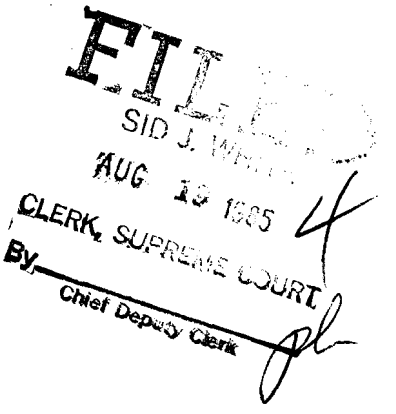
IN THE
SUPREME COURT OF FLORIDA

CASE NO: 66,716



ANDREW BENDER,

Petitioner,

vs.

FIRST FIDELITY SAVINGS AND LOAN ASSOCIATION OF WINTER PARK, f/k/a FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF MARTIN COUNTY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, AS DIRECTLY CONFLICTING WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW

Petitioner's Reply Brief

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND RULES

SUMMARY OF ARGUMENT

A Voluntary Dismissal taken under authority of Florida Rules of Civil Procedure 1.420 is a unilateral act of the Plaintiff. This does not fall within the criteria of Florida Rules of Civil Procedure 1.540(b) which states that a party may be accorded relief due to clerical error if error occured in a judgment, order, decree or proceeding.

Petitioner adopts the traditional viewpoint that when jurisdiction is terminated through the use of the Voluntary Dismissal it is terminated for all purposes. It is a tactical weapon designed for the unilateral strategic use of the Plaintiff and carries with it the commensurate responsibility for the termination of jurisdiction. Petitioner relies upon a long line of case with special reliance upon RANDLE-EASTERN AMBULANCE SERVICE v. VASTA, 360 So 2d 68 and MILLER v. FORTUNE INSURANCE CO., 453 So 2d 489.

Respondent relies upon holdings in a recent group of cases which would make jurisdiction either superfluous or subjective. These decisions have been an attempt to rationalize holdings which are clearly contrary to accepted motions of jurisdiction and common usages of the words "order" and "proceeding". Any basis for the fictions employed by these various courts are simply attempts to arrive at a decision which they desire, but without a vehicle to get there.

The basis for Florida Rules of Civil Procedure 1.540(b)

is sound and should remain to correct errors caused when words of the Court in judgments, orders, decress, and proceedings are reduced to the written word. The basis for jurisdiction is likewise sound. When jurisdiction is terminated by one's own conduct it should divest the Court of jurisdiction to award relief under Florida Rules of Civil Procedure 1.540(b) as well as the Court's jurisdiction to hear any further matters in that cause.

ARGUMENT IN RESPONSE

A Voluntary Dismissal under Florida Rules of Civil Procedure 1.420 is privilege accorded to a Plaintiff. It is a tactical weapon placed at the disposal of a Plaintiff when his cause of action appears to be going against him. It is a unilateral act which terminates the jurisdiction of the trial Court as to all further proceedings, and can be used regardless of the views, desires, and additional expenses of the Defendant. As this dismissal is not a judgment, decree, order, or proceeding, neither the Court nor the Defendant can deny its use or argue against it. Commensurate with such a tactical weapon comes the responsibility for its use. Failure to use it properly or to properly oversee its use can lead to disastrous results, as jurisdiction has been terminated in a manner for which relief cannot be granted under any Rules of Civil Procedure.

Jurisdiction is the basis for the entire judicial system. A long line of cases, including RANDLE-EASTERN AMBULANCE

SERVICE v. VASTA, 360 So 2d 68, CAROLINA CASUALTY CO. v. GENERAL TRUCK EQUIPMENT & TRAILER SALES, INC., 407 So 2d 1095 (1982), PIPER AIRCRAFT CORP. v. PRESCOTT, 445 So 2d 591 (1984), and MILLER v. FORTUNE INSURANCE CO., 453 So 2d 489, stand for the proposition that when the Court has been deprived of jurisdiction by means of a Voluntary Dismissal it has lost jurisdiction for all time.

Respondent counters this long line of cases on juridiction with several District Court holdings which approach jurisdiction on a subjective basis. The lead spokesman for this group of holdings is SHAMPAINE INDUSTRIES, INC. v. SOUTH BROWARD HOSPITAL DISTRICT 411 So 2d 364 whose cavalier attitude toward jurisdiction is set out quite clearly in an attampt to rationalize their holding:

> "we are not concerned with the Court's jurisdiction, but rather the extent to which this Rule may be applied."

An excellent synopsis of SHAMPAINE'S error in reasoning is set out at length in MILLER at Page 49 with the conclusion that. . . "if the Court loses jurisdiction it is lost for all purposes."

Other Courts have used equally imaginative rationale to justify their holdings, including the declaration by a Georgia Court that the unilateral filing of a Voluntary Dismissal is actually an "order", (PAGE v. HOLIDAY INNS, INC., 245 GA 12, 262 Se 2d 783 (1980)-See Respondent's Appendix B, Pages 1-2), and a 1970 Florida Court declaring that such an act is in realty a

"proceeding". (COOPER v. CARROLL 239 So 2d 511).

Still other holdings would give the trial Court immediate jurisdiction to apply a subjective test to determine whether or not the trial Court has jurisdiction to grant relief under Florida Rules of Civil Procedure 1.540(b). The trial Court would hear the testimony of attorneys and their secretaries to find out if this error was volitional or non-volitional; tactical or non-tactical. Applying logic to these tests, however, dissipates them. A volitional act is one which a person, in the exercise of his free will, elects to commit. Reducing the present situation to plain English, the filing of the present dismissal was a volitional act in which a secretarial error occured. Similarly, the Rule itself is a tactical weapon for use solely by Plaintiff, thereby eliminating the tactical-non-tactical rationale.

The fact remains that a Voluntary Dismissal was intended and it was taken by Respondent without authority or approval of the trial Court by means of a judgment, order, decree, or proceeding. Furthermore, Defendant below was powerless to argue against it. If the position that a Voluntary Dismissal divests jurisdiction entirely and for all reasons seems rigid, the policy reasons behind this position were stated eloquently in RANDLE-EASTERN, at Page 69:

Our rules prevent several filings and dismissals against a defendant for the same claim and they provide authority for

defendants to recoup thier court costs when a Voluntary Dismissal has been taken. There is no recompense, however, for a defendant's inconvenience, his attorneys 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.

The benefit of the dismissal privilege must carry with it commensurate responsibility-responsibility for counsel, as an officer of the courts, to ascertain the need for and the consequence of a Voluntary Dismissal before removing a client's cause from the adjudicatory process which counsel has set in motion. Correlative with this responsibility must be the risk, like so many others which attend counsel's judgmental decisions in the course of a trial, that the action taken may prove prejudicial to the ultimate success of the litigation.

REBUTAL OF ARGUMENT

Respondent has attempted to construe the unilateral filing of a Voluntary Dismissal as either a judgment, order, or proceeding. Without coming out and stating it, Respondent attempts to characterize a Voluntary Dismissal as a judgment on Page 11 of the Answer Brief. Respondent also attempts therein to characterize MILLER as being in conflict with cases which grant relief from final judgments, default final judgments and orders of dismissal. Nothing could be further from the truth. No case has

been put forth for the proposition that Florida Rules of Civil Procedure 1.540 does not apply to judgments or order. The subject before this Court is a Voluntary Dismissal which does not fit into any of the criteria stated in Rule 1.540.

Respondent then turns to the Georgia case of PAGE v. HOLIDAY INNS, INC.(supra) for the proposition that a Voluntary Dismissal is an "order". That Honorable Court states that although a Voluntary Dismissal is not a judgment, in their opinion it is an order due to the statute, Code Ann. Chapter 81A-141(a). Yet a reading of that statute does not disclose the intent to character a Voluntary Dismissal as on order. In fact, the statute states:

> ". . .an action may be dismissed by the Plaintiff without order of Court by filing a written notice of dismissal at any time before verdict."

It is also interesting to note in the PAGE decision that the Court refers to the pleadings in question as an . . ."order of dismissal. . ." in Paragraph 2. Either that case actually involved an order of dismissal or the Court confused the order of dismissal with a Voluntary Dismissal to achieve its own ends. In any event, the common usage of the word "order" dictates against the rationale used in this case.

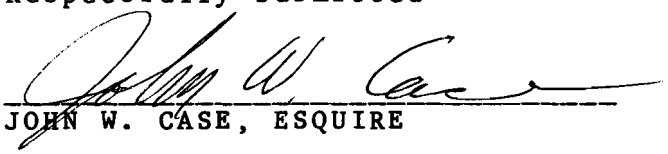
Respondent likewise attempts to use semantic gymnastics in order to define a Voluntary Dismissal as a "proceeding". According to Respondent, a proceeding is either ". . .the form and manner of conducting juridical business before a Court or judicial

officer," (Page 9, Answer Brief) which would exclude a Voluntary Dismissal, or a proceeding encompasses all matters which occur throughout a suit. If the latter case was true, Respondent's later argument distinguishing volitional non volitional; tactical and non-tactical, along with the holding in RANDLE, SHAMPAINE, and all the other cited cases would be in vain. "Proceeding" would encompass all actions at all stages without need to distinguish. This, of course, was not intended and the general usage of the word "proceeding", as used in Rule 1.540 is interchangeable with "hearing".

CONCLUSION

For the reasons set forth above Petitioner respectfully requests that the lower Court order be reversed.

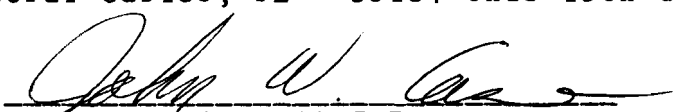
Respectfully Submitted



JOHN W. CASE, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to ROBERT L. LORD, JR., ESQUIRE, 201 Alhambra Circle, Suite 502, Coral Gables, FL 33134 this 15th day of August, 1985.



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