

IN THE SUPREME COURT OF FLORIDA

FIDELITY NATIONAL TITLE
INSURANCE CO. and JANET
FIGUEROA,

3d DCA CASE NOS.: 3D-07-466;
3D-06-2725

Petitioners,

vs.

CARMEN J. GROSSO and
JAMES CHERESKIN,

Respondents.

**ON APPEAL FROM THE THIRD DISTRICT
COURT OF APPEAL**

**JURISDICTIONAL BRIEF OF PETITIONER, FIDELITY
NATIONAL TITLE INSURANCE CO.**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE.....	1
ARGUMENT	4
I. Standard of Review	4
II. The Decision Expressly Conflicts with the First District’s Decision in <i>Chereskin</i> Regarding the Priority Principle.....	4
III. The Decision Directly Conflicts with <i>Blumberg</i> in Misapplying the Doctrine of Judicial Estoppel	6
IV. The Decision Below Applies the Incorrect Standard of Review	9
V. This Court Should Exercise Jurisdiction.....	9
CONCLUSION.....	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF COMPLIANCE.....	12

TABLE OF AUTHORITIES

Page

CASES

Allstate Insurance Co. v. Langston, 655 So. 2d 91 (Fla. 1995)4

Blumberg v. USAA Casualty Insurance Co., 790 So. 2d 1061 (Fla. 2001).....3, 7, 8, 9

Brooks v. Lockett, 658 So. 2d 1205 (Fla. 5th DCA 1995).....6

Fidelity National Title Insurance Co. of New York, n/k/a Fidelity National Title Insurance Company v. Chereskin, 945 So. 2d 624 (Fla. 1st DCA 2006)2, 3, 5, 6, 7, 8, 9

Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981)7

Seven Hills, Inc. v. Bentley, 848 So. 2d 345 (Fla. 1st DCA 2003).....3, 9

State v. Davis, 243 So. 2d 587 (Fla. 1971)4

Williams v. Duggan, 153 So. 2d 726 (Fla. 1963)4

OTHER AUTHORITIES

Art. V, §3(b)(3), Florida Constitution4

Florida Rule of Civil Procedure 1.2209

STATEMENT OF THE CASE

On January 16, 2008, the Third District Court of Appeal (“Third District”) reversed (the “Decision”) the trial court’s order certifying a class and approving a class settlement entered into by Petitioner/Defendant, Fidelity National Title Insurance Co. (“Fidelity National”) and Co-Petitioner/Plaintiff, Janet Figueroa (“Figueroa”). Petitioner, Fidelity National, now seeks to invoke this Court’s discretionary jurisdiction due to the Decision’s direct and express conflict with precedent from this Court and several District Courts of Appeal.

STATEMENT OF FACTS

This appeal arises out of three separate and competing Florida class action lawsuits against Fidelity National: (a) the instant lawsuit filed by Petitioner, Figueroa, in Miami-Dade County against Petitioner, Fidelity National, on April 20, 2004 (the “Instant Lawsuit”); (b) a lawsuit filed by Respondent, Carmen J. Grosso (“Grosso”), in Broward County against Fidelity National Title Insurance Co. of New York (“Fidelity N.Y.”) on August 24, 2004 (the “Grosso Lawsuit”); and (c) a lawsuit filed by Respondent, James Chereskin (“Chereskin”) in Nassau County against Fidelity N.Y. on September 21, 2004 (the “Chereskin Lawsuit”). In all three suits, it was alleged that the named Fidelity entity overcharged putative class members for title insurance in connection with the refinancing of their real estate transactions.

When Figueroa filed the Instant Lawsuit in April of 2004, Fidelity National and Fidelity N.Y. had not merged. However, Fidelity National and Fidelity N.Y. merged before the filing of the Grosso and Chereskin Lawsuits, with Fidelity National assuming the obligations of Fidelity N.Y. After the trial court dismissed Figueroa's contract claims in the Instant Lawsuit, Figueroa filed her Third Amended Complaint on January 20, 2005, asserting her remaining unjust enrichment claim and redefining the class to reflect the merger.

After obtaining preliminary approval of a class action settlement agreement between Figueroa and Fidelity National on November 30, 2005, Fidelity National then sought stays in the Grosso Lawsuit and the Chereskin Lawsuit. The trial court in the Grosso Lawsuit granted the motion for stay. The trial court in the Chereskin Lawsuit denied Fidelity National's motion for stay, and Fidelity National filed a petition for writ of certiorari in the First District Court of Appeal in *Fidelity National Title Insurance Co. of New York, n/k/a Fidelity National Title Insurance Company v. Chereskin*, 945 So. 2d 624 (Fla. 1st DCA 2006). The First District quashed the denial of the motion for stay and remanded with instructions to grant the stay, reasoning that under the priority principle, the trial court in the Instant Lawsuit, as the first filed class action, had the exclusive right to hear all issues or questions arising in this matter.

Respondents Grosso and Chereskin unsuccessfully moved to intervene and

replace the class counsel in the Instant Lawsuit. At the fairness hearing, the trial court found that Respondent Chereskin lacked standing to object, but did consider Respondent Grosso's objections. After the fairness hearing, the trial court issued its final order certifying the class, approving the settlement, and awarding attorneys' fees and costs. The Decision reversed the trial court, and this request to invoke the discretionary jurisdiction of the Court followed.

SUMMARY OF ARGUMENT

This Court should exercise jurisdiction under the "express and direct conflict" provision of the Florida Constitution. First, the Decision conflicts with the opinion of the First District in *Chereskin*, 945 So. 2d 624 (Fla. 1st DCA 2006), in that the Third District expressly concluded that Respondents Grosso and Chereskin could maintain claims in their respective lawsuits, while the First District expressly concluded that the trial court in the Instant Lawsuit must adjudicate all claims in this matter. Secondly, the Decision conflicts with this Court's opinion in *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061 (Fla. 2001), in that it applies the doctrine of judicial estoppel in violation of the general principles of law set forth in *Blumberg*. Finally, the Decision conflicts with *Seven Hills, Inc. v. Bentley*, 848 So. 2d 345 (Fla. 1st DCA 2003), regarding the proper standard of review an appellate tribunal must apply in considering a trial court's certification of a class for purposes of settlement.

ARGUMENT

I. Standard of Review

The Supreme Court may exercise jurisdiction over a case where the decision of the district court of appeal conflicts with a prior decision of the Court. *E.g.*, Art. V, §3(b)(3), Fla. Const; *Allstate Ins. Co. v. Langston*, 655 So. 2d 91 (Fla. 1995). Jurisdiction exists where there appears to be at least some conflict between a decision of a district court of appeal and statements of general principles of law in prior decisions of the Court. *State v. Davis*, 243 So. 2d 587 (Fla. 1971). Likewise, the Supreme Court has jurisdiction to resolve an apparent conflict resulting when one district court of appeal renders a decision irreconcilable with that of another district court of appeal. *E.g.*, *Williams v. Duggan*, 153 So. 2d 726 (Fla. 1963).

II. The Decision Expressly Conflicts with the First District's Decision in Chereskin Regarding the Priority Principle

The Third District's analysis overlooked and misapprehended that under the principle of priority, the Instant Lawsuit, as the first-filed action, has priority over the Grosso and Chereskin Lawsuits. As such, the trial court below has exclusive jurisdiction, and the Grosso and Chereskin Lawsuits cannot be considered separate and distinct actions entitled to proceed. Despite this, the Third District expressly considered the Grosso and Chereskin Lawsuits to be separate and distinct actions against Fidelity N.Y. when it concluded that "Fidelity National and Fidelity N.Y. are estopped from claiming that their merger renders the *Grosso* and *Chereskin*

actions unsupportable.” Decision at p. 14.

This conclusion is irreconcilable with the decision of the First District in *Chereskin*, 945 So. 2d 624 (Fla. 1st DCA 2006). In that case, Fidelity National argued that there was an identity of parties and issues between the Instant Lawsuit and the Chereskin Lawsuit due to the merger of Fidelity and Fidelity N.Y., and therefore, the Instant Lawsuit, as the first filed action, had priority, and the trial court in the Instant Lawsuit had exclusive jurisdiction over all issues. Relying on the priority principle, the *Chereskin* court ruled that, “[t]he Miami-Dade Circuit Court [the trial court in the Instant Lawsuit] was the first to acquire jurisdiction of this matter. Under the priority principle, the Miami-Dade Court has the exclusive right to hear all issues or questions arising in this case.” *Id.* at 624. This principle establishes that there is only one class action with the “exclusive right to hear all issues or questions arising in this case,” and that action is the Instant Lawsuit. *Id.* As such, the Third District’s conclusion that Fidelity National is estopped from asserting that its merger renders the Grosso and Chereskin Lawsuits unsupportable is in express and direct conflict with the decision in *Chereskin*.

Furthermore, the same conflict arises in connection with the Third District’s further analysis regarding the opinion of Figueroa’s expert. According to the Third District, Figueroa’s expert testified that “Fidelity’s liability would have been greater and the settlement amount would not have been fair” if the contract claims in the

Instant Lawsuit had not been dismissed. The Third District then held: “[t]he Chereskin complaint includes contract claims, and there is nothing prohibiting Grosso from amending his complaint to include a breach of contract claim. Thus, the settlement binding the plaintiffs in the Grosso and Chereskin class action lawsuits is inadequate and unfair even under the opinion of Figueroa’s own expert.” Decision at p. 18. The Third District expressly concluded that the settlement was inadequate and unfair because it resolves contract claims that could have proceeded in the Grosso and Chereskin Lawsuits. *Id.* Again, this opinion expressly conflicts with *Chereskin*, which held that all claims must be brought exclusively in the Instant Lawsuit. *Chereskin*, 945 So. 2d at 624

Finally, the Decision directly passes judgment on the merits of the First District’s stay, and expressly concludes that contract claims can proceed in the Grosso and Chereskin Lawsuits, contrary to the holding in *Chereskin*. This creates conflict with *Brooks v. Lockett*, 658 So 2d 1205, 1207-08 (Fla. 5th DCA 1995), which held that a Florida court cannot grant or lift a stay of an action pending in a court of equal standing in a different territorial jurisdiction within the state.

III. The Decision Directly Conflicts with *Blumberg* in Misapplying the Doctrine of Judicial Estoppel

The Decision likewise conflicts with the basic principles of judicial estoppel

articulated by the Florida Supreme Court.¹ As ruled by this Court in *Blumberg v. USAA Casualty Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (emphasis supplied), the rule applicable to judicial estoppel is as follows:

A claim made or position taken in a former action or judicial proceeding will, in general, estop a party to make **an inconsistent claim or to take a conflicting position** in a subsequent action or judicial proceeding to **the prejudice of the adverse party**. In order to work an estoppel, **the position assumed in the former trial must have been successfully maintained**.

Quoting this same language from *Blumberg*, the Third District in its Decision applied the doctrine of judicial estoppel as follows:

By actively litigating as Fidelity N.Y. in the *Grosso* and *Chereskin* actions, and as Fidelity National in the *Figueroa* action, and in successfully preventing the *Grosso* and *Chereskin* plaintiffs and their counsels from becoming aware of and objecting to expansion of the *Figueroa* class action lawsuit to the detriment of the *Grosso* and *Chereskin* plaintiffs, Fidelity National and Fidelity N.Y. are estopped from claiming that their merger renders the *Grosso* and *Chereskin* actions unsupportable.

Decision at 14. Despite its citation to *Blumberg*, the Third District has created conflict with the judicial estoppel principles set forth in *Blumberg*. In particular, the Third District's analysis cannot be reconciled with the inconsistency requirement and the principle that "the position assumed in the former trial must have been successfully maintained."

¹ Conflict with the legal principles applied by the Florida Supreme Court is a sufficient basis for a petition for conflict review. *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981).

In stark contrast to the express ruling in the Decision, Fidelity National never successfully maintained that Fidelity N.Y. and Fidelity National were separate entities in either the Grosso Lawsuit or the Chereskin Lawsuit. More particularly, Fidelity National never successfully maintained or even took the position that the Chereskin and Grosso Lawsuits were supportable because Fidelity National and Fidelity N.Y. were separate entities. Rather, it has consistently been Fidelity National's position that the merger requires the Instant Lawsuit, as the first-filed case, to have priority over the Grosso and Chereskin Lawsuits. Indeed, this is the position that Fidelity National "successfully maintained" in the prior suit, as confirmed by *Chereskin*, 945 So. 2d at 624. Yet, the Decision expressly estops Fidelity National and Fidelity N.Y. from "claiming that their merger renders the Grosso and Chereskin actions unsupportable."

The Decision expressly and directly conflicts with this Court's decision in *Blumberg* to the extent that *Blumberg* establishes basic principles of judicial estoppel requiring the party being estopped to have made "an inconsistent claim" in a subsequent action and the claim assumed in the prior action must have been successfully maintained. The conflict with these basic principles is borne out by the fact that the Third District's application of judicial estoppel results in the unintended consequence of forcing Grosso and Chereskin to sue a non-existent entity (Fidelity N.Y.), and forcing the parties to act as if the merger never occurred,

in conflict with *Blumberg* and *Chereskin*.

IV. The Decision Below Applies the Incorrect Standard of Review

The applicable appellate standard of review for certification of a class is abuse of discretion. *Seven Hills, Inc. v. Bentley*, 848 So. 2d 345 (Fla. 1st DCA 2003). However, the Third District substituted its judgment for that of the trial court in direct conflict with that standard of review. As the first Florida appellate court to impose a heightened scrutiny test² to be applied by trial courts when asked to certify settlement classes, the Third District clearly reweighed the evidence when it expressly found deception on the part of the Petitioners here. Decision at 13. To do so was in express and direct conflict with the applicable appellate standard of review articulated in *Bentley*, 848 So. 2d at 352.

V. This Court Should Exercise Jurisdiction

The conflicts detailed above give this Court discretion to review the Decision. Such review is necessary due to the uncertainty created by the Third District's rationale announced in the Decision and the First District's stay in *Chereskin*. In the First District, the Instant Lawsuit has priority over all pending claims. In the Third District, priority has been ignored based on the incorrect

² This test is not present in Florida Rule of Civil Procedure 1.220 nor has it been required by this Court or any other District Court of Appeal. In fact, in *Bentley*, both the trial court and the First District applied only the factors present in Rule 1.220 in examining class certification, despite the fact that the parties had asked the court to simultaneously consider certification of a settlement class and the settlement agreement at issue. *Bentley*, 848 So. 2d at 348.

assumption the claims in the Chereskin Lawsuit can be freely litigated in the First District. Without this Court's review, all parties' claims will be left in an effective standstill. Under the auspices of imposing a heightened scrutiny test on trial courts asked to certify settlement classes, the Third District has ignored the abuse-of-discretion standard of review, substituted its own judgment for that of the trial court, and left the parties in an unworkable situation. As a case of first impression in this State on the heightened scrutiny test, the parties and class action plaintiffs and defendants in Florida need direction as to the priority doctrine, judicial estoppel and the standards applicable in both the trial and appellate courts.

CONCLUSION

For the foregoing reasons, this Court should exercise its discretionary jurisdiction to consider the merits of Petitioner's argument.

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