IN THE SUPREME COURT OF FLORIDA

CASE NO. 65, 794

FILED
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BARBARA J. MILLER, :

Petitioner, :

vs. :

FORTUNE INSURANCE CO., :

Respondent. :

BRIEF OF PETITIONER ON JURISDICTION

(Conflict Certiorari)

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TABLE OF CONTENTS

	Page No.
INTRODUCTION	1
JURISDICTIONAL STATEMENT	1-2
STATEMENT OF THE CASE AND FACTS	2-4
QUESTION PRESENTED:	
WHETHER THE DECISON SOUGHT TO BE REVIEWED IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS RENDERED IN SHAMPAINE INDUSTRIES, INC. v. SOUTH BROWARD HOSPITAL DISTRICT, 411 SO. 2D 364 (FLA.APP.4TH 1982); RANDLE-EASTERN AMBULANCE SERVICE, INC. v. VASTA, 360 SO. 2D 68 (FLA. 1978); PIPER AIRCRAFT CORP. v. PRESCOTT, 445 SO. 2D 591 (FLA.APP.1ST 1984) AND UNITED SERVICES AUTOMOBILE ASSOCIATION v. JOHNSON, 428 SO. 2D 334 (FLA.APP.2D 1983).	4
ARGUMENT	4-9
CONCLUSION	10
CERTIFICATE OF SERVICE	10

INDEX OF CITATIONS AND AUTHORITIES

	Page No.
BELCHER v. BELCHER, 271 So. 2d 7 (Fla. 1972)	5
MILLER v. FORTUNE INSURANCE COMPANY, 453 So. 2d 489 (Fla.App.2d 1984)	2
NIELSEN v. CITY OF SARASOTA, 177 So. 2d 731 (Fla. 1960)	5
PIPER AIRCRAFT CORP. v. PRESCOTT, 445 So. 2d 591 (Fla.App.1st 1984)	2
RANDLE-EASTERN AMBULANCE SERVICE, INC. v. VASTA, 360 So. 2d 68 (Fla. 1978)	2
SHAMPAINE INDUSTRIES, INC. v. SOUTH BROWARD HOSPITAL DISTRICT, 411 So. 2d 364 (Fla.App.4th 1982)	1
UNITED SERVICES AUTOMOBILE ASSOCIATION v. JOHNSON, 428 So. 2d 334 (Fla.App.2d 1983)	2
WALE v. BARNES, 278 So. 2d 601 (Fla. 1973)	5

OTHER AUTHORITIES:

Article V, Section 3(b), Florida Constitution --as amended April 1, 1980	1
Rule 9.030(a)(2), Fla.R.App.P.	1
Rule 1.540(b), Fla.R.Civ.P.	4

I.

INTRODUCTION

The petitioner, BARBARA J. MILLER, was the plaintiff in the trial court (the County Court), appellant in the Circuit Court and unsuccessful common law certiorari petitioner in the District Court of Appeal, Second District. The respondent, FORTUNE INSURANCE COMPANY, was the defendant/appellee/respondent. In this Brief of Petitioner on Jurisdiction, the parties will be referred to as the plaintiff and the defendant and, alternatively, by name. The symbol "A" will refer to the petitioner's rule-required appendix which accompanies this brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

JURISDICTIONAL STATEMENT

This proceeding has been instituted, and the jurisdiction of this Court is invoked, under the aegis of Article V, Section 3(b), of the Florida Constitution--as amended April 1, 1980--and Rule 9.030(a)(2), Fla.R.App.P. The plaintiff contends that the decision of the District Court of Appeal, Second District, herein sought to be reviewed, is in express and direct conflict with decisions previously rendered by other District Courts of Appeal and with opinons of this Court. Conflict exists specifically with:

A. SHAMPAINE INDUSTRIES, INC. v. SOUTH BROWARD HOSPITAL DISTRICT, 411 So. 2d 364 (Fla.App.4th 1982); and

B. RANDLE-EASTERN AMBULANCE SERVICE, INC. v. VASTA, 360 So. 2d 68 (Fla. 1978); and (the apparent progeny of VASTA, supra),

C. PIPER AIRCRAFT CORP. v. PRESCOTT, 445 So. 2d 591 (Fla.App.1st 1984) and UNITED SERVICES AUTOMOBILE ASSOCIATION v. JOHNSON, 428 So. 2d 334 (Fla.App.2d 1983).

III.

STATEMENT OF THE CASE AND FACTS

The circumstances of this case relevant to a consideration of the jurisdictional issues present are neither in dispute nor in doubt. The circumstances may be learned from either the pleadings filed in this cause or from the opinion herein sought to be reviewed (now reported), MILLER v. FORTUNE INSURANCE COMPANY, 453 So. 2d 489 (Fla.App.2d 1984)--(A. 12-15):

* * *

> "Petitioner, Barbara J. Miller, initially filed suit in county court against Fortune Insurance Company for medical expenses incurred as a result of an automobile accident. Subsequently, petitioner filed a notice of voluntary dismissal 'with prejudice' dismissing the action. Therafter, petitioner filed, pursuant to Rule 1.540(b), Florida Rules of Civil Procedure, a motion for relief from voluntary dismissal on the ground that the filing of the notice 'with prejudice' was the result of secretarial error. In support of her motion, she filed two affidavits executed by her attorney and his secretary, which stated that the filing of the notice 'with prejudice' was in fact the result of secretarial error and/or excusable neglect."
>
> "The county court denied petitioner's motion for relief and she appealed to the circuit court, which affirmed the county court's order. She thereupon sought review in this court by certiorari."

* * *

The District Court of Appeal, Second District, denied the petition for writ of common law certiorari but, in so doing, recognized--expressly and directly--that its opinion was "in conflict" with the holding of the District Court of Appeal, Fourth District, in SHAMPAINE INDUSTRIES, INC., supra. The Court stated specifically:

> ". . .In denying certiorari and holding in accordance with RANDLE, we consider that we are in conflict with the holding in SMAMPAINE INDUSTRIES, INC.. . .In SHAMPAINE, the plaintiff southt to have the words 'with prejudice' removed from her intentionally filed voluntary dismissal contending that the words were inadvertently included in the dismissal. The appellate court affirmed the trial court and allowed the words to be removed, stating that relief is available for voluntary dismissals entered as a result of mistake, inadvertence or excusable neglect. . ." 453 So. 2d at p. 490 (A. 13).

The District Court of Appeal, Second District, in declining to afford relief to this plaintiff, relied upon this Court's opinion in RANDLE-EASTERN AMBULANCE SERVICE, INC., supra (and the VASTA progeny), the Court being of the opinion that VASTA, supra, required the Court to deny relief to this plaintiff. In "construing" VASTA, supra, and in applying VASTA to this plaintiff, the Court stated:

> "On appeal, the Supreme Court held that the plaintiff's voluntary dismissal divested the Court of jurisdiciton to relieve the plaintiff from the dismissal and, thus, THE COURT HAD NO JURISDICTION TO REINSTATE THE CAUSE OF ACTION. . ." 453 So. 2d at p. 490 (A. 13).

This plaintiff will not "get ahead of herself" and argue in this portion of her brief the operative facts as discussed above. This plaintiff does, however, with all due respect,

wish to early on emphasize:

A. This case does not present an attempt to reinstate a cause of action previously dismissed.

B. This case does present the threshold issue: To what extent, if any, may a trial court act in a cause--pursuant to Florida Rule of Civil Procedure 1.540(b)--after the filing of a notice of voluntary dismissal?

C. "VASTA" sought to reinstate a cause of action previously voluntarily dismissed because a refiled action would have been barred by the applicable statute of limitations. "VASTA" dealt not with secretarial error but, rather, with trial/tactical maneuvering totally unrelated to the subject of inadvertence, excusable neglect, mistake.

The plaintiff reserves the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

IV.

QUESTION PRESENTED

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS RENDERED IN SHAMPAINE, SUPRA; VASTA, SUPRA; PRESCOTT, SUPRA; AND, JOHNSON, SUPRA.

V.

ARGUMENT

A.

APPLICABLE JURISDICTIONAL PRINCIPLES

It is too well settled to need detailed citation of authority that this Court has jurisdiction to review the deci-

sions of District Courts of Appeal on direct conflict ground to resolve embarrassing conflicts between decisions, and that jurisdiction may be invoked where a District Court of Appeal: (1) announces a rule of law which conflicts with a rule previously announced by another Florida appellate court; or (2) applies a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by a Florida appellate court; or (3) misapplies precedent; or (4) misapplies and/or refuses to apply applicable law to a case under consideration. See: Article V, Section 3, Florida Constitution; WALE v. BARNES, 278 So. 2d 601 (Fla. 1973); BELCHER v. BELCHER, 271 So. 2d 7 (Fla. 1972); and NIELSEN v. CITY OF SARASOTA, 177 So. 2d 731 (Fla. 1960).

B.

THE DECISION HEREIN SOUGHT TO BE REVIEWED IS IN DIRECT AND EXPRESS CONFLICT WITH THE CASES CITED, SUPRA.

1. "Conflict certiorari"--Direct and Express By The Court Rendering the Opinion.

The opinion herein sought to be reviewed itself recognizes:

> "In denying certiorari and holding in accordance with RANDLE, we consider that we are in conflict with the holding in SHAMPAINE INDUSTRIES, INC... In SHAMPAINE, the plaintiff sought to have the words 'with prejudice' removed from her intentionally filed voluntary dismissal, contending that the words were inadvertently included in the dismissal. The appellate court affirmed the trial court and allowed the words to be removed, stating that relief is available for voluntary dismissals entered as a result of mistake, inadvertence or excusable neglect. . ." (A.13), 453 So. 2d at p. 490.

The plaintiff suggests to this Court conflict exists as the District Court of Appeal, Second District, refused (on the same facts as those found in SHAMPAINE, supra) to grant relief to the subject plaintiff and this Court should exercise its discretion and review this case on its merits.

2. "Conflict Certiorari"--Absolute Misapplication of Florida Supreme Court Precedent.

In addition to the conflict expressly and directly found on the face of the subject opinion, it is clear constitutional conflict exists in District Court application of VASTA, supra, to the facts of this case. In VASTA, supra, the plaintiff had taken a voluntary dismissal (announced, on the record, during the course of the trial) and later realized that the opportunity to relitigate with the defendant was foreclosed because at the time of announcing the voluntary dismissal the applicable statute of limitations had run. The plaintiff attempted to correct the earlier tactical error by asking the trial judge for permission to be relieved of the dismissal. The District Court of Appeal, Third District, held that the plaintiff could be relieved of her dismissal and this Court (resolving conflicts arising as a result of District Court ruling) specifically held:

> "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 p. 69.

The record before this Court establishes--without contradiction--the following events:

(a) Plaintiff sued the defendant "for covered losses"

pursuant to an insurance policy (A. 1,2);

(b) Plaintiff filed "NOTICE OF VOLUNTARY DISMISSAL" (A.3);

(c) Plaintiff--pursuant to Florida Rule of Civil Procedure 1.540(b), subsequently and timely filed a "PLAINTIFF'S MOTION FOR RELIEF FROM VOLUNTARY DISMISSAL" and accompanied same with the affidavits of the plaintiff's trial counsel and the trial counsel's secretary. The thrust of the pleading filed was that the voluntary dismissal, as filed (A. 3) contained (BUT SHOULD NOT HAVE CONTAINED)--within its body--a secretarial error, to wit: the words "with prejudice."

(d) The trial court held a hearing on the plaintiff's motion. The trial court's order denying relief reflects the consideration of only the motion, the two affidavits, the law and arguments of counsel (A. 10). No evidentiary hearing, to wit: the taking of testimony, occurred.

(e) Denial of all appellate relief (A. 11, 12).

The plaintiff suggests to this Court the operative facts herein involve scope/application of Florida Rule of Civil Procedure 1.540(b) to correct a secretarial error contained within the body of a pleading filed during the course of a law suit. This case cannot be controlled by VASTA, supra, as VASTA, supra, involved neither the same facts as those appearing herein nor the same principle of law, to wit: a request to have a dismissed cause of action "reinstated", vis-a-vis (the instant cause) removing from a written voluntary dismissal words entered as a result of secretarial error. It may be seen from an examina-

tion of VASTA, supra, that the plaintiff therein dismissed her case and at the time did not comprehend the significance of the action taken although at all times relevant the dismissal without qualification was desired. It was not until counsel realized the full effect of what the dismissal brought about that counsel sought to "change his mind" about what he had done. Counsel sought to have vacated the entire "voluntary dismissal". The instant cause presents no such analogous situation. The instant cause falls within the rationale of SHAMPAINE, supra, and District Court application of VASTA, supra, to the facts and circumstances of this case, generates a pure case of constitutional conflict.

C.

PLAINTIFF'S ACCEPTANCE OF RULE-RECOGNIZED OFFER TO EXPLAIN WHY THIS COURT SHOULD EXERCISE ITS DISCRETION AND ENTERTAIN THIS CAUSE ON THE MERITS

VASTA, supra, involved a plaintiff who, after voluntarily dismissing (for tactical reasons) her cause of action, subsequently sought to "vacate" the "dismissal" after realization that the cause of action (as voluntarily dismissed) could not be successful due to the running of the statute of limitations. In that opinion this Court did not address the present issue--trial court authority and jurisdiction to entertain a Rule 1.540(b) motion to correct a secretarial error in a pleading filed. Post-VASTA, supra, the various District Courts of Appeal have "taken off" with the VASTA opinion and have applied it with varying results to numerous fact patterns, some of which (this case and SHAMPAINE, supra, included) clearly do not

come within VASTA rationale or application.

The SHAMPAINE court stated (prior to certifying to this Court the operative legal issue--certification apparently not being accepted by the participating parties therein) its conflict:

> ". . . We prefer to confront the jurisdictional issue directly and hold that Rule 1.540(b) may be used to afford relief to all litigants whose attorneys have filed voluntary dismissals as the clear result of the type of 'mistake, inadvertence or excusable neglect' contemplated by Rule 1.540(b)." 411 So. 2d at p. 367.

The plaintiff believes this Court should now resolve those conflicts as heretofore discussed. This case does not deal with a request to have a case reinstated. Nowhere in VASTA, supra, did this Court hold (as stated and implied in the cases cited for conflict, supra) that after a voluntary dismissal a trial court loses, for all purposes, jurisdiction. Further, even if such an interpretation can be made from the result reached in VASTA, supra (and plaintiff in no wise intends to argue that this be so), with the divergence of District Court opinion concerning what this Court meant in VASTA, supra; with the disagreement by the various Courts of Appeal as to which type of factual situation VASTA, supra, should apply; and with all District Court concern over the long range effect of VASTA, supra, as it relates to matters other than "tactical errors", to wit: scrivenors' errors, secretarial mistakes, etc., it is clear the instant cause presents the appropriate factual circumstance from which to resolve the conflict "directly and expressly stated" in the subject opinion, as well as the "apparent con-

flict" emanating from the District Court's holding.

VI.

CONCLUSION

It is respectfully submitted that for the reasons set forth herein, the decision sought to be reviewed is in express and direct conflict with the decisions cited. This Court should grant a writ of certiorari and enter an order setting this cause for consideration on the merits.

Respectfully submitted,

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VII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on Jurisdiction (Conflict Certiorari) was served, by U.S. mail, this 24th day of September 1984 on:

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