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JUN 9 1992

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,835

JOSE V. SILVA and ALMA E. SILVA,
Petitioner,

vs.

SERAFIN HERNANDEZ,
Respondent.

RESPONDENT'S ANSWER BRIEF ON JURISDICTION
On Discretionary Review From the
Third District Court of Appeal

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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INTRODUCTION

The petitioners, Jose V. Silva and Alma E. Silva, were the defendants in the trial court and the respondent, Serafin Hernandez, was the plaintiff. All parties will be referred to as they appeared in the trial court.

^{1.} References to the appendix are designated by the symbol "A" followed by a page number.

SUMMARY OF THE ARGUMENT

The defendants' allegation of decisional conflict rests upon a misrepresentation of the facts contained in the two line per curiam opinion of the Third District Court of Appeal in this case and the Third District's citation at the end of the second and last sentence in the opinion to "...contra Burton v. GOV Contracting Corp., 552 So.2d 293 (Fla. 2d DCA 1989)". Pursuant to Article V, Section (3)(b)(3) of the Florida Constitution and this Court's holding in Reaves v. State, 485 So.2d 829 (Fla. 1986), the conflict necessary to invoke this Court's jurisdiction must be express and direct and must appear within the four corners of the majority opinion. The alleged decisional conflict can not be based on a prior written opinion. In addition, the Third District's opinion in this case is in effect an affirmance without opinion. Accordingly, this Court must decline to exercise its discretionary review jurisdiction.

STATEMENT OF THE CASE AND FACTS

The plaintiff accepts² the part of defendants' statement which states that the Third District Court of Appeal affirmed the trial court's Summary Judgment in favor of plaintiff and that the trial court properly disregarded defendants' untimely affidavit. The plaintiff, however, rejects the remainder of the defendants' statement of the case and facts as a misrepresentation of the Per Curiam Opinion filed by the Third District Court of Appeal.

². The plaintiff accepts this part of the statement of the case and facts without waiving the argument presented herein, to wit that the defendants are bound by the four corners of the majority opinion. See, infra argument p.4.

POINT ON APPEAL

WHETHER THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH BURTON V. GOV CONTRACTING CORP., 552 So.2d 293 (Fla. 2nd DCA 1989).

ARGUMENT

THE THIRD DISTRICT COURT'S DECISION
DOES NOT EXPRESSLY AND DIRECTLY CONFLICT
WITH BURTON V. GOV CONTRACTING CORP.,
552 So.2d 293 (Fla. 2d DCA 1989).

It is apparent from the four corners of the Third District's per curiam opinion in this case that there is no express and direct conflict of decisions as required by Article V, Section (3)(b)(3) of the Florida Constitution. First, the plaintiff urges that the defendants in their statement of the case and facts has gone beyond the four corners of the opinion in an attempt to create conflict.

In Reaves v. State, 485 So.2d 829 (Fla. 1986), this Court found that there was no direct and express conflict and that review was improvidently granted and held that:

"Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."

Id. at 830; See also, Dept. of Health v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986). There-

fore, any portion of the defendants' brief which cites facts not appearing in the **per** curiam opinion cannot be considered by this Court for purposes of conflict jurisdiction.

In a further effort to manufacture conflict between the Third District's per curiam opinion in this case and Burton v. GOV Contracting Corp., 552 So.2d 293 (Fla. 2d DCA 1989), the defendants have blatantly misrepresented the Third District's per curiam opinion. The Third District's opinion in this case, as it pertains to this application for review, has a total of two sentences which state as follows:

"We affirm the summary final judgment in favor of appellee. The trial court properly disregarded appellants' untimely affidavit."
(A. 1).

The **Third** District's per curiam opinion is, as this Court held in Davis v. Mandau, 410 So.2d 915 (Fla. 1981), "... effectually an affirmance without opinion with which express and direct conflict cannot be established..."; See also, Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

Defendants rely upon the Third District's citation in the opinion filed in this case to: "contra Burton v. GOV Contracting Corp., 552 So.2d 293 (Fla. 2d DCA 1989)..." to invoke this Court's jurisdiction for discretionary review.

In Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980), this Court dismissed a petition for review and held that:

"The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority."

Id. at 1369. This Court can not now exercise its discretionary review jurisdiction based upon the Third District's citation to Burton because conflict in a prior written opinion can not be the basis for this Court's review.

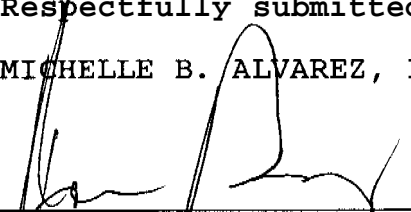
Accordingly, the Third District's per curiam affirmance of the trial court's judgment in the present case bars appellate review because it is in effect an affirmance without opinion with which express and direct conflict can not be established. Davis, 410 So.2d at 915. In fact, the defendants' use of facts not contained in the opinion demonstrate the desperation he has encountered in advancing a claim of decisional conflict. Since there is no express and direct conflict of decisions which appears within the four corners of the Third District's per curiam opinion, this Court should decline to exercise its discretionary review jurisdiction.

CONCLUSION

Based upon the foregoing, the respondent requests that this Court deny the petition for discretionary review.

Respectfully submitted,

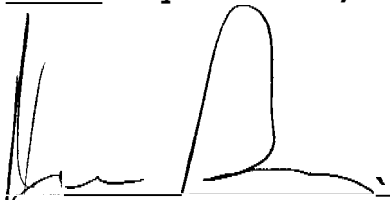
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief On Jurisdiction was hand delivered to Jorge L. Gonzalez, Esquire, 3934 S.W. 8 Street, Suite 302, Coral Gables, Florida 33134 on this 8th day of June, 1992.



MICHELLE B. ALVAREZ

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,835

JOSE V. SILVA and ALMA E. SILVA,
petitioner,

vs.

SERAFIN HERNANDEZ,
Respondent.

APPENDIX TO
RESPONDENT'S ANSWER BRIEF ON JURISDICTION
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APPENDIX TO
RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1992

JOSE V. SILVA and ALMA E. SILVA,
Appellants,

**

**

vs.

**

CASE NO. 91-2240

SERAFIN HERNANDEZ,

**

Appellee.

**

Opinion filed March 3, 1992.

An Appeal from the circuit Court for Dade County,
Rosemary Usher Jones, Judge.

Gonzalez & Vidal and Jorge L. Gonzalez, for appellants.

Michelle B. Alvarez, for appellee.

Before NESBITT, BASKIN and FERGUSON, JJ.

PER CURIAM.

We affirm the summary final judgment in favor of appellee.

The trial court properly disregarded appellants' untimely affidavit. Hartford Accident & Indem. Co. v. Gillette, 519 So.2d 1059 (Fla. 1st DCA 1988); Auerbach v. Alto, 281 So.2d 567 (Fla. 3d DCA 1973); cert. denied, 297 So.2d 31 (Fla. 1974); Hardcastle v. Mobley, 143 So.2d 715 (Fla. 3d DCA 1962); contra Burton v. GOV Contracting Corp., 552 So.2d 293 (Fla. 2d DCA 1989).

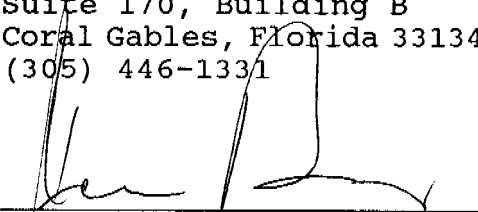
We reverse the award of attorney's fees, however. "[I]t is well settled that the testimony of an expert witness concerning a reasonable attorney's fee is necessary to support the establishment of the fee," Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351 (Fla. 1987); see Hemmerle v. First Fed. Sav. & Loan Ass'n, 338 So.2d 82 (Fla. 2d DCA 1976). Here, the record contains no testimony other than that of the attorney seeking the fees. An award of fees on that record is error. Palmetto Fed. Sav. & Loan Ass'n v. Day, 512 So.2d 332 (Fla. 3d DCA 1987); Walker v. Kremer, 382 So.2d 338 (Fla. 4th DCA 1980); Rodin v. Auto-Train Corp., 377 So.2d 810 (Fla. 3d DCA 1979); Mullane v. Lorenz, 372 So.2d 168 (Fla. 4th DCA 1979). The cause is remanded for the trial court to conduct a hearing on the attorney's fee issue.

Affirmed in part; reversed in part.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix to Respondent's Answer Brief On Jurisdiction was hand delivered to Jorge L. Gonzalez, Esquire, 3934 S.W. 8 Street, Suite 302, Coral Gables, Florida 33134 on this 8th day of June, 1992.

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