

IN THE SUPREME COURT OF FLORIDA

HERITAGE MANOR OF MEMORIAL
PARK, INC., *et al.*,

Petitioners,

CASE NO. SC18-581

vs.

DFG GROUP, LLC, *et al.*,

L.T. Nos. 4D16-2972,
502005CA000709XXXXMB

Respondents.

On discretionary conflict review of a decision
of the Fourth District Court of Appeal

RESPONDENTS' BRIEF ON JURISDICTION

Respectfully submitted by:

WEISS, HANDLER & CORNWELL, P.A.
William J. Cornwell, Esq.
Seth A. Kolton, Esq.
David K. Friedman, Esq.
One Boca Place - Suite 218A
2255 Glades Road
Boca Raton, FL 33431
Telephone: (561) 997-9995
Facsimile: (561) 997-5280

BERGER SINGERMANN LLP
Mitchell W. Berger, Esq.
350 E Las Olas Boulevard, Suite 1000
Ft. Lauderdale, FL 33301
Telephone: (954) 525-9900
Fred O. Goldberg, Esq.
1450 Brickell Avenue, Suite 1900
Miami, FL 33131
Telephone: (305) 755-9500

RECEIVED, 06/21/2018 04:48:26 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT.....	iv
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. The Opinion Does Not Create Conflict Over the Availability of Punitive Damages.....	4
A. The Opinion does not conflict with this Court’s decision in <i>Ault</i>	4
B. The Opinion does not directly and expressly conflict with the Second District’s decision in <i>Mortellite</i>	6
C. The Opinion does not conflict with the First District’s decision in <i>Eglin</i>	8
D. Petitioners’ other cases do not establish conflict jurisdiction.....	8
E. The Opinion does not create conflict with the First and Third Districts regarding the wrongful act doctrine.	9
CONCLUSION	10
CERTIFICATE OF SERVICE	10
CERTIFICATE OF COMPLIANCE	11

TABLE OF AUTHORITIES

Cases

<i>Ault v. Lohr</i> , 538 So. 2d 454 (Fla. 1989)	2, 4, 5, 9
<i>Department of Health & Rehab. Servs. v. National Adoption Counseling Serv.</i> , 498 So. 2d 888 (Fla. 1986)	3
<i>Department of Revenue v. Johnston</i> , 442 So. 2d 950 (Fla. 1983)	3, 4
<i>DFG Group, LLC v. Heritage Manor of Mem'l Park, Inc.</i> , 237 So. 3d 419 (Fla. 4th DCA 2018)	iv
<i>Eglin Federal Credit Union v. Curfman</i> , 386 So. 2d 860 (Fla. 1st DCA 1980)	2, 8
<i>Engle v. Liggett Group, Inc.</i> , 945 So. 2d 1246 (Fla. 2006)	9
<i>In re Interest of M.P.</i> , 472 So. 2d 732 (Fla. 1985)	3
<i>Lassitter v. International Union of Operating Engineers</i> , 349 So. 2d 622 (Fla. 1976)	8
<i>Mac-Gray Services, Inc. v. DeGeorge</i> , 913 So. 2d 630 (Fla. 4th DCA 2005)	10
<i>Morgan Stanley & Co. Inc. v. Coleman (Parent) Holdings Inc.</i> , 955 So. 2d 1124 (Fla. 4th DCA 2007)	9
<i>Mortellite v. American Tower, L.P.</i> , 819 So. 2d 928 (Fla. 2d DCA 2002) ...	2, 6, 7, 8
<i>Philip Morris USA, Inc. v. Russo</i> , 175 So. 3d 681 (Fla. 2015)	5
<i>Raimi v. Furlong</i> , 702 So. 2d 1273 (Fla. 3d DCA 1997)	5
<i>Sundie v. Lindsay</i> , 166 So. 2d 152 (Fla. 3d DCA 1964)	9

Statutes

Art. V, § 3(b)(3), Fla. Const. (1980)	iv, 3
---	-------

PRELIMINARY STATEMENT

Respondents, DFG GROUP, LLC, EDWARD FALCONE and ARTHUR FALCONE (“Respondents”), submit their response to Petitioners’ request for discretionary review of the Fourth District Court’s decision in *DFG Group, LLC v. Heritage Manor of Mem’l Park, Inc.*, 237 So. 3d 419 (Fla. 4th DCA 2018) (the “Opinion”).¹ Petitioners assert that conflict exists between various prior decisions and the Opinion regarding the Fourth District’s determinations that: (1) an award of punitive damages in connection with a claim for conspiracy to breach fiduciary duty cannot be sustained in the absence of compensable damages; and (2) the wrongful act doctrine does not support an award of transactional legal fees in connection with the underlying transaction. Because there is no express and direct conflict between any prior decision and the Opinion, pursuant to Art. V, § 3(b)(3), Fla. Const. (1980), this Court should not exercise discretionary conflict jurisdiction over the instant matter.

¹ The Fourth District’s Opinion, which was attached to the Petitioner’s Brief on Jurisdiction as an Appendix, will be cited as “App’x” followed by the page number “App’x, p. ____.” The Petitioners’ Brief on Jurisdiction will be cited as “PB” followed by the page number “PB, p. ____.”

STATEMENT OF THE CASE AND FACTS

This action arises from the sale of a cemetery by the Petitioners (sellers) to the Respondents (buyers). App'x, p. 4. Following the sale, the sellers discovered that one of their former attorneys had been employed by sellers after the purchase and sale agreement was executed. Petitioners sued their former attorneys and the buyers. App'x, p. 5. The sellers alleged that the attorney defendants' actions resulted in the sale of the cemetery for less than its fair market value. *Id.*

The attorneys settled before trial. *Id.* The case proceeded to jury trial on the claims against the buyers for fraud, breach of contract, conspiracy to breach fiduciary duty, aiding and abetting breach of fiduciary duty, and civil theft. *Id.* Punitive damages were asserted against two of the Respondents only on the "conspiracy to breach fiduciary duty" claim based on duties owed by the attorneys. App'x, p. 7.

The jury found that the sellers sustained \$0 in "damages relating to the sale of the business and land." App'x, p. 5. However, the jury awarded \$2,000,000 in "attorneys' fees and costs incurred in connection with the transaction" and \$2,210,000 in punitive damages. *Id.* Directed verdicts on the breach of contract and civil theft claims were thereafter granted in favor of Respondents. *Id.*

The Fourth District reversed the award of attorneys' fees concluding that: (1) once the sellers elected 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; and (2) the “sellers could not retain the proceeds from the sale and also recover attorney’s fees associated with the transaction.” App’x, p. 6. Based on the absence of a compensatory damage award, the award of punitive damages was also reversed. *Id.*

SUMMARY OF THE ARGUMENT

There is no express and direct conflict with *Ault v. Lohr*, 538 So. 2d 454 (Fla. 1989); *Mortellite v. American Tower, L.P.*, 819 So. 2d 928 (Fla. 2d DCA 2002); or *Eglin Federal Credit Union v. Curfman*, 386 So. 2d 860 (Fla. 1st DCA 1980). None of these cases hold that a party may recover punitive damages for conspiracy to breach fiduciary duty even though the party failed to prove it suffered actual, compensable damages – an essential element of a cause of action for conspiracy to breach fiduciary duty. Rather, as the Fourth District correctly held, in the “absence of a compensatory damage award,” the “punitive damage award” on the conspiracy claim “must also be reversed.” App’x, p. 6. The decisions relied upon by Petitioners are both legally and factually distinguishable. Accordingly, there is no irreconcilable conflict with the Opinion. The instant case was decided on its unique facts, which included Petitioners’ complete failure to establish any compensatory damages and the jury’s express finding that the Petitioners/sellers were paid the full value for their business and property. App’x, p. 5.

Likewise, there is no express and direct conflict with the four cases cited by Petitioners relating to the wrongful act doctrine. In each of those cases, the plaintiff was entitled to recover attorney's fees incurred as a result of *litigation* with third parties resulting from the wrongful acts of the defendants. In the instant case, Petitioners did not seek to recover attorney's fees incurred in *litigation* with third parties, rather they sought to recover the *transactional* attorneys' fees incurred in the underlying sale and purchase transaction.

ARGUMENT

This Court may exercise discretionary jurisdiction to review a District Court's decision where there exists an express and direct conflict between decisions of the District Courts or the Supreme Court on the same question of law. Art. V, § 3(b)(3), Fla. Const. (1980).² In order to constitute an express and direct conflict, the decisions cannot be factually or legally distinguishable. *Department of Revenue v. Johnston*, 442 So. 2d 950, 951 (Fla. 1983) (distinguishable facts); *In re Interest of M.P.*, 472 So. 2d 732, 733 (Fla. 1985) (distinguishable issues). Because the decisions relied upon by Petitioners are factually and legally distinguishable, this Court should not exercise discretionary conflict jurisdiction.

² An implied or inherent conflict does not trigger the Court's discretionary conflict jurisdiction. *Department of Health & Rehab. Servs. v. National Adoption Counseling Serv.*, 498 So. 2d 888 (Fla. 1986).

I. The Opinion Does Not Create Conflict Over the Availability of Punitive Damages

A. The Opinion does not conflict with this Court's decision in *Ault*.

Ault, supra, involved assault and battery claims, the proof of which created the presumption of compensatory damages.³ *Ault* did not create an absolute “rule” that required the Fourth District – in the absence of a compensatory damages award – to affirm an award of punitive damages on Petitioners’ conspiracy to breach fiduciary duty claim. This Court’s opinion in *Ault* does not address a claim for conspiracy to breach fiduciary duty. *Ault* is, therefore, clearly distinguishable on its facts. *See, Johnston*, 442 So. 2d 950 (declining jurisdiction where cases were distinguishable).

Petitioners also argue that, despite the jury’s award of zero damages, they were presumptively damaged because when an attorney “switches sides” in a transaction there is an irrefutable presumption that confidential information was disclosed. PB, p. 6. However, Petitioners only cite cases involving motions to disqualify counsel. They do not cite any cases applying such a presumption to establish damages in a civil action – much less any cases applying the presumption

³ The distinction is highlighted by Justice Ehrlich’s special concurring opinion: “Where actual damage is an essential element of the underlying cause of action, an award of compensatory damages must be a prerequisite to an award of punitive damages. This case involved the torts of assault and battery, which do not require proof of actual damage.” *Ault*, 538 So. 2d at 457 (emphasis added).

against non-attorneys who owe no fiduciary duty, such as the Respondents. Again, the decisions relied upon by Petitioners are distinguishable.

Finally, Petitioners argue that monetary damages are not an element of the tort of “aiding and abetting breach of fiduciary duty.” PB, p. 6. However, aiding and abetting breach of fiduciary duty was not a claim for which Petitioners sought punitive damages. App’x, p. 7. Punitive damages were only sought for *conspiracy* to breach fiduciary duty. Unlike an aiding and abetting claim, “damage to plaintiff as a result of the acts done under the conspiracy is an essential element of a conspiracy claim.” *Philip Morris USA, Inc. v. Russo*, 175 So. 3d 681, 686 n. 9 (Fla. 2015); *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997). The plaintiff must prove both the underlying tort (in this case breach of fiduciary duty) *and* each of the elements of a civil conspiracy, including the element of “damage to the plaintiff as a result of the acts done under the conspiracy.” *Id.* In this case, as the jury determined, Petitioners failed to prove that they suffered any damages as a result of the conspiracy. Petitioners failed to establish an essential element of their conspiracy claim – *i.e.*, damages. *Raimi*, 702 So. 2d at 1284. Having failed to establish the elements of their claim, Petitioners could not be entitled to an award of punitive damages. *See, Ault*, 538 So. 2d at 457 (concurring opinion).

B. The Opinion does not directly and expressly conflict with the Second District's decision in *Mortellite*.

In *Mortellite*, *supra*, a majority shareholder – in violation of his fiduciary duties – actively concealed an offer to buy the company's stock for \$105 million from a minority shareholder. Instead, the majority shareholder offered to buy the minority shareholder's 10% percent interest in the company for \$1.5 million (which assumed a value of the company of only \$15 million). Unaware of the \$105 million offer for the company, the minority shareholder accepted the \$1.5 million offer. The majority shareholder *then sold the company for \$105 million*. By doing so, he “managed to keep an additional \$9 million of profit out of [the minority shareholder's] pocket.” *Id.* at 935.

The Second District reversed and remanded the case to recalculate damages under the out-of-pocket rule that compares the purchase price to the *actual* value of the company (which the concurring opinion noted could be \$105 million). *Id.* at 934, 936. It also found that the trial court had improperly rejected the opinion of plaintiff's expert because of a misconception regarding his qualifications. *Id.* The rejection of the expert's opinion resulted in the trial court's failure to award compensatory damages. *Id.* Because the Second District remanded for a determination of actual damages, *Mortellite* is distinguishable from the Opinion. In the instant action, the jury's award of no damages was sustained on appeal. The Second District went on to hold that, because the trial court made an “express

finding” of a breach of fiduciary duty by the defendant, the plaintiff would be entitled to an award of punitive damages even if (after remand) it was determined that he was not entitled to compensatory damages. This conclusion was reached without discussion of whether a claim for breach of fiduciary duty requires proof of actual damages as an essential element of the claim.

The Fourth District’s holding in this case is factually distinct from *Mortellite*. First, there was no finding by the jury that the Respondents owed *any* fiduciary duty to the Petitioners. Second, the Fourth District expressly found that, once the Petitioners chose 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” and they “were not entitled to any additional compensation.” App’x, p. 6. In contrast, the Second District remanded for a determination of “entitlement to compensatory damages.” *Mortellite*, 819 So. 2d at 934. The Second District not only rejected the fact finder’s conclusion that the plaintiff suffered no economic harm, but strongly emphasized the undisclosed financial windfall (of up to \$9 million) that the majority shareholder obtained at the expense of the minority shareholder and remanded for an award of damages.

The issues of law in both cases are also different. *Mortellite*’s holding only applied to an action for direct breach of fiduciary duty, while the Fourth District’s holding was applied to a conspiracy claim. Neither this Court nor any district court

has ever rendered a decision applying the principle that a party owing no fiduciary duty to a plaintiff can be held liable for punitive damages in a conspiracy case in which the plaintiff suffered no compensatory damages.

Petitioners seek to *infer* from the Second District decision in *Mortellite* that, when a party breaches his fiduciary duty and is found liable for punitive damages, another party conspiring with such a person is subject to an award of punitive damages regardless of whether that other party owes a duty to the plaintiff or caused actual damages. *Mortellite* did not create such a rule. Petitioners' implied conflict argument does not meet the express direct conflict necessary to invoke the jurisdiction of the Florida Supreme Court. As set forth above, jurisdiction must be direct.

C. The Opinion does not conflict with the First District's decision in *Eglin*.

Eglin, supra, involved an action for conversion of an automobile. No claim for conversion was litigated in the proceeding below. App'x, pp. 4-8. A civil theft claim was asserted, but the trial court granted a directed verdict on the claim and that ruling was affirmed on cross-appeal. App'x, pp. 4 -5. Accordingly, *Eglin* is distinguishable and does not support conflict jurisdiction.

D. Petitioners' other cases do not establish conflict jurisdiction.

Lassitter v. International Union of Operating Engineers, 349 So. 2d 622 (Fla. 1976), involved an action for injuries sustained during union violence. *Id.* at 623.

Again, as noted in *Ault*, actual injury or compensatory damages are not an essential element of a cause of action for assault and battery.

Petitioners also misread *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). As noted in *Morgan Stanley & Co. Inc. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124 (Fla. 4th DCA 2007), this Court’s statement in *Engle* that “an award of compensatory damages need not precede a determination of entitlement to punitive damages,” was made in the context of addressing the order of proof in determining entitlement to punitive damages. *Morgan Stanley* at 1132-33 (“Therefore we conclude that the order of these determinations is not critical.”).

E. The Opinion does not create conflict with the First and Third Districts regarding the wrongful act doctrine.

Petitioners correctly state that the wrongful act 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.” PB, p. 9. However, the only attorneys’ fees that Petitioners sought to recover were the transactional attorney’s fees incurred in the sale of the property to Respondents. App’x, p. 5. Those fees were not attorneys’ fees incurred in litigation with a third party. App’x, p. 6.

The Fourth District, citing *Sundie v. Lindsay*, 166 So. 2d 152, 153 (Fla. 3d DCA 1964), correctly concluded that because the Petitioners *affirmed* (rather than rescinded) the transaction, they were not entitled to recover the costs of preparing to

perform (such as transactional attorneys' fees). App'x, p. 6.⁴ By contrast, all the cases cited by Petitioner involve actions seeking to recover attorneys' fees incurred in litigation with third parties. Accordingly, there is no conflict and no basis for jurisdiction.

CONCLUSION

For all of the reasons set forth above, Respondents assert that this Court should decline to exercise discretionary review of the Fourth District's Opinion because it does not expressly and directly conflict with an opinion of this Court or any other district court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished in compliance with Fla. R. Jud. Admin. 2.516 by eService Portal to counsel listed on the Service List which follows on this 21st day of June 2018.


[CONTINUED ON NEXT PAGE]

⁴ Petitioners complain that the Fourth District applied this "contract analysis even to the claims sounding in tort," but this doctrine applies in tort cases. *See, Mac-Gray Services, Inc. v. DeGeorge*, 913 So. 2d 630, 634 (Fla. 4th DCA 2005) (suing for damages on a fraudulent inducement theory affirms the contract and its terms).

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been typed using the 14-point Times
New Roman font.

WEISS, HANDLER & CORNWELL, PA
Attorneys for Respondents
One Boca Place, Suite 218-A
2255 Glades Road
Boca Raton, FL 33431-7392
Telephone: (561) 997-9995
Facsimile: (561) 997-5280

By: 
WILLIAM J. CORNWELL, ESQ.
Florida Bar No. 0782017
wjc@whcfla.com
filings@whcfla.com
SETH A. KOLTON, ESQ.
Florida Bar No. 0021045
sak@whcfla.com
jh@whcfla.com
DAVID K. FRIEDMAN, ESQ.
Florida Bar No. 307378
dkf@whcfla.com
jh@whcfla.com

- and -

BERGER SINGERMANN LLP
Attorneys for Respondents
MITCHELL W. BERGER, ESQ.
Florida Bar No. 311340
mberger@bergersingerman.com
vrozhon@bergersingerman.com
drt@bergersingerman.com
350 E Las Olas Boulevard, Suite 1000
Ft. Lauderdale, FL 33301
Telephone: (954) 525-9900
Facsimile: (954) 523-2872

BERGER SINGERMANN LLP
Attorneys for Respondents
FRED O. GOLDBERG, ESQ.
Florida Bar No. 898619
fgoldberg@bergersingerman.com
mvega@bergersingerman.com
drt@bergersingerman.com
1450 Brickell Avenue, Suite 1900
Miami, FL 33131
Telephone: (305) 755-9500
Facsimile: (305) 714-4340

SERVICE LIST

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

Bard D. Rockenbach, Esq.
Burlington & Rockenbach, P.A.
Courthouse Commons/Suite 350
444 W Railroad Avenue
West Palm Beach, FL 33401
bdr@flappellatelaw.com; fa@flappellatelaw.com