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IN THE FLORIDA SUPREME COURT

CASE NO.: SC02-502

4TH **DCA** NO. 4D01-3526

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.

RESPONDENTS' RESPONSE BRIEF ON JURISDICTION

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TABLE OF CONTENTS

Table of Authorities iii

I. Statement of Facts. 1

II. Summary of Argument 3

III. Argument. 4

A. No Conflict Appears Within the Four Corners of the Lower Court's Opinion 4

B. The Instant Case is Distinguishable from *Rosen* 5

C. Conclusion 8

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TABLE OF AUTHORITIES

CASES **PAGES**

Cook v. Pompano Shopper, Inc., 582 **So.** 2d 37 (Fla. 4th **DCA** 1991) 3

Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) 5

Dept. of Health & Rehabilitative Services v.
National Adoption Counseling Serv., Tnc., 498 **So.** 2d 888 (Fla. 1986) . . . 4

First Union National Bank v. Turney, 2002 WL 214967 (Fla. 1st DCA 2002) . . . 4

Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988) 4

Invo Florida, Inc. v. Somerset Venturer, Inc.,
751 **So.** 2d 1263 (Fla. 3d DCA 2000) 7-8

Reaves v. State, 485 So. 2d 829,830 (Fla. 1986) 4

Rosen v. Zoberg, 680 So. 2d 1050 (Fla. 3d **DCA** 1996) 3, 4, 5, 6, 7

STATUTES **PAGES**

Fla. Stat. g726.105 2

Fla. Stat. §726.106 2

Fla. Stat., Chapter 726 . . . . **2**

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I. Statement of Facts

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.

On October 11, 1999, the Institute terminated Dr. Friedman based upon his continuing erratic, inappropriate and unprofessional conduct. Dr. 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. 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. The Agreement provides that the Institute is entitled to $300,000 in liquidated damages from Friedman if he violates the restrictive covenants. 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.

In 2001, the Institute obtained a transcript of Dr. Friedman's sworn testimony in his divorce proceeding with his first wife, Meryl Friedman, in Palm Beach County,

Florida taken on January 23,2001. During the course of his testimony, Dr. Friedman described a fraudulent transfer he made to his fiancee, Christie LeMieux ("LeMieux"). Friedman testified that he transferred the $422,171.13 he received from the sale of his home on September 3, 1999 to LeMieux sometime thereafter in repayment of alleged loans from his fiancee of approximately $150,000.

The Institute, as authorized by the trial court's Order[1] amended its Complaint to add, as Count IV, a fraudulent transfer claim under Fla. Stat., Chapter **726,** et. seq. known as the Uniform Fraudulent Transfer Act ("the Act"). In Count IV, the Institute alleged that Friedman fraudulently transferred the proceeds from the sale of his home to LeMieux to defraud the Institute as a present creditor in violation of Fla. Stat. §726.106. 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.

On June 7, 2001, Friedman and LeMieux moved to stay Count IV of the Second Amended Complaint. On August **6,** 2001, the trial court held a hearing and denied Petitioners' motion. An appeal ensued. In its Petition for Certiorari, Petitioners argued that the fraudulent transfer claim should be stayed pending

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[1] Review of the Order permitting the amendment was never sought and is not a subject of this appeal.

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resolution of the breach of contract claim, relying on the limited holding presented in *Rosen v. Zoberg,* 680 So. 2d 1050 (Fla. 3d DCA 1996). In its response, the Respondent argued, that ***Cook v. Pompano Shopper,*** *Inc.*, 582 **So.** 2d 37 (Fla. 4th DCA 1991) and the Act itself controls. In *Cook,* the Fourth District held that a claim under the Uniform Fraudulent Transfer Act may proceed even though it is based upon an unresolved underlying claim in the same lawsuit. Further, the Act explicitly states that a creditor need not have a judgment to proceed under the Act.[2] The facts of *Cook* and the instant case are easily distinguishable from that of *Rosen.* On February ***6,*** 2002, the Fourth District Court of Appeals denied the Petitioner's Petition for Certiorari.

11. Summary of Argument

The Florida Supreme Court does not have jurisdiction to review the Fourth District Court of Appeal's denial of Petitioner's Petition for Certiorari. Article V, Section 3(b)(4) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(iv) provide for discretionary review in the Supreme Court of an opinion of a district court of appeal that states it expressly and directly conflicts with a decision of another district court. The lower court did not expressly state that its decision conflicts with

[2] **A** "claim", as defined by the Act, specifically includes contingent or disputed claims, whether or not they have been reduced to judgment.

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that of another court, nor did Petitioner request such certification. Because no conflict appears within the four corners of the majority decision, this Court may not acceptjurisdiction. Further, a review of the lower court's decision in the instant case reveals that the lower court's decision does not conflict with *Rosen.* This Court must not acceptjurisdiction.

III. Argument

A. No Conflict Appears Within the Four Corners of the Lower Court's Opinion

The Florida Supreme Court may only exercise its discretionaryjurisdiction in granting conflict certiorari if the conflict between the decisions is express and direct. *Reaves v. State,* 485 So. 2d 829, 830 (Fla. 1986). "Conflict between decisions must be express and direct, i.e. it must appear within the four corners of the majority decision." *Id.* An inherent or "implied" conflict may not serve as a basis for the jurisdiction of the Florida Supreme Court. *Id.; Dept. of Health & Rehabilitative Services v. National Adoption Counseling Sew., Inc.*, 498 So. 2d 888 (Fla. 1986). The existence of conflict is an absolute prerequisite for review. *The Florida Star v. B.J.F., 530* So. 2d 286 (Fla. 1988). Where the lower court opinion has established no point of law contrary to a decision of the Florida Supreme Court or another district court, Supreme Court review based on conflict is unavailable. *First Union National*

Bank v. Turney, *2002* WL 214967 (Fla. 1st DCA 2002).

A review of the lower court's opinion does not demonstrate the existence of a conflict with *Rosen.* While noting within its opinion that the Respondent cited *Rosen* in support of its arguments, the Fourth District Court of Appeal did not state that a conflict existed nor did it seek resolution of a conflict from this Court. In fact, as discussed below in Section III, *Rosen,* is easily distinguishable from the facts *sub judice,* which is obviously the reason that the lower court did not expressly certify a conflict with *Rosen.* Because inherent or implied conflict may not serve as a basis for the jurisdiction of the Florida Supreme Court and a conflict was not directly and expressly stated by the lower court, this Court does not have jurisdiction over this appeal.

B. The Instant Case is Distinguishable from *Rosen*

Where a petition is before the Supreme Court because of an alleged conflict, but the opinion on appeal is distinguishable on its facts from the case cited as in conflict, the Supreme Court must decline jurisdiction. *Department* of *Revenue* v. *Johnston,* 442 So. 2d 950 (Fla. 1983). A review of the facts of the instant case and the facts of *Rosen* lead to the inescapable conclusion that there is no conflict between the holding in *Rosen* and the instant case. The holding in Rosen is limited to the facts presented therein.

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In *Rosen, supra,* the plaintiff sued her former attorneys for overbilling of legal fees and intentional infliction of emotional distress. ***Rosen,*** 680 So. 2d at 1051. That action (Rosen I) was stayed when the attorney's insurance company was placed in receivership. *Id.* After discovering an apparent fraudulent conveyance by the attorney, the plaintiff filed a second lawsuit (Rosen II), in order to avoid a statute of limitations issue, alleging claims under the Act. *Id.* The plaintiff then moved to stay the second litigation pending the outcome of the stayed first litigation. *Id.* The Third District held that a stay was a proper vehicle to avoid a waste of judicial resources noting that Rosen I was dispositive of Rosen II. *Id.* at 1052. Thus, in *Rosen,* the trial of the fraudulent transfer action would have been rendered unnecessary if the plaintiff did not prevail on her claims in the separate underlying stayed action. In order to avoid a potentially unnecessary separate trial, the *Rosen* court held that the second action should be stayed as well.

In the instant case, the Institute brings its fraudulent transfer claim in the *same* action as its other claims. Nothing prevents the underlying claims from proceeding in the instant case. Thus, the concerns raised by *Rosen* do not apply. In the instant case, it will *conserve* judicial resources to resolve this matter in one trial. The trial judge noted this fact when he stated in rendering his decision: "[T]o me, it would be a waste of judicial resources ***not*** to try them together, to wait until the status of the

claimed creditor is determined before continuing with the rest." (emphasis added).

Rosen is limited to its unusual facts where the underlying claims could not proceed because they had been stayed in a separately filed action. *Rosen* simply does ***not*** stand for the proposition which Petitioner contends. This is made clear by subsequent holdings of the Third District. For example, in *Invo Florida, Inc. v. Somerset Venturer, Inc.*, 751 So. 2d 1263 (Fla. 3d DCA 2000), the court confirmed that a claim under the Act was a separate cause of action which could be pursued in the same action as the underlying breach of contract.

In *Invo*, the plaintiffs asserted breach of contract against a company and its principals. *Invo,* 751 So. 2d at 1264. The plaintiff also asserted various fraudulent transfer claims against other defendants. *Id.* The defendants moved for partial summaryjudgment on the fraudulent transfer claims claiming they were barred by the economic loss rule. *Id.* at 1265. The trial court granted the motion but the Third District reversed. *Id.*

The Third District noted that the fraudulent transfer claims were independent torts separate and apart from the breach of contract claims. *Id.* The court noted that without these claims, the plaintiffs' breach of contract claims would be "worthless." *Id.* at 1266. It is clear from *Invo* that the Third District contemplated all claims continuing in the same action. No mention is made of a mandatory stay of the

fraudulent transfer claims as Petitioner claims the holding in *Rosen* would require.

C. Conclusion

For the foregoing reasons, this Court does not have jurisdiction over this matter and should deny certiorari for review.

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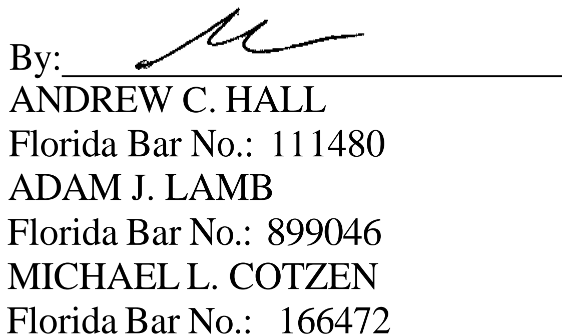

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing brief 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/Phillip C. Graham,** Esq., Helfrey, Simon & Jones, P.C., 120 South Central Avenue, Suite 1500, St. Louis, Missouri 63105 on this 29th day of March, 2002.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this response brief is typed in New Times Roman 14-point font and complies with the font requirements set forth in Fla. R. **App.** P. 9.100(l)

ADAM J. LAMB

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