IN THE SUPREME COURT OF FLORIDA
Case No. SC09-1275

GEORGE D. JOHNSON, JR.; WILLIAM M. WEBSTER, IV; JAMES W. WHATLEY; MONICA L. ALLIE; WAYNE W. HALL; AND DAVID GALLEN,

Petitioners,

vs.

GERALD BETTS AND DONNA REUTER, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Respondents.

On Discretionary Review from the Fourth District Court of Appeal
Case No. 4D08-2740

RESPONDENTS' BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

The Court lacks jurisdiction to review the Fourth District Court's decision in *McKenzie v. Reuter*, 9 So. 3d 770 (Fla. 4th DCA 2009), because it is completely consistent with both the First District's opinion in *Rensin v. State*, 34 Fla. L. Weekly D402 (Fla. 1st DCA Apr. 3, 2009), and the fraud or intentional misconduct exception to the corporate shield doctrine set forth in *Doe v. Thompson*, 620 So. 2d 1004, 1005 (Fla. 1993). There is no statement within the four corners of the *McKenzie* opinion that indicates a conflict with the *Rensin* decision or supreme court precedent, which places the *McKenzie* decision squarely outside the purview of the Court's discretionary review jurisdiction. And, both the *McKenzie* and *Rensin* opinions consistently recognize that the corporate shield doctrine does not protect nonresident corporate officers and employees from personal jurisdiction in Florida when they have actively engaged in tortious conduct calculated to inflict injury upon Florida residents, as set forth by this Court in *Doe*.

ARGUMENT OPPOSING THE EXERCISE OF JURISDICTION

Petitioners seek discretionary review of the Fourth District Court's decision in *McKenzie v. Reuter*, 9 So. 3d 770 (Fla. 4th DCA 2009), on the ground that it expressly and directly conflicts with the First District's opinion in *Rensin v. State*, 34 Fla. L. Weekly D402 (Fla. 1st DCA Apr. 3, 2009). The Florida Constitution gives the Court discretionary jurisdiction to review district court decisions that "expressly and directly conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. "The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before [the Court] for review." *Dodi Pub. Co. v. Editorial America, S. A.*, 385 So. 2d 1369, 1369 (Fla. 1980) (emphasis added).

A review of the Fourth District's succinct opinion in *McKenzie v. Reuter* demonstrates the decision is completely consistent with the body of Florida case law examining the application of the corporate shield doctrine to nonresident corporate officers and employees that direct tortious activities at Florida residents, including this Court's decision in *Doe v. Thompson*, 620 So. 2d 1004, 1005 (Fla. 1993), as well as the First District Court's decision in *Rensin*.

The *McKenzie* opinion (ruling on three consolidated cases) reads as follows:

> We affirm the non-final order denying appellants' motion to dismiss for lack of personal jurisdiction in all respects but one. With regard to Brenda Lawson, we find that her investment in Advance

> America, Cash Advance Centers of Florida, Inc. and operation of a lending company purchased by Advance America, Cash Advance Centers of Florida, Inc. did not produce sufficient minimum contacts with Florida to support personal jurisdiction over her. **We reject the individual appellants' assertion of the corporate shield doctrine because there is a sufficient basis to bring this case under the fraud or intentional misconduct exception to the doctrine. *See Doe v. Thompson*, 620 So. 2d 1004, 1006 n.1 (Fla. 1993); *Edelstein v. Marlene D'Arcy, Inc.*, 961 So. 2d 368 (Fla. 4th DCA 2007).** Nothing in this brief opinion addressing personal jurisdiction should be construed as a ruling on the viability of any claim or defense.

9 So. 3d at 771 (emphasis added). Petitioners challenge the boldface language as being in conflict with the *Rensin* opinion, which held that a nonresident corporate officer was not subject to personal jurisdiction in Florida because evidence had not been presented to the trial court to demonstrate he was a "primary participant in fraudulent or intentional misconduct aimed at Florida." 34 Fla. L. Weekly at D403. Clearly there is no conflict between these decisions because the *McKenzie* court states that in the instant case there was a sufficient basis to demonstrate the nonresident defendants engaged in fraud or intentional misconduct, rendering the corporate shield doctrine inapplicable.

To argue there is a conflict, Petitioners claim there are "no allegations in this case that any of the Petitioners either (i) engaged in any act in his or her own interest rather than on behalf of the corporation; or (ii) had any direct involvement in the transactions that are the subject of the Complaint, as explicitly required under *Rensin*." (Petitioners' Jurisdictional Brief, p. 7). Even if this was the case, which Respondents contest because they have made such allegations and supported them

with evidence, it cannot form the basis for the Court's conflict jurisdiction. "[F]or purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion." *Hardee v. State*, 534 So. 2d 706, 707 n. (Fla. 1988). Because the Court would have to look outside of the four corners of the *McKenzie* opinion and into the record before the district court in order to verify Petitioners' claim of conflict, it is without jurisdiction to exercise review in this case.

But even if the Court were to look into the record, it would find no conflict between the *McKenzie* and *Rensin* decisions. The Plaintiffs in the underlying case before the trial court brought a class action against: 1) Advance America, Cash Advance Centers, Inc., a Delaware corporation; 2) its subsidiary, Advance America, Cash Advance Centers of Florida, Inc.; and 3) individuals who acted as officers, directors, and/or employees of one or both of the corporate Defendants, including Petitioners, in response to the Defendants' unlawful scheme of charging and collecting unconscionably usurious interest on consumer "payday" loans. Pursuant to written agreements, Defendants advanced money to Florida consumers in exchange for checks made out in amounts greater than the cash advances with the understanding that Defendants would not cash the checks for a certain period of time, usually two weeks or until the customer's next payday. Defendants collected

exorbitant, usurious interest on these loans,[1] ranging upward from annual percentage rates of 260%.

In the class action, Plaintiffs allege that by making these loans to Florida consumers, Defendants acted in violation of both Chapter 687 of the Florida Statutes, particularly the prohibition against loan sharking in section 687.071, and the Florida Deceptive and Unfair Trade Practices Act. Plaintiffs also allege that the parent Advance America corporation and the individual Defendants conspired and participated with each other to operate the subsidiary corporation, which is an illegal enterprise, in order to intentionally engage in the criminal enterprise of collecting on these unlawful debts and are all, therefore, liable under the Florida Civil Remedies for Criminal Practices Act ("civil RICO Act").

Plaintiffs allege in their complaint that the Florida subsidiary is the "enterprise" for purposes of the civil RICO claim. They presented depositions and other record evidence to the trial court in order to demonstrate that each of the individual Defendants, as well as the parent Advance America corporation, was not only associated with the subsidiary/enterprise, but was also deeply involved in the establishment and operations of the subsidiary's payday loan activities in Florida. Each of the Petitioners had a hand in the illegal enterprise, from funding the

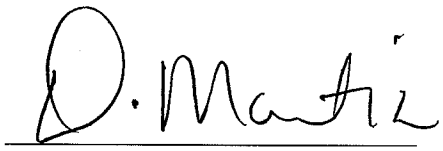
[1] This Court has held that such transactions, called "deferred presentment" transactions, constitute loans subject to Florida's prohibitions against usury. *See McKenzie Check Advance of Florida, LLC v. Betts*, 928 So. 2d 1204, 1211 (Fla. 2006).

enterprise, to managing and running its operations, to developing the enterprise's policies and procedures for charging Florida consumers usurious rates of interest. Upon review of this evidence, the Fourth District found there is "a sufficient basis to bring this case under the fraud or intentional misconduct exception to the [corporate shield] doctrine." *McKenzie*, 9 So. 3d at 771. This holding is consistent with the *Rensin* decision, although the court in that case found there was insufficient evidence in the record to demonstrate the nonresident corporate officer defendant engaged in intentional, wrongful acts targeted at the State of Florida. 34 Fla. L. Weekly at D403. And it is consistent with *Doe v. Thompson*, 620 So. 2d 1004, 1006 n.1 (Fla. 1993), which specifically notes that a nonresident "corporate officer committing fraud or other intentional misconduct can be subject to personal jurisdiction" in Florida.

CONCLUSION

As no express or direct conflict with a decision of another district court of appeal or of the supreme court on the same question of law is evident on the face of the *McKenzie* opinion, the Court lacks jurisdiction to exercise discretionary review over the Fourth District's decision. The Court must, therefore, dismiss Petitioners' request for review.

Dated: July 27, 2009

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Respondent's Brief on Jurisdiction were served by facsimile and US Mail, postage prepaid, this 27th day of July, 2009, upon:

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CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that Respondent's Brief on Jurisdiction is typed in 14 point Times New Roman font in compliance with Florida Rule of Appellate Procedure 9.210.

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