IN THE SUPREME COURT OF FLORIDA

JACK J. HOLTON and EXCELSIOR INSURANCE COMPANY OF NEW YORK,

Petitioners,

vs. Case No. 66,453

H. J. WILSON COMPANY, INC., a Florida corporation,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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I N D E X

CITATIONS OF AUTHORITY

PRELIMINARY STATEMENT

In this brief, petitioners, Jack J. Holton and Excelsior Insurance Company of New York, will be referred to as "Holton." Respondent, H. J. Wilson Company, Inc., will be referred to as "Wilson." The following symbols will be used: A - Appendix of Holton; B - Brief of Holton.

Collom sued Holton, Wilson and the City of St. Petersburg in an action for wrongful death. No crossclaims for contribution or indemnity were filed. With all parties before the Court, Wilson moved for summary judgment which was granted. Collom appealed but the judgment was affirmed. Holton did not timely appeal the summary judgment for Wilson. After affirmance of summary judgment, Holton filed a complaint against Wilson for contribution and indemnity. The claim was determined upon the merits adverse to Holton. Holton did not appeal although the order was a post-judgment order and appealable under Rule 9.130(a)(4), Fla.R.App.P., and, as a final adjudication on the merits.

Three years later, Holton obtained an ex-parte order permitting him to file an identical third party complaint. Wilson moved to dismiss. The trial Court denied the motion. Wilson petitioned the Second District Court for issuance of a Writ of Certiorari. The District Court granted the Writ holding: (1) Holton was required to timely appeal the summary judgment for Wilson and since no appeal was taken, Holton was barred from asserting its claims for contribution and indemnity; (2) since the claim of Holton was determined on the merits in the Circuit

Court, Holton was required to appeal the decision at that time and thus was barred. The District Court then ruled that the Circuit Court was without jurisdiction to entertain Holton's claim and quashed the order denying Wilson's motion to dismiss. The essence of the District Court's opinion requiring Holton to have timely appealed Wilson's summary judgment states:

> "* * To adopt Holton's view would mean that even though the judgment exonerating Wilson from liability to the Colloms was entered in 1980 and affirmed in 1981, Holton still retains the right to appeal the same judgment if the Colloms should ever obtain a judgment against him." (A 4)

Holton claims sub judice conflict with Mercy Hospital, Inc. v. Marti, 408 So.2d 639 (Fla. 3rd D.C.A. 1981), and Belcher v. First National Bank, 405 So.2d 754 (Fla. 3rd D.C.A. 1981), which hold that a co-defendant must suffer judgment before the co-defendant may appeal a judgment exonerating another defendant. But the District Court held sub judice that the underlying case of Pensacola Interstate Fair, Inc. v. Popovich, 389 So.2d 1179 (Fla. 1980), upon which Mercy and Belcher, supra, were based, did not hold that a defendant must suffer a plaintiff's judgment against him before he can complain of a ruling exonerating a co-defendant from liability to the plaintiff. The District Court reasoned that to adopt this view means that a co-defendant can appeal a judgment exonerating another defendant years later should the plaintiff ever obtain a judgment against such defendant. Such a rule would prolong litigation and there would be no finality to judgments for defendants during the course of pending litigation.

This Court should decline jurisdiction because the District Court's decision and its analysis is correct. Its decision constitutes the law of Florida and directly follows this Court's decision in Pensacola Interstate Fair, supra. This Court's decision required a "timely" appeal by a co-defendant of a judgment exonerating another defendant from liability to the plaintiff. Therefore, as stated, this Court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

The essential facts are stated by Wilson in its Preliminary Statement. Holton does a good job in laying out the procedural path the case followed and the Statement of the Case is accepted by Wilson. Wilson differs with Holton in certain statements of fact. Plaintiff Collom sued Wilson for constructing and maintaining a dangerous condition resulting in the death of Collom's decedents.[1] Holton's complaint essentially alleged the same allegations.[2] The order initially denying Holton's claim against Wilson had the legal effect, as stated by the District Court,[3] of an adjudication on the merits.

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1. (A 11-18)
2. (A 7-10)
3. (A 5)

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY HELD THAT HOLTON IS PRECLUDED FROM PROCEEDING AGAINST WILSON FOR CONTRIBUTION OR INDEMNIFICATION SINCE HOLTON DID NOT TIMELY APPEAL THE SUMMARY JUDGMENT FOR WILSON AGAINST PLAINTIFF COLLOM.

The essence of this petiiton is the claim by Holton that the District Court misinterpreted and misconstrued this Court's decision in Pensacola Interstate Fair, Inc. v. Popovich, 389 So.2d 1179 (Fla. 1980). In that decision, the Court reviewed a decision of the First District in Christiani v. Popovich, 363 So.2d 2 (Fla. 1st D.C.A. 1978). Popovich, a fairground concessionaire, sued the Christianies, Midway, Fair, and Gulf Power for the death of Popovich's wife. Crossclaims for contribution and indemnification were filed by all defendants. During the proceedings, the Court granted Fair a summary judgment. The District Court stated[4] that Popovich and the Christianies "timely appealed" the summary judgment for Fair. Summary Judgment was entered for Fair in November of 1974 while final judgment for plaintiff Popovich against the Christianies and Midway was entered in June of 1975.[5] This meant that the Christianies and Midway had to have filed notice of appeal within 30 days of the entry of summary judgment for Fair. The decision of the District Court directly confirms this analysis by stating that the timely appeals were taken from the Fair judgment.[6] The

4. 363 So.2d at 4
5. 363 So.2d at 5
6. 363 So.2d at 4

District Court held that the defendants Christiani and Midway may appeal a judgment exonerating a co-defendant. Finding conflict with North Shore Hospital v. Martin, 344 So.2d 256 (Fla. 3rd D.C.A. 1977), the Supreme Court ruled that a co-defendant has the right to "timely" appeal a judgment exonerating a co-defendant:

> "The critical policy-making issue for our determination relates solely to the right of a judgment defendant aggrieved by the exoneration of another codefendant to timely appeal from the appropriate judgment. Other jurisdictions are divided on this issue, although in some instances the denial of this right of appeal is based upon the wording of the specific contribution statute. We choose to follow the view that allows a judgment defendant the right of an appeal from a judgment which adversely affects his or her right against exonerated defendants. This is clearly the fairer and more logical result. To find otherwise places these defendants in a disfavored class and denies the opportunity to recoup their losses from the person or entity actually responsible. We agree with the logic and reasoning of the in-depth opinion written by Judge Robert Smith in Christiani v. Popovich and adopt it as the opinion of this Court. We disapprove the conflicting opinion of the Third District Court of Appeal in North Shore Hospital." (Opinion at 1181) (Emphasis Supplied)

In 1981, the Third District decided Belcher. The First National Bank of Miami's motion for summary judgment was granted. Belcher, a co-defendant, appealed not because the judgment for the bank was incorrect but because Belcher contended that he was also entitled to summary judgment and was utilizing the bank's judgment to appear before the District Court in an attempt to have it rule that Belcher's motion for summary judgment was erroneously denied. The District Court dismissed the appeal stating that if Belcher suffered a plaintiff's judgment, then he could appeal at that time. The Mercy Hospital case followed with the Third District utilizing Belcher as authority for dismissing that appeal.

In the case at bar, the District Court reviewed this Court's decision in Pensacola Interstate Fire and correctly held that that decision did not hold that a defendant must initially suffer a plaintiff's judgment before the defendant can appeal a ruling exonerating a co-defendant:

> "In seeking to avoid the effect of the judgment for Wilson against the Colloms, Holton refers to certain cases which have held that his right to appeal that judgment does not accrue until he becomes liable to the Colloms. Mercy Hospital, Inc. v. Marti, 408 So.2d 639 (Fla. 3rd D.C.A. 1981), petition for review denied, 418 So.2d 1280 (Fla. 1982); Belcher v. First National Bank, 405 So.2d 754 (Fla. 3rd D.C.A. 1981). Unlike the Third District Court of Appeal, we see nothing in Pensacola Interstate Fair, Inc. which holds that a defendant must first suffer a plaintiff's judgment against him before he can complain of a ruling exonerating a co-defendant from liability to the plaintiff. In Pensacola Interstate Fire, Inc., one of the appellants successfully appealed a judgment exonerating a co-defendant which was entered seven months before the plaintiff obtained a judgment against the appellant. In the underlying opinion approved by the Supreme Court, the First District Court of Appeal rejected the argument that inchoate contribution claims are not justiciable by appeal until liability has been established. Christiani v. Popovich, 363 So.2d 2 (Fla. 1st D.C.A. 1978). To adopt Holton's view would mean that even though the judgment exonerating Wilson from liability to the Colloms was entered in 1980 and affirmed in 1981, Holton still retains the right to appeal the same judgment if the Colloms should ever obtain a judgment against him." (A 4)

If the rule advocated by Holton should become law, it would prolong litigation and require every defendant who is exonerated during the course of the litigation to await the final outcome of all the claims asserted by plaintiff before the exonerated defendant could know that he was not susceptible to a suit for contribution or his final judgment against plaintiff might be reversed. A plaintiff could appeal the summary judgment and lose

and yet conceptually a co-defendant who has suffered a plaintiff's judgment many years later could appeal the same decision and obtain a reversal. As a policy-making body, this Court should conclude that the District Court's analysis is correct and decline jurisdiction. In sum, the decision of the District Court correctly applies Pensacola Interstate Fair and this Court should decline jurisdiction.

POINT II

THE TRIAL COURT'S DENIAL OF HOLTON'S INITIAL MOTION FOR LEAVE TO AMEND WAS A FINAL ADJUDICATION ON THE MERITS.

The District Court, in its opinion, held that "the record reflects that the order denying this motion was entered on the merits."[7] Holton claims the order was interlocutory and the Court's decision conflicts with Seaboard Coastline Railroad Company v. Wainwright, 336 So.2d 1231 (Fla. 1st D.C.A. 1976).

Holton's position is without merit because the District Court's statement of facts cannot be challenged here. Seaboard Air Line Railway Co. v. Branham, 104 So.2d 356 (Fla. 1956); Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). If the record does reflect an adjudication on the merits, then obviously there exists no conflict. As written, the District Court's opinion conflicts with no Florida precedent. Seaboard does not purport to have been decided on the basis of a record that showed an adjudication of the third party claim on the merits.

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7. (A 5)

In addition, one final factor is missing. Holton's initial motion for leave to file third party complaint which was denied on the merits was made after judgment had been affirmed for Wilson by the District Court. Even assuming arguendo that the order was interlocutory, it was incumbent upon Wilson to have appealed that decision as a post-trial motion under Rule 9.130(a)(4), Fla.R.App.P. Therefore, on this basis, the Court should decline jurisdiction.

CONCLUSION

By denial of discretionary jurisdiction, this Court will affirm the policy enunciated in the case sub judice by the District Court that a co-defendant must timely appeal a judgment for another defendant within 30 days of the rendition of that judgment or be forever barred. To rule otherwise would require the exonerated defendant to wait for possibly years to determine if he was free from suit or liability. The law of Florida resides in such a posture at the present time and should be left that way by this Court's declining jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to J. EMORY WOOD, ESQUIRE, of Butler and Burnette, One Mack Center, Suite 1100, 501 East Kennedy Boulevard, Tampa, Florida 33602, Attorney for Petitioners; DONALD W. GIFFIN, ESQUIRE, 201 East Kennedy Boulevard, Suite 1107, Tampa, Florida 33602; DONALD M. SPANGLER, ESQUIRE, P.O. Box 941, St. Petersburg, Florida 33731; and MICHAEL J. KEANE, ESQUIRE, P.O. Box 15339, St. Petersburg, Florida 33733, this 14th day of February, 1985.

JOHN T. ALLEN, JR.