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IN THE SUPREME COURT OF FLORIDA

KENNETH FRIEDMAN, M.D.,

Petitioner,

CASE NO.: SC02-502
4TH DCA CASE NO.:4D01-3526

v.

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

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

BERROCAL & WTLKINS, P.A.
ROBERT W. WILKINS, ESQ.
801 Maplewood Drive, Suite 22-A
Jupiter, FL. 33458
Florida Bar No. 578721
Telephone 561-746-7455
Facsimile 561-746-6933

HELFREY, SIMON & JONES, PC.
DAVID B.B. HELFREY, ESQ.,
PHILIP C. GRAHAM, ESQ. #40345
120 South Central Avenue Suite 1500
St. Louis, Missouri 63105

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

This Brief on Jurisdiction, filed pursuant to Fla. R. App. P. 9.120(d), seeks this Court's review, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), of a Fourth District Court of Appeals decision that expressly and directly conflicts with a previously rendered decision of the Third District Court of Appeals. There is no Supreme Court decision addressing the same question of law.

Since 1984, Petitioner/Defendant Kenneth Friedman, M.D. had been a physician at the out-patient clinic of Respondent/Plaintiff, Heart Institute of Port St. Lucie, Inc. ("HIPSL"). On or after October 11, 1999, Petitioner Friedman was informed for the first time that he was to be terminated involuntarily by HTPSL without cause, but would remain an employee through January 11,2000.

On or about October 18, 1999, HIPSL filed a breach of contract lawsuit against Petitioner, based in large part upon alleged breaches by Petitioner of an employment agreement's covenant not to compete after October 11, 1999. (hereinafter, "*HIPSLI*"). HTPSL sought both injunctive relief to prevent Petitioner from working in the area and, alternatively, liquidated damages of $300,000. Petitioner counterclaimed for breach of contract, defamation, and other claims. After an evidentiary hearing, the injunctive relief was denied.

On or about April 30,2001, one and a half years after filing *HIPSL I,* HIPSL amended its complaint to add Count IV based on the Uniform Fraudulent Transfer

Act ('UFTA"; Fla. Stat. §726.101, *et. seq.)*("HIPSL II"). The amended complaint added a non-party, Christie LeMieux, **and** alleges that she received fraudulently transferred proceeds in September, 1999 from the sale of Petitioner's house and includes a claim against Petitioner for the transfer of those proceeds. Petitioner and LeMieux denied the claims, setting forth affirmative and other defenses. HIPSL has since sought to focus litigation resources on prosecuting the UFTA claim, serving extensive discovery requests that seek personal information, including personal financial and other private information of third party LeMieux and Petitioner Friedman that is protected by Florida's constitutional right to privacy,

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 II* (the UFTA claim) pending the outcome of the resolution of the earlier-filed underlying claims in *HIPSL I*. Petitioner relied upon the holding in *Rosen* that it would be a waste of judicial resources for the underlying dispositive claim to be pursued at the same time as the UFTA claim. On August 6, 2001, the trial court held a non-evidentiary hearing, rejected the reasoning in *Rosen* based on its admitted inability to understand the "waste of judicial resources" reasoning of that case,[1] and denied Petitioners' motion for stay.

[1] The Circuit Court judge admitted "I just can't understand the waste of judicial resources issue." [Respondent's Court of Appeals.Exh. E at 18, lines 16-16]

Petitioner filed a petition for certiorari to the Fourth District Court of **Ap**-peals. 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 II.*

After the issues were fully briefed, the Fourth District Court of Appeals, filed its Opinion on February 6, 2002, denying the petition for certiorari, without distinguishing the holding in *Rosen* in any manner.

Notice was filed, pursuant to Fla. R. App. P. 9.120(c), on February 28,2002, seeking to invoke the discretionaryjurisdiction of the Supreme Court, pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv) and ArticleV,§3(b)(3), Fla.Const.

SUMMARY OF ARGUMENT

This is a case of first impression for the Florida Supreme Court. The Opinion of the Fourth District Court of Appeal in *Friedman v. HIPSL,* No. 4D01-3526 (Fla. 4th DCA 2002), expressly and directly conflicts with *Rosen* v. *Zoberg, 680* So.2d 1050 (Fla. 3d DCA 1996).

Prior to *Friedman v. HIPSL* (Fla. 4th DCA 2002), *Rosen* was the only appellate decision in Florida that addressed the proper handling of a motion to stay a UFTA claim pending the resolution of the underlying claim that determines if the claimant is a creditor under the UFTA. In *Rosen,* two causes of action were brought: one for a disputed claim between the parties *("Rosen I"*), and a later filed UFTA claim *("Rosen II"*) based on the existence of the prior-filed *Rosen I* disputed claim. The trial court denied the motion to stay the UFTA claim and Third DCA reversed, directing that the UFTA litigation of *Rosen II* be stayed pending *Rosen I*'s resolution.

The *Rosen* court held:

> 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. See *Florida Crushed Stone Co. v. Travelers Indem. Co., 632* So.2d 217 (Fla. 5th DCA1994); *REWJB Gas Inv. v. Land O'Sun Realty, Ltd.,* 645 So.2d 1055 (Fla. 4th DCA 1994), *review denied,* 654 So.2d

> 919 (Fla.1995). On remand, the court shall enter an order staying this action pending resolution of Rosen I. Id., 680 So. 2d at 1052.

There was no issue raised in *Rosen* concerning the effect of the stay on any subsequent request for extraordinary relief under section 726.108, such as an injunction or the appointment of a receiver upon a proper showing to the trial court. The only issue was the issue of whether it would be a waste of judicial resources to allow the UFTA claim to proceed simultaneously with the underlying claim when the claimant had to prevail on the underlying claim to even be a creditor under the UFTA claim. Unless the claimant is a creditor, the other elements required to be shown under the UFTA are immaterial.

In the case below, the Fourth DCA was presented with a materially identical situation to that which the Third DCA faced in *Rosen.* In this case, Plaintiff HFHT instituted court proceedings and invasive discovery against Defendant and third-party, LeMieux, to prosecute a UFTA claim based on a pending, unresolved underlying claim. The underlying claim against Petitioner is dispositive of the UFTA claim because, unless Respondent HTPSL prevails on the breach of contract claim, it is not a creditor of Petitioner. If it is not a creditor of Petitioner, then the other elements of the UFTA claim are immaterial.

Despite the similarities between the case here and *Rosen,* the Fourth DCA, without an explanation, ignored the holding of *Rosen*, and reasoned that "a stay of the fraudulent transfer proceedings would preclude the trial court from granting re-

lief under section 726.108 pending the outcome of the claim for damages." This issue was not before the Court in *Rosen* and was not before the Court in the instant action. Additionally, a trial court has inherent authority to modify and control its 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).

There is a clear split between the circuits on the treatment of requests for stays of later-filed UFTA claims where the underlying claim is disputed and determinative of whether the claimant is a creditor for purposes of the UFTA claim. To promote judicial efficiency, avoid further abuse of the UFTA against innocent parties, and uniformity among the circuits, the Supreme Court should grant review of the Fourth DCA decision below.

ARGUMENT

THERE IS AN EXPRESS AND DIRECT CONFLICT BETWEEN THE CIRCUTTS

Prior to the Fourth DCA case below, *Rosen* was the only case in Florida that dictated how a trial court should handle a motion for stay of a later-filed UFTA claim where the resolution of a pending disputed claim is dispositive of the UFTA claim.

As in *Rosen* where *Rosen II* (the UFTA claim) was brought after *Rosen I* (the underlying claim), in the case below *HIPSL II* (the UFTA claim) was also filed long after the original *HIPSL I* was filed (the underlying claim). Also, just as *Rosen I* was dispositive of *Rosen II*, in the case below resolution of *HIPSL I* is dispositive of *HIPSL II*. That is, unless the Respondent HIPSL prevails on the breach of contract claim in *HIPSL I*, it is not a creditor of Petitioner for purposes of the UFTA, and the remaining elements of the UFTA claim are immaterial. As with *Rosen*, "a stay is the proper vehicle to avoid a waste of judicial resources."

Similarly, just as with *Rosen*, it is a waste of judicial resources to go through the extensive pre-trial discovery and associated proceedings, involving constitutionally protected private information, of the latter filed UFTA claim, *HIPSL II*, until the underlying creditor issue is revolved. *See*, Article I, §23, Fla. Const. Unless the creditor issue is resolved favorably to Respondent, HIPSL, the other UFTA issues are immaterial.

Despite the similarities between *Rosen* and the instant case on the waste of judicial resources issue, the Fourth DCA came to the opposite opinion, applying reasoning that involves facts that were not involved in the *Rosen* decision and are not involved in the decision below. Specifically, the Fourth DCA found 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,* No. 4D01-3526 slip. op at 2 (Fla. 4th DCA February 6,2002)

The Fourth DCA's reasoning, that "[a] stay of a fraudulent transfer proceedings would preclude the trial court from granting relief under section 726.108," is incorrect for two reasons. First, there was no issue raised before the trial court concerning the extraordinary, equitable relief under 726.108.[2] The sole issue raised both before the trial court and before the Fourth DCA was the waste of judicial resources holding of *Rosen.* On its own, the Fourth DCA injected this issue into the record, and decided the case on this issue alone. In doing so, the Fourth DCA ignored the waste of judicial resources issue and held, effectively, that trial courts could never stay UFTA claims, just the opposite holding of *Rosen.*

Moreover, 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). Should the matter be raised in the future, and the Respondent make the extraordinary showing required for injunctive relief, the trial court could modify the stay to issue the injunction.

The issue before the Fourth DCA in this case was the very issue raised and decided in *Rosen;* that is, when the claimant under the UFTA claim is only a "creditor" for purposes of the UFTA *if* they prevail on an underlying claim being litigated at the same time, whether it is an abuse of discretion not to stay an UFTA claim until the underlying, dispositive claim is resolved. Anyone confronting the two decisions addressing this very issue would have to agree that it is an abuse of discretion in the Third District Court of Appeals, but it is not in the Fourth District Court of Appeals.

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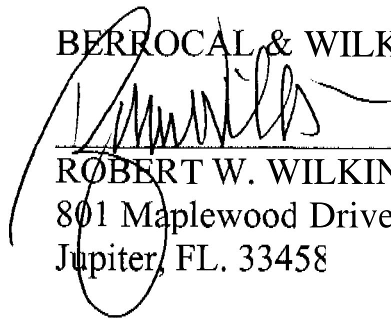
[2] Although there is a request for such general relief the "wherefore" clause of the amended complaint, Respondents have never sought such relief by motion or otherwise.

CONCLUSION AND PRAYER FOR RELIEF

With the rendering of the instant decision by the Fourth DCA, Florida is found with two polar opposite views on whether a UFTA claim can proceed or not proceed pending the final disposition of the underlying contract claim. 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 UFTA claim should be handled by a trial court where a pending claim is dispositive of the UFTA claim. For the reasons set forth, the Supreme Court has jurisdiction and should grant certiorari for review of the case below.



BERROCAL & WILKINS. P.A.

ROBERT W. WILKINS, ESQ.
801 Maplewood Drive, Suite 22-A
Jupiter, FL. 33458

HELFREY, SIMON & JONES, PC.
DAVID B.B. HELFREY, ESQ.,
PHILIP C. GRAHAM, ESQ. #40345
120 South Central Avenue Suite 1500
St. Louis, Missouri 63105

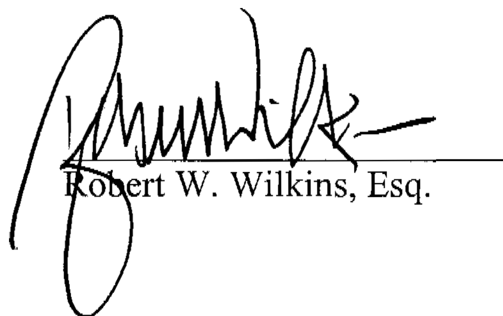
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by U.S. Mail this 11 day of March, 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 WITH RULE 9.100

I certify that the foregoing petition complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure.



Robert W. Wilkins, Esq.