

IN THE SUPREME COURT OF FLORIDA
CASE NO. 72,454

FLORIDA BAR NO. 255564

DANIEL H. BRANTLEY,

Petitioner,

vs.

GIRL SCOUT COUNCIL OF
TROPICAL FLORIDA, INC.,
a Florida corporation,

Respondent.

FILED
SID J. WHITE

JUN 8 1988

CLERK, SUPREME COURT

By:  Deputy Clerk

ON APPEAL FROM THE THIRD DISTRICT COURT
OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION
GIRL SCOUT COUNCIL OF TROPICAL
FLORIDA, INC.

PHILIP GLATZER, ESQ.
HIGHSMITH, STRAUSS & GLATZER, P.A.
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STATEMENT OF THE FACTS AND THE CASE

The Petitioners' "Statement of the Facts and the Case" is improper because it recites "facts" which do not appear on the face of the District Court's per curiam affirmance without opinion. Therefore, this Court should summarily reject the Petitioner's Statement.

The District Court does cite various cases in support of its affirmance of the lower court in addition to Sanderson v. Freedom Savings and Loan Association, 496 So. 2d 954 (Fla. 1st DCA 1986) and the holdings of those cases, none of which is in conflict with any other appellate decision, should be considered as a basis for this Court to decline to exercise its discretionary jurisdiction to review this case, as more fully set forth in the argument section of this brief.

SUMMARY OF ARGUMENT

The Petitioner is correct in arguing that this Court has discretionary jurisdiction to review this case because the Third District cited Sanderson v. Freedom Savings and Loan Association, supra, in its per curiam affirmance and because Sanderson is presently under consideration by this Court, having been argued on November 6, 1987. However, this Court should decline to exercise its discretionary jurisdiction in this case because the holdings of the cases cited by the Third District, other than Sanderson, demonstrate that one of the reasons why the Third District affirmed the lower court was because the Petitioner made arguments on appeal which were waived in the proceedings below. Accordingly, the Court should deny certiorari.

ARGUMENT

THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS CASE BECAUSE THE OPINION OF THE THIRD DISTRICT PRESENTED FOR REVIEW CITES NUMEROUS DECISIONS, OTHER THAN Sanderson v. Freedom Savings and Loan Association, WHICH DO NOT CONFLICT WITH ANY OTHER APPELLATE DECISION, WHICH DO NOT CONCERN THE FIREMAN'S RULE AND WHICH SHOW THE PROPRIETY OF THE TRIAL COURT'S SUMMARY JUDGMENT.

In its per curiam affirmance, the District Court cited certain cases which explain that the basis, in part, of the District Court's affirmance of the trial court was that the Petitioner waived certain arguments made on appeal by failing to present them to the trial court. For example, the District Court cited this court's holding in Hart Properties, Inc. v. Slack, 159 So. 2d 236, 239 (Fla. 1964) where the court said:

"We hold again that issues in a cause are made solely by the pleadings and that the function of a motion for summary judgment is merely to determine if the respective parties can produce sufficient evidence in support of the operative issues made in the pleadings to require a trial to determine who shall prevail."

The District Court also cited Steiner v. Ciba-Geigy Corporation, 364 So. 2d 47, 53 (Fla. 3d DCA, 1978) where the court held as follows:

"Turning to plaintiff's last point on appeal urging that the summary final judgment was premature, we hold that the record does not support this theory. The Florida

Rules of Civil Procedure provide a remedy for a party opposing a motion who finds that additional affidavits or depositions are necessary. Plaintiff, having failed to follow the rule even to move for a continuance of the hearing on the motion, may not claim error in the appellate court because the trial judge proceeded as provided by the rules. Cf. Page v. Staley, 226 So. 2d 129, 131 (Fla. 4th DCA 1969)."

Finally, the District Court cited Davis v. Major Oil Company, 164 So. 2d 558, 559 (Fla. 3d DCA, 1964) where it stated:

"The first and third contentions were not raised by the pleadings, pursuant to which the final summary judgment was entered, and we cannot entertain these points for the first time on this appeal."

None of the above decisions cited by the District Court as grounds for its affirmance of the trial court concerns the fireman's rule, as does Sanderson, supra, the decision urged as a basis for this court's review of the Third District's opinion. Furthermore, the citation of these cases by the Third District shows that the District Court affirmed the trial court because of fatal deficiencies in the Petitioner's case and for this reason, this court should deny certiorari.

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CONCLUSION

This Court should decline to exercise its discretionary jurisdiction in this case because the Third District's opinion indicates that the Third District affirmed the trial court based upon appellate decisions which do not conflict with any other appellate decision and which do not concern the fireman's rule, as does Sanderson, supra, the decision upon which the Petitioner relies as a basis for this court's review of the District Court's opinion.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and exact copy of the foregoing was mailed this 10th day of June, 1988 to: Richard A. Sherman, P.A. Suite 102 N. Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301 and Wayne W. Pomeroy, Esq., Pomeroy and Pomeroy, 1995 East Okland Park Boulevard, Suite 300, Fort Lauderdale, Florida 33306-1186.

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