IN THE SUPREME COURT OF FLORIDA

ANDREW KRAUSE and
DAVID BAUTSCH,

Petitioners

v.

Case No.: **SC09881**
Lower Ct. Case No.: 2D07-4060

TEXTRON FINANCIAL
CORPORATION,

Respondent.
_____/

PETITIONERS' JURISDICTIONAL BRIEF

On Review from the Second District
Court of Appeals, State of Florida

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STATEMENT OF THE CASE AND FACTS

Petitioners purchased separate equity memberships in the TwinEagles Golf and Country Club in 1997. Their membership agreement entitled them, upon resignation, to 90% of the purchase price upon resale to a new member. In May and June of 1999, Petitioners resigned, and TwinEagles sold their resigned memberships. Petitioners were entitled to sums in the area of $90,000 each, but TwinEagles delivered Petitioners' money to Respondent, Textron, in partial satisfaction of a 1998 loan that was secured by TwinEagles assets. The security included the club's previously unsold new memberships, and required that TwinEagles sell only one resigned membership for every three that it sold. Within months of the delivery of Petitioners' funds to Respondent, TwinEagles voluntarily entered into Chapter 11 bankruptcy proceedings on September 9, 1999.[1]

In June of 2000, Petitioners filed an adversary proceeding in the bankruptcy case, alleging that TwinEagles had improperly paid all of the proceeds from the resale of their resigned memberships to Respondent prior to its filing of the petition for relief in the bankruptcy court. In count one, Petitioners sought declaratory relief against TwinEagles, and in count two, they asked for the imposition of a constructive trust against any of the remaining proceeds realized from the resale of golf

[1]Bautsch had filed a civil action in circuit court in Collier County against TwinEagles prior to commencement of the bankruptcy proceeding. The circuit court lost jurisdiction when bankruptcy was commenced.

memberships or, in the alternative, "in Textron's secured claim to the extent the membership sale proceeds [were] used by [TwinEagles] or encumbered with [TwinEagles'] permission by Textron's secured claim."[2]

From June 9, 2000 through September 11, 2005 (five years and three months) neither TwinEagles nor Respondent, Textron, raised any issue concerning the bankruptcy court's subject matter jurisdiction. On April 23, 2002, Respondent moved for summary judgment on the merits as to count two of Petitioners' complaint. Subject matter jurisdiction was not raised. The bankruptcy court granted the motion, and Petitioners attempted to appeal; however, since count one remained pending, the appeal was dismissed. On May 5, 2005, Petitioners voluntarily dismissed with prejudice the remaining count of their complaint against TwinEagles, and pursued their appeal of the July 16, 2002 summary judgment in favor of Respondent.

After five years and three months of adversarial proceedings litigation, on September 12, 2005, Respondent first raised the subject matter jurisdiction issue

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[2]Petitioners and Respondent were creditors in the bankruptcy proceeding, and each of them filed proofs of claim. Petitioners were undisputedly owed about $180,000, and, at a minimum, they would have participated in the estate distribution on a pro-rata basis with similarly classified creditors. The adversary complaint essentially claimed that TwinEagles wrongfully conveyed, and Textron wrongfully held, property (money) that was **owned** by Petitioners. Conceivably, success against Textron would have reduced, perhaps completely, Petitioners' claims against the estate. That would have reduced the total amount claimed, reduced the number of creditors and increased the distributable amounts to the remaining creditors. That effect fit quite solidly within the definition of a non-core but related claim.

when it moved to dismiss the appeal. On January 12, 2006, the District Court (as appellate court) rejected the Respondent's argument that it did not have appellate jurisdiction, found that the allegations of the adversarial complaint were sufficient to vest jurisdiction in the trial court, reversed the appealed summary judgment, but made a factual finding that now the trial court did not have subject matter jurisdiction over the adversarial claim. That order concluded:

> On May 16, 2005, appellants dismissed their claims in the adversary proceeding against TwinEagles, the only party to the adversary proceeding that was a debtor before the Bankruptcy Court. Therefore, no relief can be obtained in the appeal with respect to TwinEagles as to either Counts I or II. If appellants are successful as to Count II, the only appellate relief would be against Textron. As such, the lawsuit is now a matter solely between third-party non-debtors, and cannot affect the bankruptcy estate of TwinEagle or related entities.

Given the fact that there was no longer any "core" proceeding, Judge Steele logically concluded that the claim against Respondent was then non-core and not related. However, he specifically acknowledged that the "effect of this was not that the Bankruptcy Court lacked jurisdiction from the inception…" He ordered dismissal of the adversary proceeding against Respondent. That concluded all pending matters between Petitioner and Respondent.

After that dismissal, but within 30 days, Petitioners filed their state court action against Respondent. Respondent, in a motion to dismiss, argued that the applicable statute of limitations barred the action. The trial court agreed, found that the tolling provisions of 28 U.S.C. 1367(d) did not apply, and dismissed the action. A

timely appeal was taken, and the Second District Court of Appeals, in a written opinion, held that the tolling provision of 28 U.S.C 1367(d) was not applicable, and that the statute of limitations had run. In *Krause v. Textron Financial Corporation*, 34 Fla. L. Weekly D788 (Fla. 2nd DCA 2009) it affirmed the lower court's dismissal.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal held that Plaintiffs in a state court action, admittedly filed beyond the applicable state statute of limitations, were not entitled to the 30-day tolling provisions of 28 U.S.C. 1367(d)[3], where their federal adversarial complaint in bankruptcy was dismissed based on a factual finding that the Bankruptcy Court did not then have subject matter jurisdiction. The decision of the district court expressly and directly conflicts with the decision of the Fourth District Court of Appeal in *Scarfo v. Ginsberg*, 817 So. 2d 919 (Fla. 4th DCA 2002).

[3]28 U.S.C. §§ 1367(a) & (d) provide:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(d) **The period of limitations for any claim asserted under subsection (a),** and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), **shall be tolled while the claim is pending and for a period of 30 days after it is dismissed** unless State law provides for a longer tolling period. (emphasis added)

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court that directly and expressly conflicts with the Supreme Court or another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN *SCARFO V. GINSBERG*, 817 SO. 2D 919, (FLA. 4TH DCA 2002).

Ms. Scarfo's foray into Federal court involved a Federal action against her employers for sexual harassment pursuant to Title VII of the Civil Rights Act of 1964 and Florida state actions for battery and intentional infliction of emotional distress, etc. Her employers moved for summary judgment, contending that the trial court did not have subject matter jurisdiction because none of the corporations employed at least 15 employees, the minimum under the Title VII definition of "employer." 42 U.S.C. §2000e(b) (1998), in pertinent part, defines employer as "a person... who had fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year…" In short, the trial court made a factual finding that Scarfo's employers had fewer than 15 employees, that subject matter jurisdiction was therefore lacking, and it dismissed her Federal and state claims. In *Scarfo v Ginsberg*, 175 F.3d 957 (11th Cir.

1999) the Eleventh Circuit affirmed.

Within 30 days, Ms. Scarfo filed her Florida state action (some seven years after the alleged misconduct) in circuit court, and her employers moved for summary judgment, arguing that the state claims were barred by the statute of limitations. The matter was dismissed, and appealed to the Fourth District.

In *Scarfo v. Ginsberg*, 817 So. 2d 919, (Fla. 4th DCA 2002), the Fourth District phrased the issue as follows:

> The issue in this case, where an action was dismissed on grounds that the statute of limitations had already run when it was refiled in state court, is whether the original filing of the same action in federal court operated to toll the statute during the pendency of the federal action. Id at p. 920

The Fourth District found the federal tolling provisions to be applicable and reasoned:

> It is true that the federal court of appeals rationalized the dismissal of the federal claim on grounds of subject matter jurisdiction. We disagree, however, that such a dismissal makes the tolling provision of section 1367(d) inapplicable. We do not think the text of section 1367(d) supports such a narrowing of the sweep of that provision.
>
> In this case plaintiff based subject matter jurisdiction in federal court on federal question grounds, rather than on diversity of citizenship. We note that in this instance the issue as to subject matter jurisdiction raised by defendants did not contend that plaintiff's claim was of a class that on its face could not be brought in federal court. Instead defendants' attack was based on a factual dispute as to whether any of the defendants qualified as employers under Title VII. After a “trial” on that issue, the court determined that none of the defendants met the Title VII requirements for liability. It was only on the basis of the resolution of that factual dispute that the court dismissed plaintiff's federal claim. Id at p. 920

Scarfo recognized that "The purpose of this tolling provision is u doubtedly to allow claimants to pursue their federal claim in a federal court without cost to their state law claims, should the federal claim prove unsuccessful." At p. 921 Despite the invitation, *Scarfo* refused to delve into legislative intent to determine what Congress really meant when it said "any claim asserted." It found the language of 28 U.S.C. 1367 to be clear and unambiguous.

> Section 1367(d) provides for a tolling of state law limitations on *any* state law claim *asserted* in federal court under section 1367(a). The only requirements are that the claim be *asserted* under section 1367(a). Plaintiff's dismissed claims arose under state law and they were asserted in federal court under section 1367(a). The mere fact that the federal court of appeals saw the question of the employers' liability under Title VII as an issue of subject matter jurisdiction does not change the text of section 1367. Section 1367(d) exactly fits the facts and circumstances of this case. Id at p. 921

In contrast, the Second District, in the instant case, held:

> Because this claim against Textron was not "related to" the claim against TwinEagles, it is not entitled to the federal court's supplemental jurisdiction and the tolling pro vision found in 28 U.S.C. §1367(d) does not apply. As such, the trial court was correct to dismiss the claim, which was filed beyond the five-year statute of limitations period found in section 95.11(2)(b). Id at p. 790

Rather than applying the clear and unambiguous language of subsection (d), the Second District added its own interpretation, and carved out an exception to "any claim asserted under subsection (a). In effect, it ruled that "any claim asserted under subsection (a)" did not mean "any claim," but only those asserted claims that were not ultimately members of that huge class factually determined to be out-

side the supplemental subject matter jurisdiction of the Federal court. It merits noting that Respondent never raised the subject matter jurisdiction issue during more than five years of litigation, and then only after the state statute of limitations had run.

Congress could easily have written the law to read to the effect that the 30-day tolling period applied to "any claim asserted under subsection (a), except for those claims where the court makes a factual finding that it did not have subject matter jurisdiction because the claims were not sufficiently related." Congress did not do that. The Second District Court of Appeals did that, and placed itself in express and direct conflict with the Fourth District Court of Appeals on a very important issue.

Certainly, there are some factual and procedural distinctions between the instant case and *Scarfo.* In the instant case, original federal jurisdiction was pursuant to Chapter 11 of the Bankruptcy Code, and in *Scarfo,* it was pursuant to Title VII of the Civil Rights Act of 1964. In *Scarfo,* the Federal cause of action was dismissed after a factual finding of no jurisdiction (threshold proof of employer status not satisfied); dismissal of the state actions was perfunctory. In the instant case, the core Federal claim was voluntarily dismissed, and the state court claim was involuntarily dismissed after a factual determination that the trial court did not have subject matter jurisdiction (not sufficiently related) over it.

These distinctions do not alter the fact that Scarfo's holding was broad, and it recognized that the tolling graces of 28 U.S.C. 1367(d) really were available to "any claim asserted under subsection (a)." (emphasis added)

The January 12, 2006 order of the Federal district court, expressly acknowledged that jurisdiction is determined on the facts as they exist when the complaint is filed, and that there ***was*** federal jurisdiction over this action at the outset.

> The effect of this is not that the Bankruptcy Court lacked jurisdiction from the inception, but rather that the Bankruptcy Court should have dismissed the adversary Complaint for a lack of subject matter jurisdiction...

That was twenty-twenty hindsight after five years of discovery and litigation; quite similar to the situation in *Scarfo*.

The language of subsection (d) is clear. If a claim was asserted under subsection (a), and in the instant case (*Krause*), it was, upon its dismissal, claimants had 30 days to file their actions in state court. That is the holding of *Scarfo,* and Petitioners contend that the contrary position of the Second District is in express and direct conflict.

Petitioners' claim for unjust enrichment was based on the same core set of facts as those asserted in their claim to impose a constructive trust. If the cause of action for constructive trust is allowed to proceed, the count for unjust enrichment would relate back, and not be barred by the statute of limitations. *Holly v. Innovative*, 803 So. 2d 749 (Fla. 1st DCA 2002).

CONCLUSION

This court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the Petitioners' argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was furnished to Jordi Guso and Paul A. Avron, Berger Singerman, P.A., 200 S. Biscayne Blvd., Suite 1000, Miami, FL 33131 and Richard Johnston, Jr., Fowler White Boggs, 2235 First Street, Ft. Myers, FL 33901 by United States Mail, this 11th day of June, 2009.

By: _____

William A. Donovan

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: _____

William A. Donovan