IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

BARBARA J. MILLER, §

Petitioner, §

v. CASE NO.: 65,794

FORTUNE INSURANCE COMPANY, §

Respondent. §

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT FORTUNE INSURANCE COMPANY ON THE MERITS

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PRELIMINARY STATEMENT

For the purpose of brevity and clarity, the Petitioner, Barbara J. Miller, will be referred to in this brief as "Miller" or as "Petitioner." The Respondent, Fortune Insurance Company, will be referred to as "Fortune" or as "Respondent." References to the Petitioner's appendix will be designated by the prefix "PA."

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts requires supplementation in certain areas. It also requires clarification as to the type of action involved.

The present petition involves an action which has now worked its way through the entire hierarchy of the Florida judicial system. This case was originally filed in county court in Lee County seeking personal injury protection benefits of less than $5,000 predicated on Miller's status as a passenger in a car insured by Fortune at the time of an accident. (PA. 1-2). On October 7, 1982, Petitioner, through her attorney, filed a Notice of Voluntary Dismissal dismissing the case with prejudice. (PA. 3).

Almost eleven (11) months later, on August 30, 1983, Petitioner's attorney served a document styled "Plaintiff's Motion for Relief From Voluntary Dismissal" seeking to have the words "with prejudice" stricken from the Notice of

Voluntary Dismissal under Rule 1.540(b), Fla.R.Civ.P., on the grounds of inadvertent mistake or excusable neglect. (PA. 4-5). This motion was accompanied by the affidavits of Petitioner's counsel (PA. 8-9). and that of her counsel's secretary (PA. 6-7). Both of the affidavits averred that the inclusion of the words "with prejudice" on the Notice of Voluntary Dismissal had been the result of secretarial error; neither of the affidavits, however, stated the reason why a Notice of Voluntary Dismissal had been filed in the first instance.

Petitioner's motion was denied by the county court by order dated December 6, 1983 (PA. 10). Petitioner took an appeal to the circuit court of Lee County and on April 11, 1984, that court, sitting in its appellate capacity, affirmed the county court order per curiam (PA. 11).

Miller next petitioned the Second District Court of Appeal for a writ of common law certiorari to review the appellate decision of the Lee County Circuit Court. On July 27, 1984, the Second District issued its decision denying the petition for writ of certiorari, stating that the trial court had no jurisdiction to relieve the Petitioner of the consequences of her voluntary dismissal. Miller v. Fortune Insurance Company, 453 So.2d 489 (Fla. 2d DCA 1984). In its written opinion, the Second District observed that its holding on the jurisdictional issue was in accord with this

Court's decision in Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68 (Fla.1978) but in conflict with the decision of the Fourth District in Shampaine Industries Inc. v. South Broward Hospital District, 411 So.2d 364 (Fla. 4th DCA 1982). Petitioner sought and obtained discretionary review from this Court on the ground of conflict of decisions.

STATEMENT OF THE ISSUES

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR OR GROSSLY ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF'S MOTION FOR RELIEF FILED PURSUANT TO RULE 1.540, FLA.R.CIV.P.?

SUMMARY OF ARGUMENT

This petition for discretionary review presents the question of whether a plaintiff who has filed a notice of voluntary dismissal with prejudice may subsequently seek relief from that dismissal under Rule 1.540(b), Fla.R.Civ.P., on the grounds of secretarial error. Respondent submits, and the Second District Court of Appeal below found, that this question had been definitively decided in Respondent's favor by this Court's decision in Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68 (Fla.1978), which held that "a voluntary dismissal under Rule 1.420(a)(1)(i) divests the trial court of jurisdiction to relieve the plaintiff of the dismissal." Id. at 69.

Petitioner, and the Fourth District Court of Appeal in Shampaine Industries Inc. v. South Broward Hospital District, 411 So.2d 364 (Fla. 4th DCA 1982), have taken the position that the Randle decision is not jurisdictional and applies only to situations in which a voluntary dismissal is entered deliberately and as the result of attorney miscalculation, and further that "secretarial error" in drafting a notice of dismissal is not a "tactical" decision to which Randle would apply. This view, however, ignores both the plain language of the holding of Randle and the precise issue decided by that case, namely that a notice of voluntary dismissal is not a "proceeding" within the

meaning of Rule 1.540(b) so as to bring such a notice within the application of the rule in the first instance.

Moreover, even if it were not precluded by Randle, the position taken by Petitioner and Shampaine makes neither legal nor common sense. First, it creates the anomolous situation of rendering a court's jurisdiction to entertain a Rule 1.540(b) motion dependent upon the substantive merits of the motion, and specifically upon a factual finding of whether the filing of the notice had been a "tactical" decision. Second, the public policy considerations which this Court identified in Randle as requiring the conclusion that a court lacked jurisdiction to set aside a voluntary dismissal apply with equal force whether the decision is regarded as "tactical" or "non-tactical." Indeed, if anything, they apply with greater force where the plaintiff has dismissed his case with prejudice, allowing the defendant to act in justifiable reliance on the assumption that the litigation has terminated once and for all. Third, the distinction which the Petitioner and Shampaine seek to draw is patently artificial, since in all cases the decision is "tactical" in the sense that the plaintiff intends to utilize the procedural tactic of voluntary dismissal to withdraw his case unilaterally from the adjudicatory process, and is also "non-tactical" in the sense that the plaintiff did not intend by the dismissal to prevent the case from ever being refiled.

For these reasons, the decision of the Second District Court of Appeal under review should be approved and the decision of the Fourth District in Shampaine disapproved.

ARGUMENT

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR OR GROSSLY ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFF'S MOTION FOR RELIEF FILED PURSUANT TO RULE 1.540, FLA.R.CIV.P.

This petition for discretionary review arises from the efforts of Petitioner to avoid the effect of a voluntary dismissal with prejudice of her claim for personal injury protection benefits by seeking relief under Rule 1.540(b), Fla.R.Civ.P., from the designation of the dismissal as "with prejudice." The relief sought would have permitted refiling of the suit since the dismissal, if without prejudice, would not have operated as an adjudication on the merits of the action.

A threshold question is the jurisdiction of the courts to entertain such a request at the behest of a party which has unilaterally dismissed its own action under Rule 1.420(a), Fla.R.Civ.P. As the Second District Court of Appeal noted in its opinion, this jurisdictional issue has already been definitively determined adversely to the Petitioner by this Court in Randle-Eastern Ambulance Service Inc. v. Vasta, 360 So.2d 68 (Fla.1978).1/

1/ "[T]he ruling of the trial court can be sustained as a matter of law on the basis of the holding in Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68 (Fla.1978), that a trial court is divested of jurisdiction once there is a voluntary dismissal of an action." 453 So.2d at 490.

The accuracy of the Second District's analysis of the jurisdictional nature of the Randle holding is readily apparent from a review of that decision. In Randle, the plaintiff had brought a wrongful death action against Randle-Eastern Ambulance Service, Inc., for negligence in performing ambulance services. At trial, however, when objections were sustained to certain evidence proffered by the plaintiff, the plaintiff announced on the record a voluntary dismissal of the suit. Subsequently, plaintiff discovered that the statute of limitations on the action had expired prior to the announcement of the voluntary dismissal, preventing refiling of the action. Plaintiff thereupon filed a motion for relief from the voluntary dismissal under Rule 1.540(b), Fla.R.Civ.P. The trial court granted the motion for relief and reinstated the cause of action, and the Third District Court of Appeal denied a petition for writ of common law certiorari from the order. On petition for conflict certiorari, however, this Court reversed, stating:

> The right to dismiss one's own lawsuit during the course of trial is guaranteed by Rule 1.420(a), endowing a plaintiff with unilateral authority to block action favorable to a defendant which a trial judge might be disposed to approve. The effect is to remove completely from the court's consideration the power to enter an order, equivalent in all respects to a deprivation of "jurisdiction." If the trial judge loses the ability to exercise judicial discretion or to adjudicate the cause in any way, it follows

> that he has no jurisdiction to reinstate a dismissed proceeding. The policy reasons for this consequence support its apparent rigidity.

360 So.2d at 69 (emphasis added).

The jurisdictional nature of Randle has been recognized and adhered to in subsequent decisions of the district courts of appeal. For example, a case closely analogous to the instant action is Carolina Casualty Co. v. General Truck Equipment & Trailer Sales, Inc., 407 So.2d 1095 (Fla. 1st DCA 1982). There, the plaintiff had filed a complaint against two insurance companies alleging that one or the other had issued an insurance policy covering a particular loss. During the pendency of the action, the plaintiff's counsel announced in open court that he would be proceeding solely against one insurer, Catawba, and that he would agree to a dismissal of the other, Carolina Casualty, with prejudice. Plaintiff's counsel subsequently sought relief from an order entered pursuant to that announcement by motion under Rule 1.540(b). This motion was granted by the trial court.

In reversing, the First District Court of Appeal noted that not only had the plaintiff failed to meet the standards for relief under Rule 1.540(b), but that the trial court lacked jurisdiction to relieve plaintiff of the dismissal, stating:

> Further, according to Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68 (Fla.1978), when a claimant voluntarily dismisses an action pursuant to Florida Rule of Civil Procedure 1.420(a)(1)(i), the trial court loses jurisdiction to set aside that voluntary dismissal under Rule 1.540(b). The evidence in this case supports a finding that appellee voluntarily dismissed its action against appellant pursuant to Florida Rule of Civil Procedure 1.420(a)(2). The reasoning employed in the Randle-Eastern case concerning a voluntary dismissal pursuant to Rule 1.420(a)(1)(i) applies equally to a voluntary dismissal under Rule 1.420(a)(2). Therefore, the trial court in the instant case was divested of jurisdiction over the claim against appellant as of the October 21, 1980, order and thus was powerless to relieve appellee from the dismissal.

407 So.2d at 1096.

Notwithstanding the foregoing, the Petitioner in her brief, and the Fourth District in Shampaine Industries Inc. v. South Broward Hospital District, 411 So.2d 364 (Fla.4th DCA 1982), the conflicting decision on which this Court's jurisdiction is predicated, take the position that Randle was not actually a jurisdictional decision at all, but simply held that relief under Rule 1.540(b) is not available to a plaintiff who voluntarily dismisses its case "volitionally" and for "tactical reasons." Petitioner purports to reach this conclusion by surveying a number of cases dealing with relief from judgments or orders under Rule 1.540(b) or its predecessors, such as Kippy Corporation v. Colburn, 177 So.2d 193 (Fla.1965). Petitioner claims to distill from these cases the general principle that "trial courts possess jurisdiction to grant 'post case' relief even where the

'initial' jurisdiction has been lost." Brief of Petitioner at 5-6 (emphasis in original). Shampaine purports to reach the same conclusion by analogy to the fact that Rule 1.540(a) allows a court to correct clerical mistakes and errors from oversight or omission in any part of the record at any time, stating:

> We initially reject defendants' (petitioners') argument that the trial court exceeded its jurisdiction because the original dismissal divested the court of jurisdiction. Although there is no doubt that a voluntary dismissal under Rule 1.420(a), Fla.R.Civ.P., divests the court of jurisdiction to entertain a later request for reinstatement of a cause of action, Sun First National Bank of Delray Beach v. Green Crane & Concrete Services, 371 So.2d 492 (Fla. 4th DCA 1979); Randle-Eastern Ambulance Services v. Vasta, 360 So.2d 68 (Fla.1978); Rich Motors, Inc. v. Loyd Cole Produce Express, Inc., 244 So.2d 526 (Fla. 4th DCA 1971), Rule 1.540(a) allows the court to correct clerical mistakes, and errors from oversight or omission, in any part of the record at any time.
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> Thus, we are not concerned with the court's jurisdiction, but rather the extent to which this Rule may be applied. McKibbin v. Fujarek, 385 So.2d 724, 725 (Fla. 4th DCA 1980). Under this view a trial court does have jurisdiction to grant relief assuming the existence of circumstances contemplated by the provisions of the rule.

411 So.2d at 366.

The conclusions reached by Petitioner and the Fourth District in Shampaine, however, will simply not withstand analysis for several reasons. The first and most obvious

is the plain language of this Court's decision in Randle which, it is submitted, can leave no reasonable doubt that the decision is broad in scope and jurisdictional in nature. Indeed, the precise holding of this Court, found in the next to the last sentence of the opinion, is squarely "that a voluntary dismissal under Rule 1.420(a)(1)(i) divests the trial court of jurisdiction to relieve the plaintiff of the dismissal." 360 So.2d at 68. Petitioner's arguments simply cannot prevail in light of such definitive and unambiguous language.

Equally importantly, both the Petitioner and Shampaine ignore the precise issue adjudicated by this Court in Randle. Shampaine, by purporting to focus on what it deems this Court's "careful use of the qualifying phrases 'volitional dismissal' and 'tactical mistakes'", 411 So.2d to 367, obscures the fact that the actual issue presented in Randle was whether a notice of voluntary dismissal constituted a "proceeding" within the meaning of Rule 1.540(b). The power of the court under this rule is explicitly limited to granting relief from a "final judgment, decree, order, or proceeding...." Since a notice of voluntary dismissal is patently neither a final judgment, decree, or order, it must necessarily be considered a "proceeding" if Rule 1.540(b) is to have any application in the first instance. Prior to Randle, that question had been inconsistently decided

by the district courts of appeal. As this Court observed:

> The Fourth District (now joined by the First District) has expressed the view that the trial court loses jurisdiction to proceed in any way beyond the announcement of dismissal, even though the trial judge might have pending, when the announcement of dismissal is made, a motion made by one of the parties which would conclude or resolve the liltigation. The Third District's contrary view is that the trial court retains jurisdiction, on the theory that the plaintiff's voluntary dismissal merely provides a shortcut for terminating the proceeding which is tantamount to the entry of an order by the trial judge for the same purpose. Since the plaintiff's dismissal is considered equivalent to a trial court's order, the Third District views the act of the plaintiff as a "proceeding" from which our rules provide relief in cases of mistake, inadvertence, or excusable neglect.

360 So.2d at 69.

Randle also makes it crystal clear which of these conflicting views this Court adopted as the law of Florida, stating:

> We approve the view of the First and Fourth District Courts of Appeal that a voluntary dismissal under Rule 1.420(a)(1)(i) divests the trial court of jurisdiction to relieve the plaintiff of the dismissal. The decision below is quashed and this case is remanded for proceedings consistent with this opinion.
>
> It is so ordered.

Id.

In short, if, as this Court has held, a notice of voluntary dismissal does not constitute a "proceeding," then Rule 1.540(b) has no application to such dismissals by its terms. Thus, it becomes simply irrelevant whether the notice

is volitional or non-volitional, tactical or non-tactical.

Significantly, the analyses offered by both the Fourth District in Shampaine and the Petitioner in this case are inconsistent with their own prior positions. In Shampaine, the Fourth District panel was constrained to note that its view of Randle as non-jurisdictional was in conflict with that same court's earlier opinion of the case in Sun First National Bank of Delray Beach v. Green Crane & Concrete Services Inc., 371 So.2d 492 (Fla. 4th DCA 1979), in which the Fourth District had held that Randle "clearly hold[s] that a plaintiff's voluntary dismissal divests the trial court of jurisdiction to entertain a later request for reinstatement." Id. at 492. Similarly, the Petitioner did not take the sweeping position that this case "should not pose a 'jurisdictional' issue," in its submission to the Second District Court of Appeal. Rather, there she sought to distinguish the decision on the ground that in Randle the plaintiff had sought reinstatement of his existing suit while in the present case Petitioner was seeking only the striking of the words "with prejudice" from her notice of voluntary dismissal. Even the Shampaine court, however, has rejected this purported distinction as being "both highly academic and unjustified," going on to opine that "if the trial court indeed has no authority to relieve a party of the consequences of a voluntary dismissal, its lack of

authority would appear to apply equally to dismissals filed with prejudice as well as without." Shampaine, supra, 411 So.2d at 367. The Second District agreed. Miller, supra, 453 So.2d at 491.

In light of the foregoing, Respondent would respectfully submit that it is beyond question that the decision of the Second District Court of Appeal under review is not only consistent with, but required by, this Court's prior pronouncements in Randle, and that it is the conflicting decision of the Fourth District in Shampaine which is aberrant and should be disapproved. While this is dispositive of the conflict of decisions issue which this Court has accepted jurisdiction to resolve, and while the strong public policy considerations underlying the doctrine of stare decisis support this Court's adherence to the principles enunciated in Randle, Respondent will briefly address the merits of the distinction sought to be drawn by Petitioner and Shampaine.

There are several reasons why the distinction which Petitioner and Shampaine attempt to draw makes neither legal nor common sense. First, Shampaine's view that courts lack jurisdiction under Rule 1.540(b) to grant relief only as to voluntary dismissals which are entered deliberately and as the result of attorney miscalculation stands the concept of subject matter jurisdiction on its ear. Acceptance of

Shampaine's conclusion would thus mean that a trial court's jurisdiction to decide a Rule 1.540(b) motion would depend on the substantive merits of the motion and that a court could not determine whether it had jurisdiction to entertain the motion until it made a factual finding as to whether or not the dismissal had been "tactical" in nature.

Second, the public policy considerations which this Court found to require the result reached in Randle apply with equal force whether the dismissal is volitional or non-volitional, tactical or non-tactical. As this Court observed:

> Our rules prevent several filings and dismissals against a defendant for the same claim, and they provide authority for defendants to recoup their court costs when a voluntary dismissal has been taken. There is no recompense, however, for a defendant's inconvenience, his attorney's fees, or the instability to his daily affairs which are caused by a plaintiff's self-aborted lawsuit. Nor is there any recompense for the cost and inconvenience to the general public through the plaintiff's precipitous or improvident use of judicial resources.

360 So.2d at 69.

Obviously, the cost and inconvenience to the defendant and to society is no less when the plaintiff has exercised his unilateral power to terminate litigation as a result of a "non-tactical" mistake than when the same dismissal has occurred as a result of a "tactical" mistake. Indeed, with respect to at least one of the factors identified by the Court, the instability introduced into a defendant's

affairs, the public policy grounds articulated in Randle apply with greater force to the present case. A defendant who receives a notice of voluntary dismissal without prejudice cannot automatically assume that its controversy with the plaintiff is at an end; indeed, in many such cases, it is anticipated that the case will be refiled, and the intervention of some extrinsic fact which prevents the refiling, such as the running of the statute of limitations, is in effect a fortuity. On the other hand, a defendant who is served with a pleading dismissing the plaintiff's claim against him with prejudice, as Fortune was here, is fully justified in believing, and acting, as though not only that particular suit, but also the litigation, is at an end. To permit the plaintiff to attempt to set aside that dismissal many months later, in an action which Respondent has now been required to defend from county court to the Florida Supreme Court, introduces great instability not only into the affairs of defendants but into the law as well. Indeed, undercutting the finality of a notice of dismissal with prejudice could result in serious prejudice to defendants who, in justifiable reliance upon the conclusion that this notice had terminated the litigation once and for all, had either disposed of documents or taken other actions which would make their defense on the merits more difficult if the action were to be revived.

Third, the distinctions between "tactical errors" and "mistakes," which the petitioner and the Shampaine court attempt to draw in order to distinquish Randle, are patently artificial. In Randle, the plaintiff dismissed his case in the mistaken belief that the statute of limitations had not run and that it could be refiled; in Shampaine, and allegedly in this case, the plaintiffs dismissed their cases "with prejudice" when they intended for the dismissals to be without prejudice so that they could be refiled.

There is simply no substantial distinction between the "tactical" nature of the dismissals in these cases. On the one hand, in none of the cases was the dismissal "tactical" in the sense that the plaintiff desired the result, namely the total demise of its cause of action. On the other hand, each of the decisions was "tactical" in the sense that the plaintiff intended to utilized the procedural tactic of voluntary dismissal to remove its case unilaterally from the adjudicatory process; in each case the plaintiff or his attorney simply overlooked a fact which prevented its refiling. To hold, as Petitioner urges, that a plaintiff whose attorney mistakenly terminates his client's case because he has failed to inform himself that the statute of limitations has run is barred from relief because of his "tactical" decision, while an attorney who dismisses his client's case with prejudice because he has failed to read

the notice of voluntary dismissal he has signed is entitled to relief because his decision is deemed "non-tactical," would elevate form over substance and create the type of artificial distinction which has no place in the law.

Indeed, if anything, the equities would seem to have favored relief in Randle in preference to the present case. Statute of limitations analysis is often complex and, in many cases, involves factual determinations such as when a cause of action was or should have been discovered with the exercise of due diligence. Under such circumstances, it is more understandable that an attorney might announce a voluntary dismissal in open court under the reasonably mistaken belief that his case was not barred and could be refiled. In the present case, however, assuming that the dismissal with prejudice was in fact a product of secretarial error, the entire matter could have been avoided if Petitioner's attorney had simply read the substantive portion of the pleading to which he was affixing his signature, which consisted of a grand total of one sentence.

Finally, of course, there are evidentiary problems associated with review of voluntary dismissals with prejudice under Rule 1.540(b). Before the Second District, the Petitioner took the position that the trial court had necessarily grossly abused its discretion in failing to set aside the voluntary dismissal because the only evidence

before it was the affidavits of Petitioner's counsel and his secretary, both of which asserted that the inclusion of the words "with prejudice" was unintentional and the product of secretarial error. If this were correct, of course, the mere assertion of such a mistake would be tantamount to award of relief under Rule 1.540(b) since, by definition, the only person with actual knowledge of why a party has unilaterally dismissed its case is the party making the motion, or his counsel. The potential problems of such an approach are particularly evident in this case, in which the affidavits of Petitioner's counsel and his secretary make conclusory allegations of secretarial error, but contain no explanation as to why a voluntary dismissal, either with or without prejudice, was taken in the first instance. Since the Plaintiff's claim was relatively simple and, at the time the voluntary dismissal was taken, there was no imminent trial, motion for summary judgment, or other adverse motion which the voluntary dismissal could be construed as designed to avoid, the most logical conclusion is that the Petitioner concluded that she had no case and deliberately dismissed her claim with prejudice.2/

2/ The Second District noted in its opinion that, had the trial judge disbelieved the affidavits of Petitioner's counsel and his secretary, he would have held an evidentiary hearing on the matter with live testimony. While this may be true as a general matter, it does not apply in this case. This Court's decision in Randle was cited to the trial judge and, if he concluded that he had no jurisdiction to grant the relief requested, as did the Second District, there was no need to consider the truth of the facts underlying the motion.

CONCLUSION

For the reasons stated, it is submitted that the decision of the Second District Court of Appeal under review is correct and in accord with the precedents of this Court. Accordingly, it is respectfully requested that its decision be approved and that the conflicting decision of the Fourth District Court of Appeal be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this 17th day of April, 1985, to ARNOLD R. GINSBERG, ESQUIRE, Horton, Perse & Ginsberg, and Associates and Bruce L. Scheiner, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130.

Charles P. Schropp
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