IN THE SUPREME COURT OF FLORIDA

ECHEVARRIA, McCALLA, RAYMER BARRETT & FRAPPIER, a Florida general partnership, et al.,

Petitioners,

vs.

BRADLEY COLE, individually and on behalf of all others similarly situated,

Respondents.
_____/

CASE NOS. SC05-564, SC05-647 & SC05-649
L.T. Case Nos. 1D03-1686, 1D02-3818, 1D02-4746, 1D02-4982

RESPONDENTS' BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Echevarria's Statement of the Case and Facts contains matters irrelevant to whether the First District's opinion conflicts with other cases, and inaccurately references matters that are outside the four corners of the opinion. Echevarria refers to a trial court ruling (a partial summary judgment in favor of Cole) that is irrelevant to whether this Court should exercise its jurisdiction because of a conflict. Echevarria suggests that the trial court premised its class certification order on that ruling. (Pet. Brief at p. 1.) Because the existence of the partial summary judgment is not even mentioned in the First District's opinion and therefore irrelevant to its decision, it cannot serve as a basis for an express or direct conflict. Therefore, it is improper for Echevarria to assert it.

Additionally, Echevarria erroneously contends that the First District expressly ruled, in a footnote, that its denial of a prior petition for certiorari constituted an "implicit" ruling on the merits. The language in the footnote is dicta, does not constitute an express ruling, and was not necessary to the decision rendered by the First District below.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction because there is no express and direct conflict with the decisions cited by Echevarria and the First District's opinion. Here,

nothing within the four corners of the First District's decision demonstrates that there is an express and direct conflict where *Levin, Middlebrooks, et al. v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994) and *Boca Investors Group, Inc. v. Potash*, 835 So. 2d 273 (Fla. 3d DCA 2002), *review denied*, 846 So. 2d 1147 (Fla. 2003) did not involve the statutory causes of action at issue here, and where the First District explicitly limited its holding to find that "the judicially created judicial immunity rule cannot be applied to bar the statutory causes of action in this case." (Op. at p. 9.) (Emphasis added.) Further, there is also no express and direct conflict between *Topps v. State*, 865 So. 2d 1253 (Fla. 2004) and footnotes in the First District's decision because the footnotes are dicta unnecessary to the decision and because Echevarria was permitted to argue the same issue that had been presented in a petition for certiorari previously denied by the court, which argument was explicitly rejected by the First District in the instant decision. (Op. at p. 9.) Accordingly, there is no conflict and Echevarria's petition should be dismissed.

ARGUMENT

I. THERE IS NO CONFLICT CONCERNING LITIGATION IMMUNITY.

Echevarria cannot demonstrate an express and direct conflict. Conflict jurisdiction conferred by article V, section 3(b)(3) of the Florida Constitution requires that the "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *Dep't of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986) (conflict must be express and direct; inherent or implied conflict is insufficient).

A. There is no conflict with *Levin*.

Here, the four corners of the opinion do not demonstrate an express and direct conflict with *Levin*. Rather, the First District held that the litigation immunity privilege applied in *Levin* did not control in this case because the rule had been created and applied in the context of common law tort actions. (Op. at pp. 8-9.) *Levin* simply did not concern any statutory causes of action and held that the litigation immunity, which had been applied to other torts such as slander, libel, and perjury, also applied to tortious interference with a business relationship. *Levin*, 639 So. 2d at 608. The First District, therefore, did not contravene *Levin*

where it restricted its holding to "the statutory causes of action in this case." (Op. at p. 9.) Because of this limitation, Echevarria's hyperbole concerning the potential that litigation immunity would not apply to lawyers' or litigants' acts in divorce cases under Chapter 61 is misplaced.

Importantly, the First District also recognized that the application of the litigation immunity rule to the statutory causes of action in this case would violate the limitations on judicial authority because "as a separation of powers matter, a judicially created policy such as the judicial immunity rule must not be used to limit application of a legislatively created statutory cause of action." (Op. at p. 9 citing *Delgado v. J .W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602 (Fla. 2d DCA 1997)); *see also Computech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1223 (Fla. 1999). In *Computech*, this Court held that the judicially created economic loss rule could not be used to bar a statutory claim based upon a violation of the state building code (§ 553.84, Fla. Stat.). There, this Court explained that where the Legislature expressly provides a statutory cause of action that uses unqualified terms such as "any person," it evinces a legislative intent that such an action not be limited or barred by the application of a judicial rule. 753 So. 2d at 1223. Here, section 501.211, Florida Statutes, expressly authorizes "anyone aggrieved by a violation" of Florida's Deceptive and Unfair

Trade Practices Act ("FDUTPA"), "without regard to any other remedy or relief to which a person is entitled" to bring an action for declaratory, injunctive, and/or compensatory relief.

Similarly, the plain terms of Florida's Consumer Collection Practices Act, sections 559.55, *et seq.*, Florida Statutes ("FCCPA"), demonstrate that the Legislature did not intend for lawyers to be immune from debt collection activities. The FCCPA provides that its remedies are in addition to its federal counterpart, the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. sections 1692, *et seq.*, and that if there is an inconsistency between the FCCPA and the FDCPA, then the "provision which is more protective of the consumer or debtor shall prevail." § 559.552, Fla. Stat. In construing the FDCPA, the United States Supreme Court rejected the same argument concerning litigation immunity that Echevarria advances here holding that Congress did not intend for lawyers to be immune from FDCPA claims "even when that activity consists of litigation." *See Heintz v. Jenkins*, 514 U.S. 291, 299 (1995). The Florida Legislature likewise did not intend for lawyers to be immune from the FCCPA's prohibitions against unscrupulous debt collection activities. § 559.55(6), Fla. Stat. (defining "debt collector" as "any person" who regularly collects debts); *see Sandlin v. Shapiro & Fishman*, 919 F. Supp. 1564, 1569-70 (M.D. Fla. 1996) (rejecting law firm's claim

that reinstatement letters were inadmissible offers to compromise because it would effectively overrule *Heintz*). Accordingly, no basis for conflict jurisdiction exists where the First District's decision does not conflict with *Levin*, and where it is consistent with the analysis in *Computech* given the legislative intent that FDUTPA and FCCPA claims should not be barred by the application of a judicially created rule.

B. There is no conflict with *Boca Investors*.

Echevarria argues that the First District's decision conflicts with the narrow and unexplained decision in *Boca Investors.* In *Boca Investors*, after first affirming the application of the litigation immunity rule to the common law tortious interference claim (the identical claim at issue in *Levin*), the Third District affirmed the trial court's denial of a motion to amend the complaint to add an unidentified statutory antitrust daim stating that "such a claim is also based on statements covered by the litigation privilege. *See Burton*, 725 So. 2d at 451." *Boca Investors*, 835 So. 2d at 275. This statement does not provide a basis sufficient to create an express and direct conflict with the First District's decision.

Foremost, a lack of express and direct conflict with *Boca Investors* is facially demonstrated by the fact that the First District explicitly limited the application of its ruling to the FCCPA and FDUPTA statutory causes of action "in

this case." (Op. at p. 9.) *Boca Investors* (like *Levin*) simply did not concern the statutory violations at issue here. Further, there is no indication that the Third District considered the separation of powers doctrine that informed the First District's decision here. Indeed, its citation to *Burton* as support for its ruling indicates that the Third District did not consider that doctrine because *Burton* also did not involve any statutory claim. *Burton v. Salzberg*, 725 So. 2d 450, 451 (Fla. 3d DCA 1999).

Finally, the First District's opinion does not conflict with *Boca Investors* where, notwithstanding the application of *Levin*, a statutory exemption would have barred the antitrust claim. Under federal antitrust law, antitrust claims arising out of litigation activities are barred by the principle of litigation immunity. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993). This federal exemption has been incorporated by the Florida Legislature into Florida's Antitrust Act.[1] Consequently, irrespective of whether the antitrust claim in *Boca Investors* was based on a violation of Florida or federal law, it would have been barred by the exemption for litigation activities.

[1] Section 542.20, Florida Statutes, provides that "[a]ny activity or conduct exempt under Florida statutory or common law or exempt under the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter."

Thus, there is no conflict between *Boca Investors* and the First District's decision here because, even if the Third District wrongly reasoned that the "*Levin*" litigation immunity barred the antitrust claim, the Third District correctly affirmed denial of the motion to add an antitrust claim based on the statutory antitrust litigation immunity. *See Walsdorf Sheet Metal Works, Inc. v. Gonzalez*, 719 So. 2d 355, 357 n.2 (Fla. 1st DCA 1998) (correct result should be affirmed even if decided by an incorrect analysis).

II. THERE IS NO CONFLICT WITH *TOPPS*.

Echevarria argues that the First District's decision conflicts with *Topps* because of footnotes two and three. (Pet. Brief at p. 7.) Foremost, the language in the footnotes is dicta and was not necessary to the First District's decision. *See Withlacoochee River Elec. Co-op., Inc. v. Tampa Elec. Co.*, 158 So. 2d 136, 137 (Fla. 1963). As such, the footnotes cannot serve as a basis for conflict jurisdiction.

Moreover, it is abundantly clear that the First District's denial of Echevarria's petition for writ of certiorari that was previously filed in 2001 did not constitute a decision on the merits as evidenced by the explicit ruling in the instant decision rejecting the same argument on the mootness issue raised by Echevarria in its prior writ. (Op. at pp. 9-11.) *See State Dep't of Envtl. Reg. v. Falls Chase Special Taxing Dist.*, 424 So. 2d 787 n. 8 (Fla. 1st DCA 1982). Therefore,

consistent with *Topps*, Echevarria was not barred from re-asserting this issue in the instant appeal, and there is no conflict.

CONCLUSION

There is no express and direct conflict between the First District's opinion and *Levin*, *Boca Investors* or *Topps.* Accordingly, this Court should not exercise its jurisdiction to review the First District's decision, and should dismiss Echevarria's petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Michael J. McGirney, Esq., and Dale T. Golden, Esq.,** Marshall Dennehey Warner Coleman and Goggin, 201East Kennedy Boulevard, Suite 1100, Tampa, FL 33602;and **John Beranek, Esq.,** Ausley & McMullen, 227 South Calhoun Street, Post Office Box 391, Tallahassee, FL 32302; by regular U. S. Mail this _____ day of May, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Respondent's Brief on Jurisdiction complies with the font requirements of Rule 9.100(1), Florida Rules of Appellate Procedure.

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