

**IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA**

SANDRA FROSTI,

Appellant/Petitioner,

vs.

Case No.: SC07-122

DCA No.: 2D05-3270

**LA VERNE CREEL, as personal representative
of the estate of WILLIAM H. HOUK,**

Appellee/Respondent.

***Respondent's Answer Brief
on Jurisdiction***

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PRELIMINARY NOTE

The Petitioner has filed her Notice to Invoke this Court's discretionary review pursuant to Article V, § 3(b)(4) of the Florida Constitution and Fla. R. App. P. 9.030(2)(A)(vi). Rule 9.120(d), Fla. R. App. P. provides:

Petitioner's brief, limited solely to the issue of the Supreme Court's jurisdiction and accompanied by an appendix containing only a conformed copy of the decision of the district court of appeal, shall be served within ten days of filing the Notice...If jurisdiction is invoked under rule 9.030(a)(2)(A)(v)(certifications of questions of great public importance by the district courts to the Supreme Court), no briefs on jurisdiction shall be filed.

As this Court is aware, effective January 1, 2007, jurisdictional briefs are required when a district court certifies direct conflict. See *In Re Amendments to The Florida Rules of Appellate Procedure*, No. SC06-159 (October 26, 2006).

Although the filing of jurisdictional briefs in these cases is a recent development, it appears that the procedure for filing such briefs has remained unchanged. Hence, pursuant to rule 9.120(d), the Petitioner's Brief on Jurisdictional should be limited solely to the issue of jurisdiction and accompanied only by a conformed copy of the Second District's decision.

Here, the Petitioner's Brief on Jurisdictional contains arguments and facts that are outside the scope of rule 9.120(d). Specifically, the Petitioner includes facts that are not set forth in the Second District's opinion. Further, the

Petitioner's Brief on Jurisdiction goes beyond addressing solely the issue of jurisdiction and argues the merits of the underlying case. While the Respondent strongly disagrees with these arguments (and the full record provides multiple reasons to affirm, including the premature filing defect), this brief will address only the threshold issue of discretionary jurisdiction raised by the underlying District Court opinion.

The opinion in the Appendix filed with the Petitioner's Brief on Jurisdiction shall be referred to as (A _). The Petitioner's Brief on Jurisdiction shall be referred to as (J.B. p_).

STATEMENT OF THE CASE AND FACTS

As noted above, the Petitioner's Statement of the Case and Facts exceeds the scope of the Second District's opinion. Respondent offers the following as an alternative.

The Petitioner, Sandra Frosti, challenged the trial court's order denying her Motion for Attorneys' Fees and Costs pursuant to Florida Rule of Civil Procedure 1.442 and § 768.79(1), Florida Statutes (1995). (A 1). Specifically, the district court denied the Petitioner's Motion for Attorneys' Fees and Costs because her Proposals for Settlement had been prematurely filed. (A 2). On appeal, the Second District affirmed, citing *Bottcher v. Walsh*, 834 So. 2d 183 (Fla. 2d DCA

2002). (A 2). The Second District certified conflict with *Mills v. Martinez*, 909 So. 2d 340 (Fla. 5th DCA 2005), based on *Mills* having certified conflict with *Bottcher*. (A 2).

SUMMARY OF ARGUMENT

Although this Court has jurisdiction pursuant to Article V, § 3(b)(4) of the Florida Constitution, this Court should decline review of this case because there is no actual conflict between the lower courts' opinions. The arguments set forth in the Petitioner's Brief on Jurisdiction demonstrate that, in fact, there is no conflict between the Second District's decision in *Frosti* and the Fifth District's decision in *Mills*. The Petitioner has argued against conflict in this case by acknowledging that the facts presented in *Frosti* are dissimilar to those presented to the court in *Mills*.

Further, this is not the type of case that requires this Court to exercise its discretionary jurisdiction to resolve an important legal issue. In fact, any conflict that might exist between *Frosti* and *Mills* has already been resolved by this Court in *Lamb v. Matetzschk* and *Saia Motor Freight Line, Inc. v. Reid*.

The Fifth District's decision in *Mills* was based on the court's reasoning that "rigid enforcement" of procedural rules is not necessary if such enforcement would defeat the rule's purpose. 909 So. 2d at 343. This Court's pronouncement in

Lamb that a strict interpretation of rule 1.442 is required and this Court's interpretation of rule 1.525 in *Reid* illustrate the fatal error in the Fifth District's reasoning.

The Fifth District's opinion in *Mills* is an aberration and contrary to this Court's interpretation and reasoning with regard to rule 1.442. The decisions in *Frosti* and *Bottcher* are correct interpretations of the law and are consistent with this Court's previous interpretation of both the rule and statute. Further, they are consistent with the fundamental principle that statutes and rules that are in derogation of common law must be strictly construed.

This is simply not a case that requires this Court to exercise its discretionary jurisdiction.

ARGUMENT

ISSUE

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION WHEN THERE IS NO ACTUAL CONFLICT BETWEEN THE LOWER COURTS' OPINIONS AND ANY POTENTIAL CONFLICT HAS ALREADY BEEN RESOLVED BY THIS COURT.

Although a decision certified as being in direct conflict under Article V, § 3(b)(4) does not need to "expressly" conflict with another appellate decision, there still must be conflict in the decisions of the district courts. See *Department of Law*

Enforcement v. House, 678 So.2d 1284 (Fla. 1996)(the Supreme Court accepted jurisdiction under Article V, § 3(b)(4) to review an unpublished order dismissing an appeal, which certified conflict with the decision of another district court). Although conflict is certified by the district court, this Court is not required to reach the merits of the case simply because of that certified conflict. This Court may decide that the district court decisions are distinguishable and that there is no conflict to be resolved. See, e.g., *State v. Lovelace*, 928 So.2d 1176 (Fla. 2006)(discharging an earlier granted review based on the certified conflict); *Renaud v. State*, 926 So.2d 1241 (Fla. 2006); *Summit Claims Management v. Lawyers Express Trucking, Inc.*, 944 So.2d 339 (Fla. 2006)(dismissing the proceeding and declining to exercise discretionary review of the district court's certified conflict, after the court determined that no actual conflict existed between the district courts' opinions regarding the certified question).

The relevant question presented at this time is whether this Court should accept discretionary review of this case. That question involves consideration of whether the Second District Court of Appeal's decision in *Frosti v. Creel*, 943 So. 2d 1023 (Fla. 2d DCA 2006) conflicts with the Fifth District Court of Appeal's decision in *Mills v. Martinez*, 909 So. 2d 340 (Fla. 5th DCA 2005).

Contrary to the Petitioner's argument, the Second District Court of Appeal did not certify conflict between *Bottcher v. Walsh*, 834 So. 2d 183 (Fla. 2d DCA

2002) and *Mills v. Martinez*, 909 So. 2d 340 (Fla. 5th DCA 2005). (J.B. p5). Rather, the court noted that because *Mills* certified conflict with *Bottcher*, it was certifying conflict between *Frosti* and *Mills*. Thus, the Petitioner's arguments regarding the Second District's decision in *Bottcher* and whether that decision was proper goes to the merits of the underlying case, rather than the basis for this Court accepting discretionary jurisdiction. To the extent those arguments do not address the jurisdictional issues presented, they will not be addressed at this time.

A. There is No Actual Conflict Between the District Courts' Decisions in *Frosti v. Creel* and *Mills v. Martinez*.

The arguments set forth in the Petitioner's Brief on Jurisdiction demonstrate that, in fact, there is no conflict between the Second District's decision in *Frosti* and the Fifth District's decision in *Mills*.

In *Mills*, the proposal for settlement was timely served but prematurely filed with the court two years prior to trial. 909 So.2d at 343. The Fifth District awarded attorneys' fees, concluding that the premature filing was immaterial and not prejudicial. *Id* at 344. In her Brief on Jurisdiction, the Petitioner acknowledges that the court in *Frosti* considered a factual scenario not previously addressed by the district courts of appeal.

Specifically, the Petitioner asserts "in the case at bar, the lower court expanded the reach of the extreme remedy of rendering void proposals for

settlement deemed prematurely filed by including those filed post verdict. No court has defined what is *premature* and both statute and rule lack any guidance as to the definition.” (J.B. p3) (underlining added). Further, the Petitioner argues the Second District “has expanded the breadth of its holding in *Bottcher* by including the post-trial filing of the Proposals for Settlement in *Frosti*.” (J.B. p7) (underlining added). Thus, the Petitioner herself has argued against conflict jurisdiction in this case. As acknowledged by the Petitioner, the facts presented in *Frosti* are dissimilar to those presented to the court in *Mills*.

Thus, this Court should decline to exercise its discretion to review this case because there is no actual conflict between the lower courts’ opinions. Additionally, this Court should decline discretionary review of this case because any potential conflict has already been resolved by this Court in *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005) and *Saia Motor Freight Line, Inc. v. Reid*, 930 So.2d 598 (Fla. 2006).

B. This Court Should Not Accept Discretionary Jurisdiction of this Case as This Court Has Already Resolved Any Potential Conflict Between *Mills* and *Frosti*.

This is not the type of case that requires this Court to exercise its discretionary jurisdiction to resolve an important legal issue. In fact, any conflict that might exist between the Second District’s opinion in *Frosti* and the Fifth

District's opinion in *Mills* has already been resolved by this Court in *Lamb v. Matetzschk and Saia Motor Freight Line, Inc. v. Reid*.

In *Lamb*, this Court clearly and unambiguously stated that because § 768.79, Florida Statutes and Rule 1.442, Florida Rules of Civil Procedure, are in derogation of the common law rule that each party should pay its own attorneys' fees they must be strictly construed. 906 So. 2d at 1040. In *Lamb*, this Court applied a strict construction to the plain language of rule 1.442 in holding that offers of judgment made to multiple offerors must apportion the amounts attributable to each offeror, even if a party's liability is purely vicarious. *Id.*

Further, this Court recently required a strict interpretation and application of Rule 1.525, Florida Rules of Civil Procedure, in *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598 (Fla. 2006). In *Reid*, this Court concluded that the plain language of rule 1.525 set forth a "bright-line" time for the filing of a motion for attorneys' fees that had to be strictly construed and enforced.

The Fifth District's decision in *Mills* was based on the court's reasoning that "rigid enforcement" of procedural rules is not necessary if such enforcement would defeat the rule's purpose. 909 So. 2d at 343. This Court's broad pronouncement in *Lamb* that a strict interpretation of rule 1.442 is required, and this Court's interpretation of rule 1.525 in *Reid* illustrate the fatal error in the Fifth District's reasoning.

Also illustrative are the concurring opinions in *Lamb*. Justice Pariente wrote a concurring opinion in which Justices Anstead and Lewis joined. Additionally, Justice Lewis wrote an opinion concurring in the result only. In both concurring opinions, the Justices noted that although the opinion reached by the majority was required - - based on the necessary strict interpretation of rule 1.442 - - the result was contrary to the manner in which settlements are made and contrary to the purpose of the rule, which is to encourage settlements. See 906 So.2d at 1043 (Pariente, C.J. specifically concurring); 906 So.2d at 1045 (Lewis, J. concurring in result only). This Court's opinion in *Lamb* clearly provides that a strict application of rule 1.442 is required even when such construction results in a decision that is contrary to the goal and intent of the rule.

Clearly, the Fifth District's opinion in *Mills* is an aberration and contrary to this Court's interpretation and reasoning with regard to rule 1.442. The decisions in *Frosti* and *Bottcher* are correct applications of the law and consistent with this Court's previous interpretation of both the rule and statute. Further, they are consistent with the fundamental principle that statutes and rules that are in derogation of common law must be strictly construed.

This Court's broad pronouncement in *Lamb* with regard to the application and interpretation of rule 1.442 and section 768.79 resolves any potential conflict

in this case. This is simply not a case that requires this Court to exercise its discretionary jurisdiction.

CONCLUSION

For the reasons stated herein, the Respondent, WILLIAM H. HOUK, respectfully requests that his Court decline to exercise its discretionary jurisdiction in this case.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished via United States Mail to William J. Capito, Esq., 511 Grove Drive, Lutz, FL 33548, *Attorney for Appellant/Petitioner*, on this _____ day of February, 2007.

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CERTIFICATE OF COMPLIANCE

I **HEREBY CERTIFY** that the foregoing satisfies the requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2) and is submitted in Times New Roman 14-point font.

Jennifer J. Card