

IN THE SUPREME COURT of the STATE of FLORIDA

CASE NO. SC-04-604

DISTRICT COURT CASE # 5DO3-602

PONDELLA HALL FOR HIRE, INC., ETC

Petitioner,

vs.

LAWSON LAMAR, STATE ATTORNEY
For the NINTH JUDICIAL CIRCUIT,

Respondent.

JURISDICTIONAL BRIEF of RESPONDENT

ON DISCRETIONARY REVIEW from
THE FIFTH DISTRICT COURT OF APPEAL

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STATUTES:

Section 932.703(2)(b), Fla.. Stat (1993)3

FLORIDA CONSTITUTION:

Art, V, §3 (b)(3), Fla. Const.5

STATEMENT of the CASE and FACTS

The State Attorney rejects the Petitioner's Statement of the Case and Facts as it sets forth facts not in the opinion of the Fifth District Court of Appeal -- and also makes legal arguments. The State Attorney agrees with the facts set out in footnote 1 of the opinion below by the district court, Pondella v. Lawson Lamar, 866 So.2d 719, 721 (5th DCA 2004), which reads:

Pondella was a business that operated bingo halls in several counties. As a result of a multi-county criminal investigation, state and local authorities seized Pondella's personal property, sought to enjoin them from operating bingo games at several locations, filed numerous criminal charges against its principals and pursued numerous civil forfeiture and RICO actions.

This case is one of several arising out of the above actions that have made their way to the appellate courts. [Citations omitted.]

While those various court actions had a variety of outcomes, and the statewide civil RICO case brought by the Attorney General against Pondella is still pending and set for trial, the opinion below by the Fifth District Court of Appeal goes on to describe the subsequent development of the particular Orange County civil case involving Pondella and the State Attorney and now before this Court, Pondella v. Lawson Lamar, 866 So.2d 719, 721 (5th DCA 2004), as follows:

On April 26, 1994, a search warrant was executed and personal property seized from Pondella at its place of business in Orlando, Florida. On May 24, 1994, Lawson Lamar, State Attorney for the Ninth Circuit, filed a *Petition for Final Judgment of Forfeiture*,

Complaint for Civil Racketeering Relief and Petition for Injunctive Relief to Abate a Public Nuisance against Pondella and other defendants. On the same date, the lower court entered an order finding probable cause for the forfeiture. Shortly thereafter, Pondella filed its answer, affirmative defenses and counterclaims.

Several years passed with little activity in the case. On September 24, 2001, Pondella filed a Notice of Filing Amended Supplemental Affirmative Defenses and Counterclaims. This pleading contained three counterclaims: (1) damages for wrongful injunction, (2) damages under Chapter 932 and (3) damages for the taking of property. [FN2] Lamar responded by filing a Motion to Dismiss Counterclaims and Motion for Summary Judgment. Lamar alleged various grounds for dismissing Pondella's counterclaims, including: (1) prosecutorial immunity, (2) qualified immunity, (3) sovereign immunity, (4) laches, (5) insufficient pleadings and (6) statutory bars. The trial court accepted Lamar's arguments in their entirety and dismissed Pondella's counterclaim with prejudice. Pondella timely appealed the dismissal of its counterclaims.

FN2. Lamar's claims against Pondella were ultimately dismissed after a summary judgment. Lamar did not appeal the dismissal.

The Record on Appeal below, however, reflects that Pondella waited over seven years, until September 24, 2001, to file its claims for damages against the State Attorney and does not support Pondella's factual assertions that the action filed below targeted real property, or improperly placed an injunction against real estate, or improperly failed to use a notice of *lis pendens* before obtaining the stipulated injunction with the property owner – as is demonstrated by the following facts from the decision below of the Fifth District Court of Appeal:

While the State certainly seized Pondella's personal property and obtained an injunction against the property owners from operating

illegal bingo games on the property, it did not take Pondella's lease. Pondella's loss of the leases was incidental to lawful government action based on probable cause.

Pondella improperly raises in its Statement of the Case and Facts, a new allegation that the State Attorney somehow violated Section 932.703(2)(b), Fla. Stat. (1993) because it required that a *lis pendens* be used to restrain real property.¹

Pondella also improperly suggests, in its Statement of the Case and Facts, that the State Attorney had not raised any argument to support the trial court's concern with the fact that it would be impossible and speculative to determine in what amount, if any, Defendants were damaged for the loss of the seized property.²

¹ That *lis pendens* argument, however, is not only improper for a jurisdictional brief but can only be based on a very incomplete reading of the statute as that Section 932.703(2)(b), Fla. Stat. (1993), required only that real property cannot be restrained other than by *lis pendens* “until the persons entitled to notice are afforded the opportunity to attend the pre-seizure adversarial preliminary hearing.” (Emphasis added.) In this case, Pondella itself filed the proceeding specifically to get an adversarial preliminary hearing (that request is the first document in the case, R-1 of the record below) and Pondella set and noticed adversarial preliminary hearing which occurred May 24, 1991 -- before (and therefore, pre-seizure) the injunction subsequently stipulated to with the landowner.

² As the Fifth District Court of Appeal acknowledged in its decision below, the defense of laches was made, and preserved, by the State Attorney, Pondella v. Lawson Lamar, 866 So.2d 719, 721 (5th DCA 2004), along with the defenses of prosecutorial, qualified, and sovereign immunity. The State Attorney argued below the defense of laches because Pondella had waited more than seven years before making its first claims for damages against the State Attorney. The difficulty in determining damages would support that defense of laches where the claim was brought so late.

SUMMARY of ARGUMENT

Pondella does not demonstrate a case for jurisdiction -- as Pondella completely fails to demonstrate a conflict in the decision below by the Fifth District Court of Appeal with any decision of another District Court of Appeal, or this Court – the Supreme Court of Florida. Instead, Pondella improperly reargues many of its positions already rejected below – and even brings up at least one new argument, for the first time, about *lis pendens* in RICO cases – and claims conflict only with other general cases that do not expressly or directly apply to Pondella’s circumstances. Pondella demonstrates no express or direct conflict.

Further, the ruling below, published at Pondella v. Lawson Lamar, 866 So.2d 719 (5th DCA 2004), was consistent with a series of related rulings of the Fifth District Court of Appeal, and Pondella has been consistently denied damages and attorney’s fees in several other related decisions of the Fifth District Court of Appeal – from which Pondella took no appeal. See, Pondella v. St. Cloud, 837 So.2d 510 (Fla. 5th DCA 2003) and Pondella v. Croft, 844 So.2d 696 (Fla. 5th DCA 2003) – including another similar claim brought in Osceola County by Pondella against the same State Attorney. See, Pondella v. Lawson Lamar, 860 So.2d 19 (5th DCA 2003).

ARGUMENT

POINT of LAW

THE DECISION BELOW, BY THE FIFTH DISTRICT COURT of APPEAL, DOES NOT EXPRESSLY or DIRECTLY CONFLICT WITH a DECISION of THIS COURT or ANY OTHER COURT.

When the decision of a district court “expressly and directly conflicts” with a decision of either this Court, or of another district court, this Court has jurisdiction to review that decision. Art, V, §3 (b)(3), Fla. Const. This Court has repeatedly held that such conflict must be express and direct, and that, “it must appear within the four corners of the majority decision.” Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). The Petitioner in this case has completely failed to show such a conflict. Accordingly the appellate decision below should be considered as final.

In Jenkins v. State, 385 So.2d 1356, 1357-58 (Fla. 1980), this Court discussed the creation of the district courts of appeal and noted that the jurisdiction of the Supreme Court should not be invoked for the purpose of seeking a second appellate review. In Jenkins, this Court quoted from Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958):

It was never intended that the district courts of appeal should be intermediate courts... To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far

more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

In the Petitioner's Jurisdictional Brief, Pondella completely fails to demonstrate that the Fifth District Court of Appeal's decision in this case is in direct conflict with the cases of this Court, or the cases of another district court. Instead, Pondella cites a number of cases on tangential issues, and not issues upon which the decision below disagreed, or cases with very different facts upon which the results were based. The brief by Pondella really just seeks to relitigate its losses below before the trial court, and the Fifth District Court of Appeal – even injecting a new issue never before brought up below.

An examination of each case cited by Pondella shows no conflict, and the brief certainly never specifically identifies any language in the decision below that in any way conflicts with a prior case. In the end, Pondella offers, on the conflict issue, only a general argument that the decision below violated “directives of this court” to protect constitutional rights to due process, citing Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991). Interestingly, review of the appellate opinion below shows that the Real Property case (certainly an important case in forfeiture jurisprudence) was not even cited by either the majority or the dissent – which is understandable as that case did not specifically or directly apply in this litigation.

Further, it can be seen from Page 9 of the Petitioner's Jurisdictional Brief that Pondella is not really complaining about what was in the opinion below by the Fifth District Court of Appeal, but is now complaining about other issues that Pondella believes were not addressed to its satisfaction and is rearguing its case.

The ruling below by the Fifth District Court of Appeal did not conflict with any case cited by the Petitioner. The Petitioner is simply attempting to reargue its case and get a second appeal of an adverse ruling with which Pondella disagrees. Such disagreement with the ruling of the appellate court below does not create proper conflict jurisdiction for this Court.

For this Court to have jurisdiction, any case conflict should be directly apparent. Because no such conflict exists in this case, jurisdiction should not be granted.

STATUTORY CONSTRUCTION ARGUMENT

Pondella not only improperly seeks to reargue the issue of statutory construction, but wholly fails to identify a specific or express holding of another court that is in conflict with the below decision of the Fifth District Court of Appeal. The cases cited in that section of Pondella's jurisdictional brief only apply to the issues below in the most general ways, and the brief fails to demonstrate there is any direct conflict in the ruling below with those cases.

Pondella also misstates in its jurisdictional brief the nature of the rulings below by the trial court and the Fifth District Court of Appeal related to statutory construction -- as being related to whether damages were permissive or mandatory in the forfeiture statute. The statutory construction issue in the decision below, however, (labeled “Forfeiture Claim”) at page 722, Pondella v. Lawson Lamar, 866 So.2d 719, 722 (Fla. 5th DCA 2004), centered on the substantive expansion of remedies in the 1995 revision to the forfeiture statute that were not present in the 1993 version that was in effect when the seizures in this case occurred in 1994.

THE DECISION BELOW is CONSISTENT
with ALL RELATED CASES:

The ruling below, Pondella v. Lawson Lamar, 866 So.2d 719 (5th DCA 2004), about which Pondella now complains, was consistent with the series of three prior related rulings of the Fifth District Court of Appeal -- in actions where Pondella was also unsuccessfully claiming damages and attorney’s fees – from which Pondella took no appeal. See, Pondella v. St. Cloud, 837 So.2d 510 (Fla 5th DCA 2003) and Pondella v. Croft, 844 So.2d 696 (Fla. 5th DCA 2003), as well as another related claim brought against the same State Attorney, Pondella v. Lawson Lamar, 860 So.2d 19 (5th DCA 2003). Pondella did not prevail in any of the four.

In each of those four cases, the Fifth District Court of Appeal ruled on the narrowest possible grounds -- depending on the circumstances or nature of the

different and varied government entities from which Pondella asserted claims -- and that sometimes meant that a subsequent ruling for a different governmental party was on a broader or different ground. In none of those cases, however, did Pondella prevail in its claims to collect damages for the government's unsuccessful -- but good faith and court-approved -- forfeiture actions based upon Pondella's various bingo activities in different jurisdictions.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully requests that this Court does not accept jurisdiction in this matter. The decision below is not in conflict with any decision of any court – and is consistent with all related cases.

CERTIFICATE of SERVICE

I HEREBY CERTIFY that true and correct copy of the above JURISDICTIONAL BRIEF of RESPONDENT has been provided by United States Mail to THOMAS F. EGAN, Esquire, 204 Park Lake Street, Orlando, Florida 32803 and STEVEN G. MASON, Esquire, 1643 Hillcrest Street, Orlando, Florida 32803, counsel for Petitioner, this _____ day of _____, 2004.

CERTIFICATE of COMPLIANCE

The undersigned counsel certifies that this brief was typed using 14 pt. Times New Roman, a font that is not proportionately spaced.

Respectfully submitted, this ____ day of _____, 2004

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APPENDIX

to JURISDICTIONAL BRIEF of RESPONDENT

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