SUPREME COURT OF FLORIDA

CASE NO. SC11-1196

GEORGE JACKSON, KERRY JACKSON, and JACKSON REALTY TEAM, INC., a Florida Corporation,

Petitioners,

Lower Tribunal No(s):
1D10-1049
09-1399-CA

vs.

THE SHAKESPEARE FOUNDATION, INC. and THE HERD COMMUNITY DEVELOPMENT CORPORATION, a California Corporation authorized to do business in the State of Florida

Respondents.

RESPONDENTS' AMENDED BRIEF ON JURISDICTION

CLAYTON-JOHNSTON, P.A.

Leonard E. Ireland, Jr.
Florida Bar No. 104630
18 N.W. 33rd Court
Gainesville, FL 32607
Tel. (352) 376-4694
Fax (352) 371-7366
Attorneys for Respondents

O R I G I N A L

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondents, THE SHAKESPEARE FOUNDATION, INC. and THE HERD COMMUNITY DEVELOPMENT CORPORATION, will be referred to herein as Shakespeare.

Petitioners, GEORGE JACKSON, KERRY JACKSON and JACKSON REALTY TEAM, INC. will be referred to herein as Jackson.

STATEMENT OF THE FACTS

The parties contracted for the sale and purchase of real property owned by Jacksons. Jacksons advertised the property in the local Multiple Listing Service, and included the following sentence: "Wetland study verified No Wetlands." Shakespeare agreed to the price of $253,000.00 for the property and signed a Uniform Real Estate Contract. The Contract included the following provisions:

> **14. DISPUTE RESOLUTION:** This Contract will be construed under Florida law. *All* controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled as follows:
>
> . . .
>
> (b) **All other disputes: Buyer and Seller** will have 30 days from the date a dispute arises between them to attempt to resolve the matter through mediation, failing which the parties will resolve the dispute through neutral binding arbitration in the county where the Property is located. *The arbitration may not alter the Contract terms or award any remedy not provided for in this Contract* . . . This clause shall survive closing.

After closing, Shakespeare visited the property and became concerned that it contained wetlands. A new Wetland Study ordered by Shakespeare revealed that wetlands covered approximately 26% of the property.

Shakespeare filed a Complaint in March 2009, alleging the decision to buy the property was based on the advertisement, and they would not have purchased the property had they known 26% of the property was wetlands. Shakespeare asserted the advertisement was knowingly false when made because before posting their advertisement Jacksons possessed a study which indicated that 25% of the property was wetlands. Shakespeare alleged they missed a favorable housing market due to the wetlands and suffered more than $15,000.00 in damages because of Jacksons fraudulent misrepresentation.

Jacksons moved to dismiss the complaint, arguing that the above-quoted contract language required arbitration. The trial court granted Jacksons' motion to dismiss finding that the contract was the subject matter of the litigation, and the contract mandated arbitration. The district court reversed the trial court, applying this Court's "contractual nexis" analysis to this case, and held that Shakespeare's fraud claim was not significantly related to the contract.

ARGUMENT ON JURISDICTION

SUMMARY OF ARGUMENT

The opinion of the First DCA was not unequivocally certified to this Court and does not expressly and directly conflict with the decision of another district court of appeal. Therefore, it should not be reviewed.

This Court's jurisdiction to review opinions of the district courts is set forth in Article 5, Sec. 3(4) of the Florida Constitution which provides that the Florida Supreme Court "may review any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal." The powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed.

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice.
>
> To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Jenkins v. State, 385 So.2d 1356, 1357, 1358 (Fla. 1980). In *Jenkins* this Court went on to state:

> The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a

district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law.

I. THE DISTRICT COURT DID NOT UNEQUIVOCALLY CERTIFY CONFLICT IN THIS CASE.

Although the First DCA in *Shakespeare* addressed the Fifth DCA's decision in *Maguire* under a heading "*Conflict Certified*", any certification was equivocal. In fact, the First DCA distinguished the facts in this case from the facts in *Maguire* stating: "Important to our decision here, the parties in *Maguire* executed a written addendum to their real estate contract which included the drainage rights." *Id.* at 1200. The district court in *Shakespeare* further stated: "Because the parties' dispute was directly related to duties arising from the contract, *Maguire* is distinguishable from this appeal. . . . To the extent that the decision in *Maguire* cannot be distinguished, we certify a conflict."

In *State v. Vickery*, 961 So.2d 309, 311 (Fla. 2007), this Court held that district court decisions that simply acknowledged, discussed, cite, suggest, or in any other way recognize conflict do not provide a proper basis for a party to seek this Court's initial review under its "certified conflict" jurisdiction. Although the district court used the term of art "certify", it is respectfully suggested it did nothing more than suggest that there may be a conflict between its opinion and the Fifth DCA's opinion in *Maguire*. Therefore, unless the Court finds that the First

DCA's opinion in *Shakespeare* "expressly and directly" conflicts with the decision of the Fifth DCA's opinion in *Maguire*, which, as shown hereafter, it does not, this Court should not accept jurisdiction.

II. THE DECISION OF THE FIRST DCA IN *SHAKESPEARE* DOES NOT "EXPRESSLY AND DIRECTLY" CONFLICT WITH THE DECISION OF THE FIFTH DCA IN *MAGUIRE*.

Because the district court's certification was equivocal, this Court's jurisdiction to review this case depends on whether the decision "expressly and directly" conflicts with the decisions of another court. See *Vickery* at 312. So far as conflict is concerned, this Court's jurisdiction under the Constitution expressly contemplates "collision on a point of law rather than restriction to all fours conflict". *Williams v. Duggan*, 153 So.2d 726, 727 (Fla. 1963), rehearing denied June 11, 1963.

Over fifty years ago this Court stated:

> It is not amiss to again point out that the scope of review by the Supreme Court of a decision of a Court of Appeal is extremely limited when the ground of asserting jurisdiction is an alleged conflict of such decision with the decision of another appellate court on the same point of law. For this court to interfere with the judgment of a district court of appeal, on the ground mentioned, it must appear that the court of appeal has, in the decision challenged, made a pronouncement of a point of law which the bench and bar and future litigants may fairly regard as an authoritative precedent but which is in direct conflict with the pronouncement on the same point of law in a decision or decisions of the Supreme Court or another District Court of Appeal.

South Florida Hospital Corporation v. McCrea, 118 So.2d 25, 27, 28 (Fla. 1960), (emphasis added.)

Turning to the instant case, as well set forth in the First DCA's opinion, there is no conflict between its opinion in *Shakespeare* and the Fifth DCA's opinion in *Maguire*. Both the opinion of the First DCA in this case and the opinion of the Fifth DCA in *Maguire* were based on the respective Court's interpretation of this Court's "contractual nexis" test set forth in *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999).

In *Maguire* the seller of a tract of land represented that the transaction would include two acres of permitted drainage rights. That representation was reduced to writing and the parties executed an addendum to the real estate purchase and sale agreement. After the transaction was closed the purchaser discovered that the seller had previously transferred an acre of the drainage rights during the sale of a different parcel, leaving the purchaser with approximately one acre of drainage rights. *Maguire* at 264. The court in *Maguire* applied the "contractual nexis" test from *Seifert* by which courts determine a claims arbitrability by considering the "existence of some nexis between the dispute and the contract containing the arbitration clause." The court stated: "A dispute arises from the contract if it at least raises an issue that requires reference to or construction of some portion of the contract for resolution. . . . Therefore, although tort claims based on duties

owed to the public under common law or public policy may fall outside an arbitration clause, tort claims based on duties created by a contractual relationship between the parties are normally arbitrable under broad arbitration provisions." *Maguire* at 266, citing *Seifert.* The court in *Maguire* held that, though couched in torts, the allegations of fraud in the inducement, fraud, and negligent misrepresentation were identical to those supporting the purchasers breach of contact claim, that the seller purportedly failed to deliver approximately two acres of drainage rights in connection with the sale of the parcel. Therefore the alleged fraud and misrepresentation can only be seen as arising out of or relating to the obligation they assumed under the contract with the seller and found that the trial court's order concluding that the tort claims were not arbitrable was clearly erroneous.

This case involved a one count complaint alleging intentional fraud against the Jacksons. There was no count for breach of contract. The fraud in this case was based on an advertisement in the local Multiple Listing Service which included the following sentence: "Wetland study verifies No Wetlands", not on any provision in the contract for purchase and sale. Shakespeare alleged in their complaint that the advertisement was knowingly false when made, because before posting their advertisement the Jacksons possessed a study which indicated that 25% of the property was wetlands. After closing, Shakespeare visited the property

and became concerned that it contained wetlands. They had a new wetlands study prepared which showed that wetlands covered approximately 26% of the property.

The First DCA in this case found, as did the Fifth DCA in *Maguire*, that based on *Seifert* the arbitration provision in this case was broad because it required all controversies, claims and other matters in question arising out of or relating to the transaction or the contract or its breach to be arbitrated. The First DCA in *Shakespeare* then, as did the Fifth DCA in *Maguire*, referred to this Court's opinion in *Seifert* stating that it must determine whether the fraud claim has a significant relationship to the real estate contract. The First DCA then stated: "Appellants and appellees obviously would not be in this adverse situation had they not agreed to the contract; however, the claim at the center of the dispute arose from a general duty owed under common law, not from the contract." *Shakespeare* at 1198, (emphasis added).

> "[F]or a tort claim to be considered 'arising out of or relating to' an agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself."
>
> * * *
>
> Applying the supreme court's analysis to this case, we hold that Appellants' fraud claim is not significantly related to the contract. Appellants' common-law fraud claim does not require reference to or construction of the contract, nor does it invoke any contractual provisions; Appellants' arguments rest solely on Appellees' allegedly false advertisement.
>
> * **
>
> The contract here is incidental to the dispute, because Appellants theoretically could have raised their fraud claim even before the

> contract was signed if Appellants detrimentally relied on Appellees' advertisement. In addition, the arbitration clause in the contract expressly contemplates remedies in case of breach by either party, but it specifically prohibits an arbitrator from awarding remedies not provided in the contract. None of the contractual language suggests the parties contemplated that intention fraud claims would be resolved under the agreement."

Id. at 1198, 1199.

The First DCA in *Shakespeare* then addressed the Fifth DCA's opinion in *Maguire* stating:

> Important to our decision here, the parties in *Maguire* executed a written addendum to their real estate contract which included the drainage rights. * * * Reasoning that the tort claims were "**nonsensical when divorced from the contractual obligation**" to deliver two acres of drainage rights, the court reversed and remanded so that the trial court could impose arbitration. *Id at 266-67.* Because the parties' dispute was directly related to duties arising from the contract, *Maguire* is distinguishable from this appeal. As that decision notes, "**Though couched as torts, the [tort] allegations . . . are identical to those supporting Kings' breach of contract claim**." *Id* at 267.
>
> * * *
>
> Appellants' fraud claim is not subject to arbitration because it was not significantly related to or dependent upon any duties or obligations created by the contract.

Id. at 1200, 1201, (emphasis in original).

Therefore this Court should not interfere with the judgment of the *Shakespeare* court because the First DCA has not, in the decision challenged, made a pronouncement of a point of law which the bench and the bar and future litigants may fairly regard as an authoritative precedent but which is in direct conflict with

the pronouncement on the same point of law in a decision or decisions of the Supreme Court or another district court of appeal. See *McCrae* at 27.

CONCLUSION

As set forth above, the opinion in *Shakespeare* and the opinion in *Maguire* are distinguishable. In *Maguire*, because the alleged fraud and misrepresentation could only be seen as arising out of or related to the obligations assumed under their contract, the tort claims were arbitrable. In *Shakespeare* the claim was not arbitrable because the contract was incidental to the dispute. Therefore there is no conflict and this Court should not exercise jurisdiction over this matter.

CLAYTON-JOHNSTON, P.A.

By: _____

Leonard E. Ireland, Jr.
Florida Bar No. 104630
18 Northwest 33rd Court
Gainesville, FL 32607
Tele. No.: (352) 376-4694
Fax No.: (352) 371-7366
Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to Jean Marie Downing, 2111 Thomas Drive, Suite 1, Panama City, Florida 32408, on this _____ day of August 2011.

_____
Leonard E. Ireland, Jr.

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this Brief has been prepared in accordance with Rule.9.210(a) and is submitted in Times New Roman 14-point font.

_____
Leonard E. Ireland, Jr.