

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC18-581

HERITAGE MANOR OF MEMORIAL  
PARK, INC.; MEMORIAL PARK OF BOCA  
RATON, INC.; SANDRA STRONG, as  
Personal Representative of the ESTATE OF  
KATHLEEN I. MICHAEL; ELISHKA E.  
MICHAEL TARNAWA REVOCABLE  
TRUST UNDER AGREEMENT DATED  
AUGUST 9, 2002; LAILA TAYLOR,  
TRUSTEE; and LAILA TAYLOR, as  
Personal Representative of the ESTATE OF  
ELISHKA E. MICHAEL TARNAWA,

Petitioners,

-vs-

DFG GROUP, LLC, ARTHUR FALCONE,  
AND EDWARD FALCONE,

Respondents.

---

**BRIEF OF PETITIONERS ON JURISDICTION**

On appeal from the Fourth District Court of Appeal

Edward M. Ricci, Esq.  
EDWARD M. RICCI, P.A.  
6650 W. Indiantown Road, Suite 200  
West Palm Beach, FL 33458  
edricci@edriccilaw.com  
jlee@edriccilaw.com

BURLINGTON & ROCKENBACH, P.A.  
Courthouse Commons/Suite 350  
444 West Railroad Avenue  
West Palm Beach, FL 33401  
(561) 721-0400  
Attorneys for Petitioners  
bdr@FLAppellateLaw.com  
fa@FLAppellateLaw.com

RECEIVED, 05/23/2018 03:43:26 PM, Clerk, Supreme Court

## **TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-iv
STATEMENT OF THE CASE AND FACTS	1-2
SUMMARY OF ARGUMENT	2-4
ARGUMENT	2-10
A. The Opinion Creates Conflict over the Availability of Punitive Damages.	4-9
1. The Opinion Conflicts with this Court’s Decision in <i>Ault v. Lohr</i>	4-7
2. The Opinion Conflicts with the Second District’s Decision in <i>Mortellite v. American Tower</i> .	7-8
3. The Opinion Conflicts with the First District’s Decision in <i>Eglin</i> <i>Federal Credit Union v. Curfman</i> .	8-9
B. The Opinion Creates Conflict with the First and Third Districts Regarding the Wrongful Act Doctrine	9-10
CONCLUSION	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF TYPE SIZE & STYLE	12

## **TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<i>Ault v. Lohr</i> , 538 So.2d 454 (Fla. 1989)	3, 4, 5, 7
<i>Capitol Envtl. Services v. Earth Tech</i> , 25 So.3d 593 (Fla. 1st DCA 2009)	3, 10
<i>Eglin Federal Credit Union v. Curfman</i> , 386 So.2d 860 (Fla. 1st DCA 1980)	3, 9
<i>Engle v. Liggett Group</i> , 945 So.2d 1246 (Fla. 2006)	5
<i>Fonseca v. Taverna Imports</i> , 212 So.3d 431 (Fla. 3d DCA 2017)	5, 6
<i>Lassitter v. Int’l Union of Operating Engineers</i> , 349 So.2d 622 (Fla. 1976)	5
<i>Morgan Stanley v. Coleman (Parent) Holdings</i> , 955 So.2d 1124 (Fla. 4th DCA 2007)	6
<i>Mortellite v. Am. Tower, L.P.</i> , 819 So.2d 928 (Fla. 2d DCA 2002)	3, 7, 8
<i>Nordyne v. Florida Mobile Home Supply</i> , 625 So.2d 1283 (Fla. 1st DCA 1993)	9
<i>Northamerican Van Lines v. Roper</i> , 429 So.2d 750 (Fla. 1st DCA 1983)	4, 10
<i>State Farm Mut. Auto. Ins. v. K.A.W.</i> , 575 So.2d 630 (Fla. 1991)	6, 7
<i>Tibbetts v. Nichols</i> , 578 So.2d 17 (Fla. 1st DCA 1991)	4, 10

*Winselmann v. Reynolds*,  
690 So.2d 1325 (Fla. 3d DCA 1997) 3, 9, 10

*Young v. Achenbauch*,  
136 So.3d 575 (Fla. 2014) 7

## **STATUTES**

Art. V, §3(b)(4), Fla. Const 4

§772.11(1), Fla. Stat. 8

## **STATEMENT OF THE CASE AND FACTS**

The jury verdict in this case found that Respondents DFG Group, LLC, Arthur Falcone, and Edward Falcone (hereinafter “Respondents” or “DFG and the Falcones”) conspired with Petitioners’ attorneys at Sachs, Sax & Klein, P.A. to violate their fiduciary duties to Plaintiffs. They did so by scheming with attorney Michael D. Masanoff to secretly work “both sides of the transaction” for the sale of a cemetery to Respondents and for Masanoff to “receive[] a kickback of \$100,000 from the buyers after the sale closed” (A5). Based on this misconduct, Petitioners alleged causes of action for intentional misrepresentation and willful non-disclosure, breach of contract, conspiracy to breach fiduciary duty, aiding and abetting breach of fiduciary duty, and civil theft (A5).

The jury found in favor of Petitioners *on every cause of action* and awarded punitive damages. For compensatory damages, the jury found that the sellers sustained \$0 in “damages relating to the sale of the business and land,” but that the Petitioners incurred \$2,000,000 in “damages relating to attorneys’ fees and costs incurred in connection with the transaction (A5). Needless to say, these were fees Petitioners would not have paid had they known their attorney was secretly working both sides of the transaction for a \$100,000 kickback. The jury awarded \$2,110,000 in punitive damages against DFG Group and \$100,000 against Edward Falcone (A5).

The Fourth District vacated the award of \$2,000,000 in damages concluding that Petitioners were not entitled to transactional costs. The Fourth District held that because Petitioners “picked affirmance over rescission, their damages were limited to the difference between the sale price and the fair market value at the time of the sale” (A6). The Fourth District applied this contract analysis even to the claims sounding in tort and centering on DFG and the Falcones’ fraud and aiding and abetting the breach of the attorneys’ fiduciary duties. The court then concluded that “[b]ecause the jury found no difference between the sale price and the fair market value at the time of the sale, the sellers ... were not entitled to any additional compensation” (A6). The Fourth District held “[o]nly if the sellers had elected rescission would they have been entitled to their transactional attorney’s fees” (A6). Lastly, despite the jury’s finding of liability and breach of duty, the Fourth District held “[i]n the absence of any compensatory damage award, the punitive damages award must also be reversed” (A6).

### **SUMMARY OF ARGUMENT**

The Fourth District’s Opinion creates conflict with multiple decisions:

*First*, the Fourth District’s decision creates conflict with numerous decisions on the issue of the availability of punitive damages in the absence of compensatory damages. This Court, the Second District, and the First District have held that a compensatory damage award is not a necessary prerequisite to punitive damages

where a breach of fiduciary duty is found. Here, for example, the jury finding that Respondents aided and abetted a breach of fiduciary duty satisfies this requirement. Thus, the Fourth District's opinion striking down the punitive damage award conflicts with this Court's decision in *Ault v. Lohr*, 538 So.2d 454 (Fla. 1989), the Second District's in *Mortellite v. Am. Tower, L.P.*, 819 So.2d 928 (Fla. 2d DCA 2002), and the First District's in *Eglin Federal Credit Union v. Curfman*, 386 So.2d 860 (Fla. 1st DCA 1980). The conflict with *Mortellite* is striking because the Second District held a breach of fiduciary duty was sufficient to impose punitive damages even if it is "determined that [the plaintiff] is not entitled to compensatory damages." 819 So.2d at 935.

*Second*, the Fourth District created conflict by holding that Petitioners were not entitled to recover transactional fees and costs paid to their attorneys who were secretly working both sides of the transaction. The Fourth District's decision conflicts with the "wrongful act doctrine," as enunciated by the First and Third Districts, which permits the recovery of attorneys' fees as damages when the wrongful conduct of a party causes the plaintiff to incur fees in a dispute with another. *See Capitol Envtl. Services v. Earth Tech*, 25 So.3d 593, 596 (Fla. 1st DCA 2009); *Winselmann v. Reynolds*, 690 So.2d 1325, 1328 (Fla. 3d DCA 1997); *Tibbetts v. Nichols*, 578 So.2d 17, 19 (Fla. 1st DCA 1991); *Northamerican Van Lines v. Roper*, 429 So.2d 750, 752 (Fla. 1st DCA 1983).

In the absence of the exercise of this Court’s jurisdiction, there is essentially no consequence for those like DFG Group and the Falcones who aid and conspire with an attorney to breach their duties to their clients if that breach does not result in measurable economic harm. The Fourth District’s Opinion has the potential to undermine the attorney-client relationship and bolster those who interfere with it. The Court should rectify this injustice. Art. V, §3(b)(4), Fla. Const.

## **ARGUMENT**

### **A. The Opinion Creates Conflict over the Availability of Punitive Damages.**

Assuming without conceding that the Fourth District was correct that the transactional fees awarded by the jury as damages were not recoverable, the punitive damage award should have been upheld. The jury found that a duty had been breached and therefore punitive damages were authorized even in the absence of compensatory damages. By concluding otherwise, the Fourth District Opinion creates conflict with this Court, the Second District, and the First District.

#### **1. The Opinion Conflicts with this Court’s Decision in *Ault v. Lohr*.**

In *Ault*, this Court resolved the question: “In Florida, must a compensatory damages award underlie a punitive damages award in a case in which the jury has made express findings against a defendant?” *Ault*, 538 So.2d at 454-55. The Court answered the question in the negative, finding that “a breach of duty should be the critical factor in an award of punitive damages.” *Id.* at 456. This rule is well

supported. *See also Engle v. Liggett Group*, 945 So.2d 1246, 1262 (Fla. 2006) (“[E]ntitlement to punitive damages is not dependent on a finding that a plaintiff suffered a specific injury, an award of compensatory damages need not precede a determination of entitlement to punitive damages.”); *Lassitter v. Int’l Union of Operating Engineers*, 349 So.2d 622, 626 (Fla. 1976) (“[T]he establishment of liability for a breach of duty will support an otherwise valid punitive damage award even in the absence of financial loss...”). The *Ault* Court further considered whether nominal damages must be awarded, concluding they did not because “nominal damages are in effect zero damages and are defined as those damages flowing from the establishment of an invasion of a legal right where actual or compensatory damages have not been proven.” *Ault*, 538 So.2d at 456. Punitive damages are thus proper if premised on the breach of a duty even if compensatory damages are not awarded. *Id.*

The same conclusion should be reached here to uphold the punitive damage award. This is so, for example, with respect to the jury’s finding on the claim of aiding and abetting a breach of fiduciary duty, which necessarily entailed finding a breach of the underlying fiduciary duty. *See Fonseca v. Taverna Imports*, 212 So.3d 431, 442 (Fla. 3d DCA 2017) (reciting the elements). The jury found a breach of duty and, the Fourth District’s decision striking down the punitive damage award conflicts with *Ault*.

Although the Fourth District did not address *Ault*, it did cite *Morgan Stanley v. Coleman (Parent) Holdings*, 955 So.2d 1124, 1132 (Fla. 4th DCA 2007) which purports to distinguish *Ault* on the ground that, because damages are an essential element of fraud, an award of compensatory damages was a necessary prerequisite to the recovery punitive damages in that action. The claimed distinction does not eliminate conflict.

*First*, monetary damage is not an essential element for every cause of action. For example, it is not for aiding and abetting a breach of fiduciary duty. *See Fonseca*, 212 So.3d at 442 (listing elements).

*Second*, even assuming damage is required and the *Morgan Stanley* limitation on *Ault* is proper, Petitioners did prove damage. Petitioners' damage was the disclosure of confidential information. On this point, the law is well-established that because an attorney "cannot erase from his mind the confidences he received from his former client," when an attorney "switches sides" his former client does not have to show actual use or misuse of confidential information. *State Farm Mut. Auto. Ins. v. K.A.W.*, 575 So.2d 630, 634 (Fla. 1991). Instead, Florida law holds that when an attorney "switches sides" in a transaction: (1) there is an irrefutable presumption that confidential information was disclosed to the attorney; and (2) disqualification of the attorney is required because the "possibility of conflict of interest and the appearance of it are too strong to ignore."

*Id.*; *Young v. Achenbauch*, 136 So.3d 575, 583 (Fla. 2014) (“[T]he existence of an attorney-client relationship gives rise to an irrefutable presumption that confidences were disclosed.”). Petitioners were presumptively damaged by the breach aided and abetted by DFG Group and the Falcones.<sup>1</sup>

It is of no consequence that there was no dollar value placed on the disclosure because the disclosure itself establishes the “critical factor” of “a breach of duty.” *Ault*, 538 So.2d at 456. Indeed, many client confidences have no monetary value, but their disclosure is no less damaging. Accordingly, the Fourth District’s Opinion conflicts with *Ault*.

## **2. The Opinion Conflicts with the Second District’s Decision in *Mortellite v. American Tower*.**

The Fourth District’s Opinion conflicts with the Second District in *Mortellite v. American Tower*. The Second District held a breach of fiduciary duty sufficient to “support punitive damages ‘even in the absence of financial loss for which compensatory damages would be appropriate.’” 819 So.2d at 934.

The facts of *Mortellite* are strikingly similar. At issue was the sale of the plaintiff’s ten percent stock interest in a company. At the time of the sale to his business partners, the partners were aware of an offer to purchase the company for \$96 million. The partners concealed the offer, terminated plaintiff, and offered to buy back his interest for the lower price of \$1.5 million.

---

<sup>1</sup> To be clear, the evidence also established confidential information was disclosed.

The trial court concluded that the partners had breached their fiduciary duty. However, based on a stock valuation, it determined that plaintiff was not entitled to compensatory damages because the value of the company stock was \$15 million, and plaintiff received \$1.5 million for ten percent. Accordingly, much like the Fourth District, the trial court concluded that there “being no compensatory damages, the claim for punitive damages ... fails.” *Id.* at 932.

The Second District reversed. While the Second District found error in the valuation, it also concluded that because of the breach of fiduciary duty, plaintiff “will ultimately be entitled to a punitive damage award *even if, after remand, it is again determined that he is not entitled to compensatory damages.*” *Id.* at 935 (emphasis added). The Fourth District Opinion conflicts with this conclusion and this Court should exercise jurisdiction to correct it.

**3. The Opinion Conflicts with the First District’s Decision in *Eglin Federal Credit Union v. Curfman*.**

The jury found in Petitioners’ favor on the claim for Civil Theft, which supports punitive damages and statutory minimum damages of \$200. Fla. Stat. §772.11(1). In the largely identical context of conversion, the First District held that a finding of conversion “satisfies the requirement[]” that a “liability for a breach of duty will support an otherwise valid punitive damage award even in the absence of financial loss for which compensatory damages would be appropriate.” *Eglin*, 386 So.2d at 862. Civil theft thus supports punitive damages, even in the

absence of compensatory damages. The Fourth District's Opinion conflicts with *Elgin*.

**B. The Opinion Creates Conflict with the First and Third Districts Regarding the Wrongful Act Doctrine.**

The Fourth District created conflict by holding that Petitioners were not entitled to recover the transactional attorneys' fees as damages when their attorneys were secretly working both sides of the transaction. The Fourth District held that rescission is the only circumstance in which Petitioners could have recovered fees as damages. This conflicts with decisions of the First and Third Districts applying the "wrongful act doctrine."

"In tort actions, the goal is to restore the injured party to the position it would have been in had the wrong not been committed." *Nordyne v. Florida Mobile Home Supply*, 625 So.2d 1283, 1286 (Fla. 1st DCA 1993). It is the law in the First and Third Districts that attorneys' fees are recoverable as damages under the "wrongful act doctrine." *Winselmann v. Reynolds*, 690 So.2d 1325, 1328 (Fla. 3d DCA 1997). The doctrine "permits a plaintiff to recover third-party litigation expenses as special damages where the defendant's wrongful act caused the plaintiff to litigate with the third-party." *Id.*; *see also Capitol*, 25 So.3d at 596 (Award of fees as damages not conditioned on success); *Northamerican*, 429 So.2d at 752 ("[W]here the wrongful act of the defendant has involved the claimant in

litigation with others,” the costs of that litigation “may be recovered as an element of damages.”). These decisions do not condition recovery on rescission.

The First District holds that although “this rule is typically applied to permit recovery when an attorney’s services are rendered in a separate action,” this is not required. *Tibbetts*, 578 So.2d at 19. Rather, “the circumstance justifying such an award is the necessity of entering into litigation against a third party, and not whether the action is *separate* or part of the lawsuit against the covenantor.” *Id.* (emphasis in original).

This is what occurred here. DFG and the Falcones’ wrongful act caused Petitioners to incur attorneys’ fees paid to their own lawyers who were secretly working both sides of the transaction. These fees would not have been paid had Petitioners known of the misconduct. That misconduct embroiled Petitioners in litigation with both the attorneys and DFG Group and the Falcones in this action.

The Fourth District’s Opinion conflicts with the First and Third Districts’ decisions on the wrongful act doctrine by conditioning the recovery of fees on rescission. The Court should exercise jurisdiction to resolve the conflict.

### **CONCLUSION**

For the reasons stated above, the Opinion of the Fourth District creates decisional conflict. This Court should accept jurisdiction to eliminate that conflict.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on May 23, 2018.

Edward M. Ricci, Esq.  
EDWARD M. RICCI, P.A.  
6650 W. Indiantown Road, Suite 200  
West Palm Beach, FL 33458  
edricci@edriccilaw.com  
jlee@edriccilaw.com

and

BURLINGTON & ROCKENBACH, P.A.  
Courthouse Commons/Suite 350  
444 West Railroad Avenue  
West Palm Beach, FL 33401  
(561) 721-0400  
Attorneys for Petitioners  
bdr@FLAppellateLaw.com  
fa@FLAppellateLaw.com

By: /s/ Bard D. Rockenbach  
BARD D. ROCKENBACH  
Florida Bar No. 771783

**CERTIFICATE OF TYPE SIZE AND STYLE**

Petitioners hereby certify that the type size and style of the Brief of  
Petitioners on Jurisdiction is Times New Roman 14pt.

By: /s/ Bard D. Rockenbach  
BARD D. ROCKENBACH  
Florida Bar No. 771783

## **SERVICE LIST**

DFG Group, LLC, et al. v. Heritage Manor of Memorial Park, etc., et al.  
Case No. 4D16-2972

**William J. Cornwell, Esq.**

wjc@whcfla.com

ma@whcfla.com

**Seth A. Kolton, Esq.**

sak@whcfla.com

gg@whcfla.com

filings@whcfla.com

**David K. Friedman, Esq.**

dkf@weissandhandlerpa.com

jh@whcfla.com

Weiss, Handler, & Cornwell, P.A.

2255 Glades Rd., Ste. 218-A

Boca Raton, FL 33431

(561) 997-9995

Attorneys for Appellants/Cross-  
Appellees, DFG Group, LLC, Arthur  
Falcone & Edward Falcone