IN THE
SUPREME COURT OF FLORIDA

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AUG 8 1986
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CASE NO. 69,023

BARNETT BANK OF EAST POLK COUNTY,

Petitioner,

vs.

GEORGE T. FLEMING,

Respondent.

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

# ANSWER BRIEF ON JURISDICTION OF RESPONDENT GEORGE T. FLEMING

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## PRELIMINARY STATEMENT

As was done in Appellee/Petitioner's Brief On Jurisdiction, the parties to this cause will hereinafter be referred to as FLEMING (Appellant/Respondent) and BARNETT BANK (Appellee/Petitioner).

## STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts as set forth in BARNETT BANK's Brief On Jurisdiction is, for the purpose of FLEMING's response to the jurisdictional issues, accurate; therefore, FLEMING hereby adopts that statement and incorporates it herein by reference.

## SUMMARY OF ARGUMENT

BARNETT BANK has not demonstrated, because it cannot demonstrate, that the decision of the Second District Court of Appeal in this case expressly and directly conflicts with the decision of another district court of appeal on the legal issues before the court. In an attempt to create a legal conflict, BARNETT BANK has misconstrued and distorted the clear language and obvious intent of the Second District Court of Appeal opinion.

## ARGUMENT

I. THE SUPREME COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THIS MATTER BECAUSE, ON ITS FACE, THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

The opinion of the Second District Court of Appeal in this case reversed the trial court on the basis of two clearly stated principles of law, yet BARNETT, in its Brief On Jurisdiction, attempts to distort and expand that opinion in order to achieve its desired results.

First, in its order, the trial court stated that it dismissed this action in reliance on its "inherent power to dismiss an action for failure to prosecute with due diligence." When presented with this issue, the Second District Court of Appeal properly reversed the trial court, citing American Salvage & Jobbing Co., Inc. v. Salomon, 367 So.2d 716 (Fla. 3d DCA 1979), for the proposition that inherent authority or power to dismiss an action for lack of due diligence no longer exists in Florida.

Second, the Second District Court of Appeal, addressed Florida Rule of Civil Procedure 1.420(e) terming it an 'exception' to American Salvage & Jobbing, and stated that: "A motion to dismiss for failure to prosecute which is premature does not fall within this category, it does not achieve the termination of the litigation and, for purposes of the rule, the premature

motion is a nullity."

Despite BARNETT BANK's attempts to otherwise construe the Second District Court of Appeal decision, it is clear from a careful reading of the same that the court reversed the trial court due to the trial court's improper and erroneous reliance on a principle of law which no longer exists; specifically, a trial court's inherent power to dismiss. Further, the Second District Court of Appeal stated that BARNETT BANK's premature motion to dismiss was a nullity, which statement of law does not conflict with any of the cases cited by BARNETT BANK.

## II. THE SUPREME COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THIS MATTER BECAUSE THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

The basis for Supreme Court review of this type of case is clear; the Second District Court of Appeal opinion must expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law. As is evident from the Brief On Jurisdiction of BARNETT BANK, no such conflict exists here.

In an effort to create such a conflict, BARNETT BANK cites and briefly discusses two cases, both of which are distinguishable from the case at bar. BARNETT BANK cites Chemical Bank of New York v. Polakov, 448 So.2d 1148 (Fla. 4th DCA 1984), in which the Fourth District Court of Appeal addressed a failure to

prosecute issue created by the trial court having filed a premature *sua sponte* Motion and Order to Show Cause why the action should not be dismissed for lack of prosecution. The obvious material distinction here is that in the instant case, BARNETT BANK filed the premature motion, whereas in *Chemical Bank of New York*, the trial court initiated the dismissal. Perhaps more importantly, the Court of Appeal opinion in this case declares that BARNETT BANK's motion was a nullity, which statement is a correct interpretation of the factual setting and which statement does not expressly and directly conflict with *Chemical Bank of New York*.

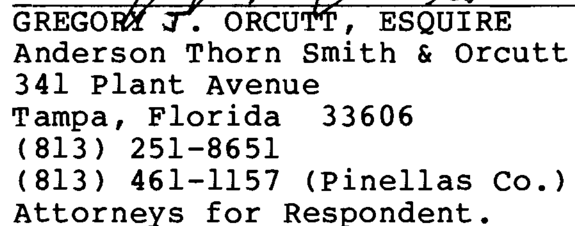
BARNETT BANK then cites *Karcher v. F.W. Schinz & Associates, Inc.*, 487 So.2d 389 (Fla. 1st DCA 1986), as somehow supporting its position before this Court. The court in *Karcher* addressed the sole issue of the meaning of 'record activity' under Florida Rule of Civil Procedure 1.420(e), and at no time does that decision discuss the question of law presented to the Second District Court of Appeal in this case. BARNETT BANK's Motion to Dismiss was the only activity on the record within the one year time period in question. In contrast, the *Karcher* court was faced with, and decided, the question of whether or not an interrogatory was sufficient record activity to avoid dismissal under Rule 1.420(e).

In neither of the above cases did the trial court rely on its perceived inherent authority to dismiss an action for lack of due diligence, as the trial court did in the case at bar. The

Second District Court of Appeal simply ruled that the trial court erroneously applied the law of 'inherent authority', and that BARNETT BANK's premature motion, for purposes of Florida Rule of Civil Procedure 1.420(e), is a nullity. No Florida appellate decisions exist which expressly and directly conflict with the Opinion on these questions of law, and therefore Supreme Court review of this matter would be inappropriate.

## CONCLUSION

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) provides very clearly that in order for a decision to be reviewed under the Supreme Court's discretionary jurisdiction, the Second District Court of Appeal decision must expressly and directly conflict with the decision of another district court of appeal or of the Supreme Court on the same question of law. As set forth in this Answer Brief, BARNETT BANK has failed to show this Court that that strict standard has been met. Accordingly, the Supreme Court should not exercise its discretionary jurisdiction to review the decision of the Second District Court of Appeal.



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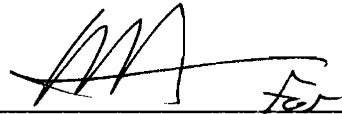
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Answer Brief on Jurisdiction has been furnished by U.S. Mail, on this 7th day of August, 1986, to: ROY C. SUMMERLIN, ESQUIRE, Summerlin and Connor, P.O. Drawer 798, Winter Haven, Florida 33882.



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