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SUPREME COURT OF FLORIDA

CASE NO. SC18-2143

LAURA FOXHALL,

Petitioner,

vs.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
L.T. CASE NO. 1D17-3113

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner Laura Foxhall, appellant below, seeks review of the decision of the District Court of Appeal, First District, in Foxhall v. Portfolio Recovery Assocs., LLC, No. 1D17-3113, 43 Fla. L. Weekly D2667b (Fla. 1st DCA Nov. 30, 2018), based on certified conflict with Bushnell v. Portfolio Recovery Assocs., LLC, 255 So. 3d 473 (Fla. 2d DCA 2018),[1] and express and direct conflict with Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002). A copy of the district court's slip opinion is included in the appendix to this brief which petitioner will cite by designation "A," followed by the appropriate page number.[2]

The district court opinion indicates that Portfolio, as assignee of GE Capital Retail Bank, filed an action against Foxhall in the Escambia County Court to collect the balance allegedly owed on a credit card account. (A 4). Based solely on the theory of "account stated," Portfolio alleged in its complaint that Foxhall had a revolving credit card account with GE; Foxhall used the account to make purchases and/or cash advances resulting in an unpaid balance; Portfolio provided monthly credit card account statements to Foxhall for the amounts due; and Foxhall did not object to the account statements. (A 4). Portfolio did not attach to the complaint or mention any

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[1] Bushnell is pending review in this Court under Case No. SC18-1593.

[2] This case was consolidated in the district court with Ham v. Portfolio Recovery Assocs., LLC, No. 1D17-3112, 43 Fla. L. Weekly D2667b (Fla. 1st DCA Nov. 30, 2018), The Ham case is pending in this Court under Case No. SC18-2142.

written credit card contract between GE and Foxhall. (A 4).

After denying cross-motions for summary judgment, the county court proceeded to trial. (A 5) Finding that Portfolio failed to offer any admissible evidence to support its complaint, the county court entered final judgments in Foxhall's favor and reserved jurisdiction to address attorney's fees and costs. (A 5).

Foxhall thereafter filed a motion for reciprocal attorney's fees pursuant to section 57.105(7), Florida Statutes, based on a provision in the credit card contract between GE and Foxhall which provided for payment to GE of attorney's fees and collection costs in the event of default.[3] (A 5). Portfolio opposed the motion on several grounds, including the argument that the credit card contract did not apply since its complaint was based on the theory of "account stated," not breach of contract. (A 5).

The county court initially granted Foxhall's motion for "attorney's fees, concluding that because there would be no consumer debt but for the credit contract[], the extension of credit and ultimate collection of the debt[] are inextricably intertwined and cannot be separated." (A 5). Portfolio moved for a

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[3] Section 57.105(7), Florida Statutes, provides:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

new trial based on an intervening appellate decision from the Escambia County Circuit Court, Portfolio Recovery Assocs., LLC v. Grunewald, No. 2016 AP 000024 (Fla. 1st Cir. Ct. Apr. 21, 2017), which "held that section 57.105(7) does not apply in a case in which a creditor proceeds under an account stated cause of action independent of any written credit card agreement the creditor has with a debtor." (A 5-6). Acknowledging that Grunewald was binding precedent, the county court granted Portfolio's motion for new trial and reversed its judgment for attorney's fees and costs. (A 6). Recognizing the conflicting judicial decisions around the state on the issue and the significance of its ruling, the county court certified the following question of great public importance to the First District (A 7):

> IS AN "ACCOUNT STATED" CAUSE OF ACTION BROUGHT BY AN ASSIGNEE SEEKING TO COLLECT A CREDIT CARD DEBT ARISING FROM A WRITTEN CREDIT CARD AGREEMENT BETWEEN THE DEFENDANT DEBTOR AND THE ASSIGNOR, WHICH INCLUDES A UNILATERAL ATTORNEY'S FEE PROVISION, AN ACTION TO ENFORCE A CONTRACT, SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER §57.105(7), FLORIDA STATUTES, WHERE A PORTION OF THE DEBT INCLUDES LATE FEES AND FINANCE CHARGES ARISING OUT OF THAT WRITTEN AGREEMENT?

The First District accepted jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(4)(A) and 9.160. (A 7). While the appeal was pending, the Second District decided Bushnell in which the court "conclude[d] that in an action for account stated brought to collect the amount due under a credit card agreement,

the reciprocity provision in section 57.105(7) applies to a properly pleaded request for attorney's fees made pursuant to the terms of the agreement." Bushnell, 255 So. 3d at 477-78.

Certifying conflict with Bushnell, the First District affirmed the county court's ruling, reasoning that "[b]ecause the action framed by Portfolio in these cases did not rely on the credit contracts containing the unilateral fee provision, we conclude that the debtors are not entitled to reciprocal fees under section 57.105(7) by virtue of those contracts." (A 9).

STANDARD OF REVIEW

This Court has discretionary jurisdiction to review district court decisions that are certified to be in direct conflict with decisions of other district courts of appeal. See Art. V, § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(vi). The Court also has discretionary jurisdiction to review district court decisions that expressly and directly conflict with a decision of another district court of appeal or this Court on the same question of law. See Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

I. Certified Conflict. This Court should accept jurisdiction to review the First District's decision below in Foxhall based on certified conflict with the Second District's decision in Bushnell. On nearly identical facts, the two district courts

reached the opposite conclusion on the issue whether reciprocal attorney's fees under section 57.105(7), Florida Statutes, are recoverable by the prevailing party in an action based on "account stated." The Court should resolve the conflict.

II. Express and Direct Conflict. As an additional jurisdictional basis, the decision below expressly and directly conflicts with this Court's decision in Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002), because, unlike the Bushnell court, the Foxhall court failed to follow Caufield's "inextricably intertwined" test to determine whether section 57.105(7) applies.

ARGUMENT

I. The Court should accept jurisdiction based on certified conflict with Bushnell v. Portfolio Recovery Assocs., LLC, 255 So. 3d 473 (Fla. 2d DCA 2018).

The district court in Foxhall certified conflict with Bushnell v. Portfolio Recovery Assocs., LLC, 255 So. 3d 473 (Fla. 2d DCA 2018). (A 7). The issue in both Foxhall and Bushnell was whether the prevailing debtor was entitled to reciprocal attorney's fees under section 57.105(7), Florida Statutes, in a collection action brought under the theory of "account stated." Section 57.105(7) provides:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

(emphasis supplied). The court in Bushnell observed that the statute applies if two requirements are met: "(1) the contract must include 'a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract,' and (2) the other party seeking fees must 'prevail[ ] in any action, whether as plaintiff or defendant, with respect to the contract.'" Bushnell, 255 So. 3d at 475. The court further noted that while the debtor in that case was unquestionably the prevailing party, "there is a dispute over whether the action for account stated constitutes an action with respect to the credit card agreement." Id. at 476. Based on this analysis, the Second District rephrased its certified question as follows:

> IS AN ACCOUNT STATED CAUSE OF ACTION TO COLLECT ON AN UNPAID CREDIT CARD ACCOUNT AN ACTION "WITH RESPECT TO THE CONTRACT" SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 57.105(7), FLORIDA STATUTES (2015)?

Id. Answering the question in the affirmative, the Second District relied on this Court's decision in Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002), with the following reasoning:

> In Caufield, the contract provided for "attorney's fees in connection with any litigation 'arising out of' the contract." Id. at 373. The supreme court concluded that the prevailing party in an action for fraudulent misrepresentation was entitled to fees under this provision. Id. at 379. In so doing, the court considered three other decisions in which courts declined to limit similar contractual provisions to contract enforcement claims. Id. . . . The supreme court reasoned, "Had there been no contract, the ensuing misrepresentation would not have occurred. Therefore, the existence of the contract and the subsequent misrepresentation in this case are inextricably intertwined such that the

tort complained of necessarily arose out of the underlying contract." Id. Bushnell, 255 So. 3d at 476. The Second District then "conclude[d] that the 'arising out of' language is not materially different from the 'with respect to' language in section 57.105(7). And we hold that the supreme court's 'inextricably intertwined' test in Caufield is applicable to determine whether an action is 'with respect to the contract' such that the reciprocity provision in section 57.105(7) applies." Id.

The Bushnell court also rejected Portfolio's argument that section 57.105(7) does not apply to "account stated" causes of action because such actions are not founded upon a written instrument:

> While a claim "for an account stated is based on 'the agreement of the parties to pay the amount due upon the accounting, and not any written instrument,' " Farley, 37 So. 3d at 937, the amount due here is based on the debtor's failure to pay under the credit card contract. Simply put, if there had been no credit card contract, the amount due would not have accrued in the first place. The credit card contract and the account stated cause of action are therefore inextricably intertwined such that the account stated cause of action is an action "with respect to the contract" under section 57.105(7). Accordingly, we answer the rephrased certified question in the affirmative.

Bushnell, 255 So. 3d at 477 (emphasis the court's). The First District in Foxhall disagreed with this analysis and held that "[b]ecause the action framed by Portfolio in these cases did not rely on the credit contracts containing the unilateral fee provision, we conclude that the debtors are not entitled to reciprocal fees under section 57.105(7) by virtue of those contracts." (A 9). The Foxhall court also disagreed with Bushnell's reliance on Caufield:

> In so holding, we have not overlooked the debtors' argument that the credit contracts are inextricably intertwined with the account stated claims because the account stated claims would not exist but for the credit contracts. Portfolio's claim, they reason, is therefore an action "with respect to the contract" under section 57.105(7).
>
> * * *
>
> We distinguish this case from Caufield because the actions for accounts stated were distinct from, and not inextricably intertwined with, the credit contracts. Portfolio pled a cause of action for account stated that was based not on the credit contracts, but rather on a separately enforceable legal agreement that arose from the debtors' implied promises to pay on an accounting rendered by the Bank. The tort claim in Caufield required proving the existence and the breach of the contract. Id. An account stated claim, on the other hand, exists independent of the underlying contract, requires no evidence of breach of the contract, and can exist in the absence of any contract at all.

(A 9-10). In short, the Foxhall and Bushnell courts applied the same statute (section 57.105(7)) and same case (Caufield) to similar facts yet reached opposite conclusions. The Court should accept jurisdiction to resolve the conflict.

II. The district court decision expressly and directly conflicts with Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002).

The district court's decision in Foxhall also conflicts with this Court's decision in Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002). The parties in Caufield entered into a contract for the sale of a mobile home park. The buyers later sued the sellers for fraudulent misrepresentation and requested attorney's fees under a provision in the sales contract "which entitled the prevailing party to costs and attorney's fees in connection with any litigation 'arising out of' the contract." Id. at 373. The trial court denied attorney's fees on two grounds: the buyers failed to plead

attorney's fees and its belief that a tort claim for intentional misrepresentation did not "arise out of" the contract. Id. at 373-74. The Fifth District affirmed on both grounds, reasoning on the latter issue "that a cause of action for 'fraudulent misrepresentation made orally or external to a contract, concerning property purchased pursuant to the contract, is not litigation arising out of the contract.'" Id. at 378.

This Court quashed the Fifth District decision on the pleading ground and, as pertinent to this case, also reversed on the "arising out of" issue. Even though fraudulent misrepresentation is a tort cause of action, the Court reasoned that the claim arose from the failure of one party to carry out its contractual duties. The Court explained:

> Had there been no contract, the ensuing misrepresentation would not have occurred. Therefore, the existence of the contract and the subsequent misrepresentation in this case are inextricably intertwined such that the tort complained of necessarily arose out of the underlying contract. As a result, the contractual provisions, including the prevailing party clause, should be given effect.

Id. at 379 (emphasis supplied).

Applying Caufield to this case, the Bushnell court concluded that "[t]he credit card contract and the account stated cause of action are therefore inextricably intertwined such that the account stated cause of action is an action 'with respect to the contract' under section 57.105(7)." Bushnell, 255 So. 3d at 477 (emphasis the court's). On the other hand, the Foxhall court found Caufield distinguishable

"because the actions for accounts stated were distinct from, and not inextricably intertwined with, the credit contracts." (A 10). This disagreement between the two district courts not only underscores the conflict between them, it also establishes that Foxhall misinterpreted Caufield creating express and direct conflicts. See Allen v. Nunez, No. SC16-1164, 2018 WL 4784606, at *8 (Fla. Oct. 4, 2018) (citing misapplication of supreme court decisional law as a basis for conflict jurisdiction).

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction based on certified conflict and express and direct conflict of decisions.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been furnished to the below-named attorneys for respondent and amicus by e-mail through the Florida Courts E-Filing Portal this 7th day of January, 2019.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman font in accordance with Florida Rule of Appellate Procedure 9.210(a)(2).

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