IN THE SUPREME COURT OF FLORIDA

EDMUND MADY,

Petitioner,

v.

DAIMLERCHRYSLER CORPORATION,

Respondent.

Fla. S. Ct. No. SC08-808

DCA No. 4D07-842
Trial Ct. No. 05-CA-7920-AO

PETITIONER'S BRIEF ON JURISDICTION

On Petition for Review from the

Fourth District Court of Appeal

State of Florida

Theodore F. Greene III, Esquire
Fla. Bar No. 0502634
Law Offices of Theodore F. Greene, LC
PO Box 720157
Orlando, FL 32872-0157
Phone: (407) 482-8212
Of Counsel to Krohn & Moss, Ltd.,
attorneys for the Petitioner

Aaron Radbil, Esquire
Fla. Bar No. 0047117
Krohn & Moss, Ltd.
120 W. Madison St., 10th Floor
Chicago, IL 60602
Phone: (312) 578-0427
Counsel for Petitioner

I. TABLE OF CONTENTS

II. TABLE OF CITATIONS

Case Law

Florida Rules of Procedure

III. STATEMENT OF THE CASE & FACTS

1. The Central Issue in this Appeal.

During the course of the underlying lawsuit the Defendant served the Plaintiff with an offer of judgment which stated the amount offered was exclusive of attorney fees, which the Defendant agreed would be decided by the trial court following acceptance of the offer.[1] (AR 169-200, Exhibit C.)[2] The Defendant agreed to immediately pay the Plaintiff $8,500 on his substantive claim,[3] but expressly stated that the "proposal is made exclusive of attorney's fees, interest and costs,"[4] which "DaimlerChrysler concedes that Plaintiff's counsel may seek . . . through a hearing before this Court." (Id at ¶ 3.) The Plaintiff accepted the offer and moved for fees and costs. (AR 169-200.) The Defendant then argued that despite the fact that the offer of judgment allows the Plaintiff to seek fees and costs and preserves the trial court's jurisdiction to award them,[5] the Plaintiff was supposedly barred as a matter of law from recovering them.[6] The trial court agreed and denied the Plaintiff's motion. (AR 213.) The issue in this appeal is whether the Plaintiff is barred as a matter of law from recovering fees and costs by

---

[1] Petitioner will generally be referred to as "Plaintiff;" Respondent as "Defendant."
[2] The record on appeal is generally cited as "AR" followed by page number(s).
[3] AR 169-200, Exhibit C at initial paragraph and at ¶ 2(a).
[4] Id at ¶ 2.
[5] Offer of Judgment at ¶ 2 & 3.
[6] See Defendant's "Memorandum in Opposition to Plaintiff's Motion for Entitlement to Attorney Fees" at supplemental record.

accepting an offer of judgment which preserves the Plaintiff's right to seek fees as well as the trial court's jurisdiction to decide the issue which the offer expressly permits the Plaintiff to bring before it. (AR 169-200; 228-230.)

2. Trial-level Facts & Procedural History (Mady).

In May 2003 the Plaintiff leased a 2003 Dodge Viper. (AR 1-67.) The vehicle was manufactured, supplied and warranted by the Defendant. (Id at Exhibit "B.") Shortly after taking possession, the Plaintiff began to experience serious and recurring problems with the vehicle. (AR 1-67.) For example, the steering and suspension system showed poor handling characteristics and had a grinding noise in the rear end and wheel distortion in the front end. (Id, ¶ 19a.) A defective electrical system caused the vehicle's lights to flicker when the headlights were on, and intermittently set off various dashboard warning lights. (Id, ¶19b.) Additionally, the engine ran rough, backfired, lost power and made snapping noises on acceleration (Id, ¶ 19c); the transmission made shifting difficult (Id, ¶ 19e); the windshield whistled constantly, and the fender and other accessories were coming loose and separating from the vehicle (Id, ¶ 19d). Each time the Plaintiff experienced problems with the vehicle, he brought it back in for warranty repairs. (Id, ¶¶ 15-21, 37.) Two years into the lease the defects remained uncorrected. (Id, ¶ 18; AR 169-200, Exhibit "B.") Frustrated with the Defendant's inability or unwillingness to repair the vehicle, the Plaintiff hired an attorney and

revoked his acceptance of the vehicle. (AR 169-200, Exhibit B.) The Defendant refused revocation, and left with no other choice the Plaintiff filed suit. (AR 1-67.)

During the course of the underlying action the Defendant filed two offers of judgment: the first for $6,500; the second for $8,500.[7] The Defendant's first offer of judgment and its second (the one ultimately accepted) were substantively identical in all material respects.[8] Both stated they were exclusive of attorney fees, both preserved the Plaintiff's right to seek fees, and both preserved the court's jurisdiction to award fees. (Id.) In both offers "DaimlerChrysler concedes that Plaintiff's counsel may seek . . . attorneys' fees through a hearing before this Court" following acceptance. (AR 169-200 at Exhibit C, ¶ 3.) The accepted offer expressly provides that "Edmund Mady will receive eight thousand five hundred dollars and xx/00 ($8,500.00) *exclusive of attorneys' fees*." (AR 169-200 at Exhibit C, ¶ 2(a), emphasis added.) Both offers expressly stipulate to the trial court's involvement in the settlement, and both expressly preserve the court's jurisdiction to decide the matter of fees and costs.[9]

The Plaintiff accepted the second offer and moved for attorney fees and costs. (AR 169-200.) The Plaintiff argued he was the prevailing party by virtue not only of having taken some of the relief sought in bringing suit, but that the

---

[7] The first offer was filed on 11/7/05 (AR 140); the second on 12/19/05 (AR 150).
[8] See, *inter alia*, Appendix at Appellant's Initial Brief to the district court.
[9] See Offer of Judgment at ¶¶ 2-4 (AR 169-200 at Exhibit C).

offer not only contemplates an award of fees and costs to the Plaintiff, it expressly preserves the trial court's jurisdiction to award them. (Id.) The Defendant argued the Plaintiff could only recover fees and costs if he obtained either a judgment on the merits or a consent decree.[10] The trial court agreed, ruled the Plaintiff was barred as a matter of law from recovering fees, and denied the Plaintiff's motion. (AR 213). The Plaintiff appealed. (AR 228-230.)

3. Appellate-level Facts & Procedural History (Mady, Dufresne and San Martin).

On February 8, 2008, the Second District decided a case on substantively identical facts after hearing substantively identical legal arguments. See Dufresne v. DaimlerChrysler Corp., 975 So.2d 555 (Fla. 2nd DCA 2008). Chrysler served an offer of judgment in Dufresne (as it did in Mady) that preserved the plaintiff's right to seek fees and costs and the trial court's jurisdiction to award them. Dufresne at 557. When the plaintiff moved for attorney fees and costs, however, Chrysler argued the plaintiff was barred from recovering the very thing expressly held out in the offer. Id. Chrysler argued that Buckhannon Board & Care[11] supposedly bars a plaintiff from recovering fees and costs unless the plaintiff obtains either a judgment on the merits or a consent decree. Id. The Second District analyzed

---

[10] See Defendant's Memorandum in Opposition to Plaintiff's Motion for Entitlement to Attorneys' Fees at supplemental record.

[11] Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources, 532 U.S. 598 (2001).

Buckhannon and concluded that (1) the case requires the court to look for a judicially sanctioned change in the legal relationship of the parties, and (2) that the Buckhannon court used judgments on the merits and consent decrees as two examples of judicially sanctioned changes in the legal relationship of the parties which would qualify a plaintiff as the prevailing party for purposes of a fee award. Id. The Second District held that "[w]hile either a judgment on the merits or a consent decree is sufficient to make a plaintiff a prevailing party, they are not, as DaimlerChrysler contends, the only bases upon which a plaintiff can be considered a prevailing party." Id. The Second District also relied on a federal Eleventh Circuit Court of Appeals decisions which interpreted Buckhannon and came to the same conclusion. Id, citing Am. Disability Ass'n v. Chmielarz, 289 F.3d 1315, 1319 (11th Cir. 2002). In the end, the court concluded that Chrysler's argument was not only wrong, but irrelevant, because "the settlement here is the functional equivalent of a consent decree and [the consumer] is not precluded from claiming entitlement to attorney's fees under the MMWA simply because he accepted [it]." Dufresne at 557. The Second District reversed the trial court's denial of fees, and ruled that the consumer may be awarded fees as the prevailing party. Id at 557.

Six weeks later, the Fourth District interpreted Buckhannon far more narrowly. Buckhannon instructs courts to look for a "*judicially sanctioned* change in the legal relationship of the parties," as part of the prevailing party analysis for

an award of attorney fees. Buckhannon at 605 (emphasis added). The Fourth District interpreted that as imposing a "requirement [of] a *court-ordered* change in the legal relationship between the parties regardless of whether the defendant admits liability." Mady v. DaimlerChrysler, --- So.2d ---, 2008 WL 783329 * 2 (Fla. 4th DCA 2008) (emphasis added). Buckhannon held that "these examples" (judgments on the merits and consent decrees) provide the necessary "judicial *imprimatur* on the change" to justify an award of fees and costs. Buckhannon at 605. The Fourth District interpreted that to limit an award of fees and costs *only* to those situations in which a plaintiff obtains either a judgment on the merits or a consent decree. Mady at * 2. The Second District relied on, and expressly cited to an Eleventh Circuit Court of Appeals decision mirroring the Second District's analysis of Buckhannon. Dufresne at 557. The Fourth District asserted it was aligning itself with federal decisions contrary to that analysis, but failed to cite a single case in support of its extremely narrow reading of Buckhannon. See Mady at * 2. The Fourth District expressly disagreed with the Second District's holding in Dufresne and certified conflict to the Supreme Court. Mady at * 3.

Four weeks after Mady, the Third District decided a third case on substantively identical facts after hearing substantively identical legal arguments. San Martin v. DaimlerChrysler Corp., --- So.2d ---, 2008 WL 1809321 (Fla. 3rd

DCA April 23, 2008).[12] The Third District expressly agreed with the Second District's analysis.

> Our careful study of *Buckhannon* persuades us that because in the two cases before us the court by rule retained authority to enforce the terms of the accepted offers of judgment, see Fla. R. Civ. P. 1.442(d); *Abbott & Purdy Group, Inc. v. Bell*, 738 So.2d 1024, 1026 (Fla. 4th DCA 1999), these accepted offers were the near functional equivalent of consent decrees in which neither party admits liability. Stated otherwise, the use of the procedural vehicle as it was employed by the parties in this case removes their arrangement from that of a private settlement or voluntary cessation. We note that our sister court, the Second District Court of Appeal, has very recently reasoned to the same result. See *Dufresne v. DaimlerChrysler Corp.*, 975 So.2d 555 (Fla. 2nd DCA 2008).

San Martin v. DaimlerChrysler Corp., --- So.2d ---, 2008 WL 1809321 * 4 (Fla. 3rd DCA April 23, 2008). Like the Second District, the Third District held that an offer of judgment which allows a plaintiff to seek fees and costs and preserves the court's jurisdiction to award them is essentially the equivalent of a consent decree. The Third District didn't mention Mady, but expressly agreed with the Second District's analysis, and reached the same result as in Dufresne.

IV. SUMMARY OF THE ARGUMENT

Rule 9.030 governs appeals seeking to invoke the discretionary jurisdiction of the Florida Supreme Court. See Fla. R. App. P. 9.030. There are three independent bases under the rule upon which the Supreme Court may rely to

[12] The case is actually a consolidation of two cases with substantively identical facts which present identical legal issues for resolution by the district court.

exercise discretionary jurisdiction over this appeal. First, the decision expressly certifies direct conflict with the decision of another district court on the same issue. See Rule 9.030(a)(2)(A)(vi). Second, the decision expressly and directly conflicts with a decision of another district court of appeal on the same question of law. See Rule 9.030(a)(2)(A)(iv). Third, the decision expressly and directly conflicts with a decision of the Supreme Court on the same question of law. Id.

VII. ARGUMENT.

There are three independent bases for exercising discretionary jurisdiction.

1. The decision of the Fourth District certifies direct conflict with a decision by the Second District on the same issue of law.

Rule 9.030(a)(2)(A)(vi) provides that "[t]he discretionary jurisdiction of the supreme court may be sought to review . . . decisions of district courts that . . . are certified to be in direct conflict with decisions of other district courts of appeal." See Fla. R. App. P. 9.030(a)(2)(A)(vi). The decision being appealed certifies direct conflict with a decision issued several weeks ago by the Second District on the same issue of law and decided on substantively identical facts. See Mady v. DaimlerChrysler, --- So.2d ---, 2008 WL 783329 * 3 (Fla. 4th DCA March 26, 2008) ("Because we reach a decision contrary to that of the Second District Court of Appeal, we certify conflict with Dufresne v. DaimlerChrysler Corp., No. 2D05-5118, 975 So.2d 555 (Fla. 2nd DCA 2008).") When a case is certified to the supreme court, the certificate itself establishes appellate jurisdiction." Padovano,

Florida Appellate Practice, p. 314 FN 1 (West 2007); see also State v. Vickery, 961 So.2d 309, 312 (Fla. 2007) ("a certification of conflict provides us with jurisdiction per se"). The Supreme Court may therefore exercise discretionary jurisdiction.

2. The decision of the Fourth District expressly and directly conflicts with a decision by the Third District on the same issue of law.

Rule 9.030(a)(2)(A)(iv) provides that "[t]he discretionary jurisdiction of the supreme court may be sought to review . . . decisions of district courts that . . . expressly and directly conflict with the decision of another district court of appeal . . . on the same question of law." See Fla. R. App. P. 9.030(a)(2)(A)(iv). In addition to being certified as in direct conflict with the Second District's decision in Dufresne, the decision on appeal also directly and expressly conflicts with a ruling by the Third District on the same question of law decided on substantively identical facts. Compare Mady v. DaimlerChrysler, --- So.2d ---, 2008 WL 783329 (Fla. 4th DCA March 26, 2008) to San Martin v. DaimlerChrysler Corp., --- So.2d ---, 2008 WL 1809321 (Fla. 3rd DCA April 23, 2008). The Third District expressly approved of Dufresne, and arrived at the same decision that the Second District had several weeks earlier. San Martin at * 4 ("We note that our sister court, the Second District Court of Appeal, has very recently reasoned to the same result"). The Third District's holding in San Martin mirrors the Second District's in Dufresne. Since the Third District's decision mirrors the Second's, and since the Fourth District certified direct conflict between its decision and the Second's, it

logically follows that the Fourth District's decision also conflicts with the Third's decision as well. The Supreme Court may therefore exercise discretionary jurisdiction over this appeal under Rule 9.030(a)(2)(A)(iv). See State v. Vickery, 961 So.2d 309, 312 (Fla. 2007) (Supreme Court has discretionary jurisdiction where a decision expressly and directly conflicts with decision of another district).

3. The decision of the Fourth District expressly and directly conflicts with a decision of the Florida Supreme Court on the same question of law.

Rule 9.030(a)(2)(A)(iv) also allows the Court to exercise discretionary jurisdiction where the decision expressly and directly conflicts with a decision of the supreme court on the same question of law." See Fla. R. App. P. 9.030(a)(2)(A)(iv). The issue in Wollard v. Lloyd's and Companies of Lloyd's is identical to the one here. See Wollard v. Lloyd's and Companies of Lloyd's, 439 So.2d 217 (Fla. 1983). In Wollard, this Court held that "Requiring the plaintiff to continue litigation in spite of an acceptable offer of settlement merely to avoid having to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system." Wollard at 218. This Court held in Wollard that a plaintiff shouldn't have to continue to litigate just to recover statutory fees, but that is exactly what the Fourth Districts ruling in Mady requires.

VIII. CONCLUSION.

WHEREFORE, the Petitioner prays this Court will accept jurisdiction over this appeal.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was furnished by first-class US Mail to: **John J. Glenn, Esquire**, Anderson, St. Denis & Glenn PA, 2201 N.W. Corporate Blvd., Suite 100, Boca Raton, FL 33431 on **May 14, 2008**.

_____

Theodore F. Greene III, Esquire
Fla. Bar No. 0502634
Law Offices of Theodore F. Greene, LC
PO Box 720157
Orlando, FL 32872-0157
Phone: (407) 482-8212
Of Counsel to Krohn & Moss, Ltd, attorneys
for the Petitioner