, *Rosen v. Zoberg*, 680 So.2d 1050 (Fla. 3d DCA 1996), Friedman and LeMieux moved on June 7, 2001 to stay *HIPSL-FUFTA* proceedings pending the outcome of the resolution of the earlier-filed dispositive breach of contract *HIPSL-CONTRACT* claims. Petitioner relied upon the holding in *Rosen* that it would be a waste of judicial resources to allow the FUFTA claim to proceed until the underlying dispositive contract claim is first resolved. Petitioner also raised concerns about the irreparable harm that would be caused by discovery of constitutionally protected personal financial information of third party LeMieux and Defendant Friedman and the harassing nature of the *HIPSL-FUFTA* case. (RA-Exh E, pages 7-8 and 17) On August 6, 2001, the trial court admitted an inability to understand the "waste of judicial resources" reasoning of the *Rosen* case,[3] ignored the effects on the rights to protect

[3]The Circuit Court judge admitted: "So, I don't understand their understanding of judicial resources in the statement they made in *Rosen*." (RA-Exh E at 18, lines 2-5)

private financial information of LeMieux and Friedman, and denied Petitioners' motion for stay. Despite denying Petitioner's motion, the lower court appeared to have expressed skepticism of the FUFTA claims of ***HIPSL-FUFTA*** and that awarding attorney's fees would be enough to compensate Petitioner for any harm incurred: "Keep track of everything you spend on this issue, and they [HIPSL and Wertheimer] may be paying some freight on it if it turns out to be a frivolous issue in this case." (RA-Exh E, page 19, lines 19-22)

Petitioner filed a petition for certiorari to the Fourth District Court of Appeals. On September 28, 2001, the Fourth DCA entered an Order to Show Cause directing Respondents to show cause why the petition should not be granted. At Petitioner's request, pending the outcome of the petition for certiorari, the trial court stayed the discovery in ***HIPSL-FUFTA***.

The Fourth District rendered its decision on February 6, 2002, denying the petition for certiorari, without distinguishing in any manner the holding in *Rosen* from its decision in the instant case. *Friedman v HIPSL*, 806 So.2d 625, 626 (Fla. 4th DCA 2002) (*Friedman*)

Notice was filed, pursuant to Fla. R. App. P. 9.120©), on February 28, 2002, seeking to invoke the discretionary jurisdiction of the Supreme Court, pursuant to Rule 9.030(a)(2)(A). This Court has discretionary jurisdiction under Fla. R. App.

P.9.030(a)(3) and Article V, §3(b)(3),Fla. Const. On November 18, 2002, this Court issued an order accepting jurisdiction and setting oral argument.

SUMMARY OF ARGUMENT

This case is one of first impression for this Court, addressing how a trial court should proceed on a motion to stay the proceedings of a contingent Florida Uniform Fraudulent Transfer Act ("FUFTA") claim (involving invasive discovery directed towards third parties), pending resolution of an underlying earlier-filed dispositive contract claim. There is a split among the lower courts on this matter, To resolve this conflict, Petitioner suggests that the Court reject the Fourth District's approach that would require the denial of all such stay motions. Instead, the Court should require an analysis that balances the various factors that a contingent FUFTA claim brings into play. Such a balancing is in line with the approach taken by the Third District in *Rosen v. Zoberg*, 680 So.2d 1050 (Fla. 3d DCA 1996) (*Rosen*).

The opinion of the Fourth District below (*Friedman*) expressly and directly conflicts with the Third District's opinion in *Rosen*. Prior to *Friedman*, *Rosen* was the only appellate decision in Florida that addressed the proper handling of a motion to stay a FUFTA claim, pending the resolution of the underlying claim that determines if the claimant is a true creditor. In *Rosen*, the Third District found that it was an abuse of discretion for the trial court to deny a motion to stay a later-filed contingent FUFTA claim ("*Rosen II*") while the underlying disputed claim between the parties ("*Rosen I*") remained unresolved:

> Additionally, we hold that the trial court abused its discretion in denying Rosen's motions to stay *Rosen II*. The record demonstrates that resolution of *Rosen I* is dispositive of *Rosen II*. If Rosen does not prevail in *Rosen I*, she is not a creditor, and there is no basis for setting aside the transactions attacked in *Rosen II*. A stay is the proper vehicle to avoid a waste of judicial resources….On remand, the court shall enter an order staying this action pending resolution of *Rosen I*.
>
> *Id.*, 680 So. 2d at 1052 (citations omitted).

The Rosen court identified the likely waste of judicial resources if the stay were not granted and Rosen does not prevail as a creditor as the primary overriding issue tipping the balance in favor of the stay.

In the Friedman case below, the Fourth District was presented with a materially identical situation to that which the Third District faced in *Rosen*. Despite the similarities between *Friedman* and *Rosen*, the Fourth District, without any discussion of the waste of judicial resources analysis set forth in *Rosen*, reasoned that "a stay of the fraudulent transfer proceedings would preclude the trial court from granting relief under section 726.108 pending the outcome of the claim for damages." *Friedman*, at 627.

The Fourth District injected, on its own, this "remedy" issue into the case; it was neither briefed by either side, nor has any motion seeking section 726.108 relief prior to the resolution of ***HIPSL-CONTRACT*** ever been made in this case. By focusing solely on this "remedy" analysis, the Fourth District erred by ignoring the

waste of judicial resources issue identified in *Rosen*, and by failing to recognize that the FUFTA statute is supplemented by the established "principles of law and equity," (e.g., see, §726.111), and its implementation must conform with the Florida Constitution, including it's right to privacy. Article I, §23, Fla. Const. This Court has determined that constitutionally protected rights override the FUFTA provisions. *See*, *Havoco v. Hill*, 790 So.2d 1018 (Fla. 2001)

The Fourth's District's reasoning is so heavy handed that it will cause the automatic denial of any motion to stay a FUFTA claim, because the grant of any such stay motion would "preclude the trial court from granting relief under section 726.108 pending the outcome of the claim for damages." Under the Fourth District's decision, a trial court could not consider any of the many competing factors that should go against allowing a particular FUFTA claim to proceed, including a particular FUFTA claim's effects on constitutional rights, the waste of judicial resources, the likelihood that the contingent FUFTA claim's elements could not be proven, and/or the likelihood the underlying dispositive claim will fail. The Fourth District's reasoning provides a trial court no discretion.

A FUFTA claim suddenly makes relevant private financial information where such relevance would not have otherwise existed. Left with no safeguards, as the Fourth District's opinion requires, the FUFTA claim creates for an

"unscrupulous litigant" a powerful and intimidating tool to injure other persons by obtaining constitutionally protected financial information from a Defendant, his/her friends, family and acquaintances – which would not have otherwise been available under this Court's normal privacy balancing test in the underlying case. An unscrupulous litigant can easily contrive a contingent FUFTA claim, as in the case below, and attempt to use its aggressive discovery as a sledgehammer to pressure a Defendant -- whose family and friends are under attack in the FUFTA litigation -- to settle the underlying case, no matter how frivolous both cases may be. The only, albeit ineffective, consolation the trial court in Friedman saw for such irreparable injuries was the possible awarding of attorney's fees.

Petitioner is not arguing herein that a stay of a FUFTA claim could never be denied or, if granted, never lifted, thus precluding a trial court from granting relief under the remedies set forth in section 726.108. However, because the legislature has allowed a creditor with an "unliquidated…contingent…unmatured" claim to bring a FUFTA claim, and because the mere allegation of such a claim automatically attaches to personal financial information a relevance that, but for the claim, would not exist, contingent FUFTA claims are open to abuse by unscrupulous litigants. To safeguard against such abuse, as in this case, a trial court should be required to analyze a motion for stay by performing a balancing of

the many competing factors, including the effects on the constitutionally protected rights to privacy of the alleged debtor/transferor and, even more importantly, the alleged third party transferee. Where a stay is justified at one point in time but changes can be shown that alter that balance, a trial court can dissolve the stay when a requisite showing has been made to establish entitlement to a section 726.108 remedy.

As with *Rosen*, in the instant case, a balancing requires that ***HIPSL-FUFTA*** be stayed pending resolution of ***HIPSL-CONTRACT*** in this case. No party would be prejudiced by the grant of such a stay. Petitioner respectfully requests this Court find an abuse of discretion by the trial court, and reverse the trial court's denial of Petitioner's motion to stay ***HIPSL-FUFTA***. In the alternative, Petitioner respectfully requests that the Court remand the issue to the trial court for holding a hearing conforming to the balancing test set forth herein.

ARGUMENT

The trial court failed to balance the interests of the parties and grant a motion for stay of a Florida Uniform Fraudulent Transfer Act (FUFTA) claim proceeding (including its invasive discovery of private financial information) brought by a speculating contingent creditor against a third party and the defendant, pending resolution of the underlying contract case which would have established the validity of the contingent creditor's dispositive claim.

1. STANDARD OF REVIEW ON APPEAL

The scope of the Florida Supreme Court's review of a decision of a Court of Appeal is limited when the grounds for accepting jurisdiction was a conflict with the decision of another appellate court on the same point of law. *See*, *South Fla. Hospital Corp. v McCrea*, 118 So.2d 25, 27 (Fla. 1960); *see also*, *Ansis v Thurston*, 101 So.2d 808, 810 (Fla. 1958). In these circumstances, the Court will examine the pronouncements in the decisions and resolve the conflict. The question to be resolved is on the "point of law" that differs between the decisions, for which review is de novo.

In *Rosen*, the Third District found that the trial court abused its discretion by failing to stay proceedings for a contingent FUFTA claim, pending the final

outcome of the underlying dispositive claim because a failure to stay the FUFTA proceedings would waste judicial resources. In *Friedman* below, the Fourth District deviated from the *Rosen* approach, with no explanation as to why *Rosen*'s reasoning would not apply to the *Friedman* case. Without consideration of the argument concerning waste of judicial resources, and other competing factors, the Fourth District instead established its own broad-brush rule, and found no abuse of discretion by the trial court in denying Friedman's motion to stay the ***HIPSL-FUFTA***. In *Friedman*, the Court ruled that a stay cannot be granted because it would preclude the trial court for considering the remedies provided in section 726.108. Had the Fourth District's analysis been applied to *Rosen* by the Third District, that court's decision would have come to the opposite result and the motion in that case would have been denied as well. Thus, there is clearly a conflict on the "point of law" that the two District Courts' require be applied by trial courts when they are confronted with a motion to stay a contingent FUFTA claim.

This Court has jurisdiction to review such conflicts and interpretations of state statutes. Art. V, § 3(b)(3), Fla. Const.

2. THE FOURTH DISTRICT ERRED IN FAILING TO RECOGNIZE THAT THE FLORIDA UNIFORM FRAUDULENT TRANSFER ACT IS SUPPLEMENTED BY FLORIDA PRINCIPLES OF LAW AND EQUITY, AND MUST OTHERWISE CONFORM TO THE FLORIDA CONSTITUTION, INCLUDING ITS RIGHT TO PRIVACY

The Florida Uniform Fraudulent Transfer Act, chapter 726.101 et. seq., (FUFTA) was developed from the Uniform Fraudulent Conveyance Act, and must be applied in the context of Florida's constitution and other laws. *See, e.g.*, *Havoco v. Hill*, 790 So.2d 1018, 1029 (Fla. 2001) [Agreeing that the legislature, in enacting FUFTA, is powerless to affect the rights provided under the homestead exemption through statutory enactments; citing for the general principle: *Ostendorf v. Turner*, 426 So. 2d 539, 544 (Fla. 1982) (quoting *Sparkman v. State ex rel. Scott*, 58 So. 2d 431, 432 (Fla. 1952)) ("Express or implied provisions of the Constitution cannot be altered, contracted or enlarged by legislative enactments.")]

The FUFTA serves two primary purposes: 1) it defines for its purposes what transfers are fraudulent with regard to certain creditors, *see*, Section 726.102(3) and (2) provides certain remedies for some FUFTA-defined creditors with regards to the fraudulently transferred assets. *See*, Section 726.108. Even within its four corners, FUFTA provides that principles of equity and law should continue to

coexist with its terms, (*see, e.g.*, Sections 726.111 (which calls for the entire FUFTA to be supplemented by the principles of law and equity), and Section 726.708 (calling specifically for the remedies to be limited by various mitigating factors contained in Section 726.709, "attachment or other provisional remedy ……in accordance with applicable law," and "[s]ubject to applicable principles of equity and in accordance with applicable rules of civil procedure..").

The Fourth District erred in applying FUFTA's provisions without regard to the Florida constitution (including its right to privacy) and other principles of law and equity.

3. IN CONTRAST TO THE THIRD DISTRICT, THE FOURTH DISTRICT ERRED IN FAILING TO CONSIDER THAT FUFTA PROCEEDINGS WASTE SIGNIFICANT JUDICIAL RESOURCES WHEN THE FUFTA CLAIM IS CONTINGENT ON THE OUTCOME OF AN EARLIER-FILED DISPOSITIVE CASE

A FUFTA claim draws on significant judicial resources both at trial and before trial.

Once alleged, FUFTA claims are not easily disposed of by the trial court. As the Third District pointed out in *Rosen*, "[o]rdinarily, the issue of fraud is not a proper subject of a summary judgment. Fraud is a subtle thing, requiring a full

explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute a fraud." *Rosen v. Zoberg*, 680 So. 2d 1050, 1052 (Fla. 3d DCA 1996) (quoting *Auto. Sales, Inc. v. Federated Mut. Implement & Hardware Ins. Co.*, 256 So. 2d 386, 386 (Fla. 3d DCA 1972))

If at a trial, the FUFTA and underlying claim (in this case, a complex contract claim) are litigated together, the FUFTA action can significantly increase the time required and complexity of that trial because of this need to prove a "full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute fraud." *Rosen*, 680 So.2d at 1052. Similarly, if litigated separately, the FUFTA trial will be one of significance and complexity.

That need for extensive proof at trial also means that FUFTA claims will necessarily require extensive pre-trial discovery, including financial discovery. To prove a claim under FUFTA and establish the right to any of its remedies, the alleged creditor must, among other things, establish the financial condition of the debtor before, during and after the transfer, the disposition of the asset allegedly transferred, and, if transferred, what the transferee did with the asset. In the case of allegedly fraudulently transferred cash, which is highly fungible, the alleged FUFTA litigant will attempt very broad sweeping and invasive financial discovery, as illustrated by the document and interrogatory requests that HIPSL propounded

on third party LeMieux (the alleged transferee) and Petitioner Friedman (the alleged debtor), where HIPSL demands, among other things:

> "7) Any document evidencing any transfer of real estate from Kenneth Friedman to Christie LeMieux…"
> "8) Every document evidencing the transfer of personal or intangible property …[between]….Christie LeMieux…[and].. Kenneth Friedman…"
> "9) United States income tax returns filed by Christie LeMieux…
> "10) United States income tax returns filed by Kenneth Friedman…"
>
> (PA-Tab 8, Request for Production from Christie LeMieux and Kenneth Friedman, MD)

> "4) Identify all transactions, conveyances, transfers of interests, loans or other dealings with real property, personal property, cash or intangible property on or after January 1, 1998 to the present, for each transaction state (1) the consideration…; 2) the property or interest involved; 3) the date of the transaction; and 4) the present location of the property or tangible evidence of interest."
>
> (PA-Tab 8, Plaintiff's Interrogatories Propounded to Christie LeMieux)

This Court has found such information to be protected by the Florida constitutional right to privacy of the individual. As reaffirmed recently in *Straub v. Matte*, 805 So.2d 99, 100-101 (Fla. 4th DCA 2002), the Fourth District Court of Appeals in *Woodward v. Berkery*, 714 So. 2d 1027, 1035, 1036 (Fla. 4th DCA 1998) held:

> The constitution of the State of Florida contains an express right of privacy. Although there is no catalogue in our constitutional

> provision as to those matters encompassed by the term privacy, it seems apparent to us that personal finances are among those private matters kept secret by most people. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985) (law in Florida recognizes an individual's legitimate expectation of privacy in individual's private bank account, financial records).
>
> ……
>
> the failure to analyze the need for the requested discovery under the unique circumstance of this case was a departure from the essential requirements of law which if uncorrected will lead to the kind of irreparable harm contemplated by *Martin-Johnson*.
>
> *Id.*, 714 So. 2d 1027(citing Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1100 (Fla. 1987)); *See*, *Straub v Matte*, *supra*, 805 So.2d 100-101 (Fla. 4th DCA 2002)

Because the legislature has seen fit to allow unliquidated, contingent and unmatured claims to support a FUFTA claim, they have made the discovery of personal financial information automatically relevant to the issues in the lawsuit. Discovery involving such protected private financial information will inevitably lead to discovery disputes involving this Court's prescribed balancing of the constitutionally protected privacy rights of those individuals against the need for such discovery. Due to their potential for irreparable harm, any denials of motions to quash such invasive discovery can legitimately lead to certiorari requests seeking

review. As this Court recently noted in *Alterra Healthcare Corporation, Et Al., v. Estate Of Francis Shelley, etc.*, 827 So. 2d 936 (Fla. 2002), 'non-final' denials of motions to quash discovery involving personal financial information are subject to appeal:

> …in *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1100 (Fla. 1987), this Court observed that irreparable harm such as might be occasioned by an order that would let the "cat out of the bag" and provide the opponent "material that could be used by an unscrupulous litigant to injure another person" was the governing standard for determining whether a petition for writ of certiorari would, in a particular case, be an appropriate vehicle for challenging non-final orders granting discovery. As this Court observed in *Rasmussen v. South Florida Blood Service, Inc*., 500 So. 2d 533 (Fla. 1987):
>
> > In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it. *North Miami General Hospital v. Royal Palm Beach Colony, Inc*., 397 So. 2d 1033, 1035 (Fla. 3d DCA 1981); *Dade County Medical Association v. His*, 372 So. 2d 117, 121 (Fla. 3d DCA 1979). 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.
>
> Accordingly, we must assess all of the interests that would be served by the granting or denying of discovery--the importance of each and the extent to which the action serves each interest.

Alterra at 945 (emphasis added)

Thus, a FUFTA claim, particularly one involving alleged third party transferees, will place burdens on judicial resources, both pre-trial and at trial.

When a non-FUFTA case, such as ***HIPSL-CONTRACT***, is dispositive of the FUFTA claim, such as ***HIPSL-FUFTA***, and the FUFTA claim is allowed to proceed, the opportunity for those extra judicial resources to go to waste becomes greatest. For example, if no valid breach of contract is found in ***HIPSL-CONTRACT*** against Petitioner Friedman, then HIPSL (the FUFTA litigant) will not be a creditor of Friedman, and all of the judicial resources expended on ***HIPSL-FUFTA*** would have been wasted.[4]

4. UNDER THE FOURTH DISTRICT'S VIEW, A FUFTA CLAIM GRAFTED ONTO A PRE-EXISTING CONTINGENT CLAIM CASE, BECOMES A POTENT TOOL FOR ABUSE AND IRREPARABLE HARM BY THE UNSCRUPULOUS LITIGANT OF THAT CASE

FUFTA claims involving alleged fraudulent cash transfers, when grafted onto non-FUFTA litigation (such as breach of contract), suddenly make invasive

[4] The Friedman trial court's apparent reasoning that attorney's fees would provide adequate compensation for the burdens imposed on innocent parties, and the irreparable harm of constitutionally protected financial information is also inconsistent with the cases cited in Alterra. (RA-Exh E at 19).

financial discovery demands justifiable in cases where they would otherwise not have been, thus undermining this Court's constitutional privacy protection policies. In such cases, a FUFTA litigant can turn a non-FUFTA litigation proceeding into a no-holds-barred financial discovery inquisition of the private finances of alleged fraudulent transferors (who are also the defendants in the initial non-FUFTA action) and transferees (typically friends, associates, business partners, and family members), and potentially almost every cash transaction that occurred between them before and/or after the alleged triggering event(s) for the FUFTA claim.

A contingent FUFTA claim, regardless of the merits of the underlying claim, is easily created and used as a litigation strategy, as is being done in the Friedman case, to harass friends and family to coerce settlement. Adding a contingent FUFTA claim makes it open season on financial information of defendants and third parties, no matter how invasive and detailed – with no safeguards that effectively protect against such abuse. Of significant concern to this Court is that such FUFTA abuse undermines this Court's prescribed procedural protections for constitutionally protected rights to privacy, and the "unscrupulous litigant" who will cause irreparable harm. *Alterra* at 945.

One three step formula demonstrates a simple FUFTA abuse strategy:

1) The FUFTA abuser need only allege damages in his or her underlying legal dispute against Defendant for an amount in excess of what the FUFTA abuser alleges the defendant is worth, or is otherwise able to pay.

2) The FUFTA abuser alleges one or more significant transfers of money or other assets to a third party, preferably an "insider" (i.e., family member or partner), and, if required, alleges any needed intent, and.

3) The FUFTA abuser files their FUFTA claim against Defendant and any other party who were alleged "transferees" – serving them with a complaint that seeks to freeze all of their assets, along with blanket discovery covering most, if not all, of their financial dealings.

Thus, if -- as the Fourth District would have it -- a contingent FUFTA claim must be allowed to automatically proceed without regard to established principles of law and equity (including consideration of its effects on individual's state constitutional rights of privacy), the FUFTA claim becomes a sledgehammer that could easily be abused and used to target innocent parties. Each cash transferee can be targeted regardless of how immaterial their financial relationship might have been with the alleged debtor/transferor. Each transfer of the alleged transferor and transferee, no matter how immaterial, can be sought to be disclosed in discovery. Thus, if the defendant made any transfers before or after the alleged fraudulent transfer, such as gifts to family members, business associates, the sale of an asset to such persons, or funding a child's trust, each of those transferees

could be joined in the action and the details of their complete financial life exposed, all on the basis of a FUFTA allegation in the complaint.

Even a determined defendant could feel enough pressure from those who have been targeted around him/her to settle the most non-meritorious dispositive case on the most unfavorable terms, simply to eliminate the harassment caused by the FUFTA claims against their loved ones, families, friends, partners, and business associates. As the procedures stand now with the Fourth District court's ruling, there are no safeguards against FUFTA abusers, like HIPSL.

To help prevent such abuses, this Court should adopt *Rosen*'s view that motions for stay of contingent FUFTA claims must be granted in certain circumstances. Specifically, a balancing test of several critical factors is needed in evaluating whether to grant or deny a motion for stay a contingent FUFTA claim.

5. THE COURT MUST PRESCRIBE A BALANCING PROCEDURE FOR HANDLING MOTIONS TO STAY FUFTA CLAIMS

In order to protect against the waste of judicial resources, the unscrupulous litigant, and the potential for irreparable harm, a trial court – when presented with a motion to stay a contingent FUFTA proceeding -- should be required, in the exercise of its discretion, to weigh various factors specified by this Court. This

Court has required analyses in similar contexts. *See, Medical Facilities Development v Little Arch Creek Properties, Inc*., 675 So. 2d 915 (Fla. 1996)(explaining that trial court's discretion is not limited to cases showing irreparable harm and explaining types of issues the trial court may consider). A proper balancing of interests will inevitably favor a stay in the case of a contingent FUFTA claim such as that in *Rosen* and *Friedman*.

The need for such a balancing is consistent with *Rosen,* where the Third District held that it is an abuse of discretion not to stay the fraudulent transfer claim until resolution of a breach of contract claim, which is dispositive of whether the plaintiff is a creditor. As a result, the Third District court directed that *Rosen II* (the fraudulent transfer claim) be stayed until the resolution of *Rosen I* (the underlying action that would determine, as a threshold matter, whether a creditor situation existed at all). In the Court's own words:

> 'If Rosen does not prevail in *Rosen I,* she is not a creditor, and there is no basis for setting aside the transactions attacked in *Rosen II*. A stay is the proper vehicle to avoid a waste of judicial resources…. On remand, the Court shall enter an order staying this action pending resolution of *Rosen I*. Affirmed in part, reversed in part, and remanded with instructions.'
>
> *Rosen,* 680 So.2d at 1052 (citations omitted).

A court should be required to balance a number of factors in determining whether a motion for stay of a FUFTA claim should be granted, including, but not limited to:

a) the judicial resources that will likely be taken up by the FUFTA litigant attempting to prove the "subtle" element of the fraud (including the threshold facts of insolvency and a fraudulent transfer),

b) the effects on constitutional rights to privacy of each of the parties upon whom financial discovery will likely be taken,

c) the likelihood of success of the underlying dispositive claim in the amount sought,

d) the likelihood of success of any contingent claims that could accrue to the benefit of the Defendant, including counterclaims or other lawsuits by the Defendant against the Plaintiff for damages, that might offset the potential financial impact of the Plaintiff's dispositive claims on Defendant,

e) the speculative nature of the allegations of the FUFTA complaint,

f) whether the FUFTA claim was brought in good faith,

g) the expected ability of the Defendant to pay the Defendant any likely amount of resulting net expected damages at the time of judgment,[5]

h) the immediate need for involving third party defendants in any pre-judgment proceedings, and

I) whether other less invasive remedies are adequate for satisfying any likely net damages, including establishing true risks of collection, and the adequacy of posting a bond.

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[5] For example, was the Defendant formerly unemployed, but now employed?

6. THE SUPREME COURT HAS THE AUTHORITY TO ESTABLISH HOW FUFTA PROCEEDINGS WILL BE HANDLED BY THE COURTS

It is well established in Florida that only this Court has the authority to establish rules relating to judicial procedure in *Florida. State v. D.H.W.*, 686 So. 2d 1331 (Fla. 1996); *Johnson v. State*, 336 So. 2d 93 (Fla. 1976). Thus it is proper for this Court to set forth how motions to stay FUFTA proceedings will be handled where the dispositive claim remains unresolved in an earlier-filed contract dispute case.

7. THIS COURT SHOULD REVERSE THE FOURTH DISTRICT AND TRIAL COURT IN FRIEDMAN

Despite the similarities between *Rosen* and *Friedman* with regard to the need for balancing the interests of the parties, the invasive discovery of private constitutionally protected financial information, and the waste of judicial resources issue, the Fourth District failed to make needed analysis, and ignored the *Rosen* reasoning. Instead, the Fourth District's entire reasoning for not overturning the trial court's decision denying the stay was that:

> In section 726.108 the Act authorizes the court to grant a creditor broad relief against the transferee of a fraudulent transfer, including an injunction against further disposition of the asset or the appointment of a receiver to take charge of the asset. A stay of the fraudulent transfer proceedings would preclude the trial court from granting relief under section 726.108 pending the outcome of the claim for damages. We therefore conclude that the trial court did not abuse its discretion in denying the stay and deny certiorari.
>
> *Friedman v HIPSL*, 806 So.2d 625, 626 (Fla. 4th DCA 2002)

As explained above, the Fourth District's reasoning, improperly focusing solely on the availability of relief under 726.108, is flawed for several reasons. First, the Fourth District's analysis failed to recognize that the FUFTA is supplemented by the established "principles of law and equity," (e.g., see, §726.111[6], and §726.108[7]) and can trigger constitutionally protected invasive financial discovery directed at both primary and third parties. Article I, §23, Fla. Const. As described above, these competing issues must be balanced along with other factors, including the likelihood of a resulting waste of judicial resources. Second, there was no issue raised before

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[6] "726.111 Supplementary provisions.--Unless displaced by the provisions of ss. 726.101-726.112, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement those provisions."

[7]"…. in accordance with applicable law; …..(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure…"

the trial court concerning the extraordinary equitable relief under 726.108, and this issue was not proper for consideration by the Fourth DCA.[8] Even so, should the matter be raised in the future, and the Respondent make the extraordinary showing required for pre-judgment injunctive-type relief under FUFTA, the trial court could modify the stay to issue the injunction, but only if consistent with the principles set forth herein.[9] On its own, the Fourth DCA injected this issue into the record, while avoiding the overriding issues that compel a stay of the FUFTA claims pending resolution of the underlying contract litigation claim of ***HIPSL-CONTRACT***.

No party would be prejudiced by a stay of the ***HIPSL-FUFTA*** claim, resulting in more efficient use of judicial resources, avoidance of invasive unconstitutional discovery of Petitioner and third parties, and the more expeditious resolution of legal claims of ***HIPSL-CONTRACT***.

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[8] Although there is a request for such relief in general in the "Wherefore" clause of the amended complaint, Respondents failed to seek such relief by motion or otherwise.

[9] A trial court always has the ability to modify and control its interlocutory orders, including stay orders. *Nationsbank, N.A. v. Ziner*, 736 So.2d 364, 366 (Fla. 4th DCA 1999)(trial court has inherent authority to reconsider any of its interlocutory rulings prior to final judgment), *Uiterwyk v. Uiterwyk*, 592 So.2d 1156, 1157 (Fla. 2nd DCA 1992)

CONCLUSION AND PRAYER FOR RELIEF

The Fourth District Court of Appeals of Florida opinion below expressly and directly conflicts with the previously rendered leading decision of the Third District Court of Appeals on how a motion for stay of a contingent FUFTA claim should be handled by a trial court where a pending claim is dispositive of the contingent FUFTA claim.

Failing to balance the interests of the parties, the trial court erred in failing to stay the contingent FUFTA claim proceedings.

For the reasons set forth, Petitioner urges this Court to reverse the trial court below and grant Petitioner's motion for stay pending resolution of *HIPSL-CONTRACT*. In so doing, the Petitioner urges that this Court prescribe how motions to stay contingent FUFTA claims should be handled, so as to balance the various competing factors, including the interests of parties, waste of judicial resources, and the effect on constitutionally protected privacy rights and potential for causing irreparable harm.

In the alternative, Petitioner urges the Court to remand consideration of the motion for stay back to the a trial court with instructions that the trial court, after hearing, apply the Court's newly prescribed balancing test.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by U.S. Mail this 13 day of December, 2002 on Plaintiff, THE INSTITUTE, and Third Party Defendants. RAYTEL and WERTHEIMER, by serving Stephen Navaretta, Esq. 1100 S.W. St. Lucie West Blvd., Suite 203, Port St. Lucie, Florida 34986 and Andrew C. Hall, Esq., 1428 S. Brickell Avenue, Suite 800, Miami, Florida 33131.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing petition complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Robert W. Wilkins