IN THE SUPREME COURT OF FLORIDA

DONALD E. WATSON,

Plaintiff/Petitioner,

vs.

Case No. 67,806

LAUREN FRANK ANDERSON, MISENER MARINE CONSTRUCTION COMPANY, and INTERNATIONAL INSURANCE COMPANY,

Defendant/Respondents.
_____/



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# JURISDICTIONAL BRIEF OF RESPONDENTS

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## STATEMENT OF THE CASE AND FACTS

Respondents agree generally with the Petitioner's Statement of the Case and Facts. Respondents supplement the statement by stating that Petitioner was prepared to go to trial against Respondents Anderson, Misener, and International principally on a claim for punitive damages, since he had already received in excess of $300,000 for his knee injury from Misener's primary insurer. The jury trial was scheduled to commence on June 11, 1984. On June 8, 1984, for specific strategic and tactical reasons, Watson's counsel intentionally voluntarily dismissed Anderson from the lawsuit. The factual reason was to remove as a defendant the individual driver, who was allegedly intoxicated at the time of the accident. Anderson's net worth, the touchstone of the amount of punitive damages to be awarded, was so relatively insignificant, that Petitioner decided to drop him with prejudice and pursue only the two "target" defendants, Misener and International, who had much deeper pockets.

## SUMMARY OF ARGUMENT

The decision of the Second District Court of Appeal below is completely consistent with this Court's decision in Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So. 2d 68 (Fla. 1978); therefore, this Court does not have conflict certiorari jurisdiction.

The decision of the Second District Court of Appeal below does not conflict with any decision of the Third or Fourth District Courts of Appeal. Specifically, the cases cited by

Petitioner, Atlantic Associates, Inc. v. Laduzinski, 428 So.2d 767 (Fla. 3d DCA 1983), and Shampaine Industries, Inc. v. South Broward Hospital District, 411 So.2d 364 (Fla. 4th DCA 1982), are no longer the views expressed by those respective appellate courts. Therefore, no conflict jurisdiction exists. Bailey v. Hough, 441 So.2d 614 (Fla. 1983).

## ARGUMENT

### A. The Second District Court of Appeal's decision is entirely consistent with this Court's decision in Randle-Eastern Ambulance Service Inc. v. Vesta, 360 So.2d 68 (Fla. 1978).

Petitioner predicates his claim of jurisdiction upon the argument that the Second District Court of Appeal below misapplied this Court's decision in Randle-Eastern Ambulance Service, Inc. v. Vesta, 360 So.2d 68 (Fla. 1978). Petitioner claims that this misapplication of Randle-Eastern, supra, creates conflict jurisdiction pursuant to this Court's holding in McBurnette v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962). Petitioner's reliance on McBurnette, supra, is misplaced.

McBurnette, supra, held that conflict jurisdiction exists when a district court of appeal applies a decision of this Court as controlling precedent in a situation which materially varies from the situation in the relied upon case. Applying McBurnette to the present situation demonstrates that there is no conflict jurisdiction. The fact situation in Randle and the fact situation in the present case are almost identical.

In Randle, this Court was faced with a factual situation in which plaintiff's counsel had intentionally served a voluntary dismissal and later requested that the trial court give him permission to be relieved from the effect of the voluntary dismissal. In Randle, the effect of the dismissal was to forever bar the plaintiff from litigating the claim due to the expiration of the statute of limitations. In the present case the plaintiff's counsel also intentionally filed a voluntary dismissal. Plaintiff's counsel also later asked the trial court for permission to be relieved from the dismissal and its effects. The effects of the dismissal in this case would be a collateral estoppel adjudication on the merits with respect to the Petitioner's remaining claims against Misener and International. There simply is no factual variance between the situation in Randle and the situation in the present case.

This Court, in Randle, stated the rule of law that a voluntary dismissal under Rule 1.420 divests the trial court of jurisdiction to relieve the plaintiff of the dismissal. The Second District Court of Appeal below adhered strictly to this Court's decision and ruled:

> "A voluntary dismissal under Florida Rule of Civil Procedure 1.420(a)(1)(i) divests a trial court of jurisdiction to relieve a plaintiff of the dismissal."

The Second District Court of Appeal below applied this Court's rule of law from Randle to a factual situation that is almost identical to the factual situation in Randle.

Petitioner, for the first time in his brief on jurisdiction, appears to take the position that the voluntary dismissal in this case was an unintentional act that removes the Petitioner from the rule of law expressed by this Court in Randle. The facts below indicate otherwise. Petitioner's trial counsel testified that they intended to file a voluntary dismissal with respect to respondent Anderson. However, petitioner's trial counsel testified that they did not intend the dismissal to be "with prejudice". Petitioner should not be able to claim at this point that the volitional act of voluntarily dismissing Mr. Anderson was somehow an unintentional action on the part of counsel. The fact that the filing of the voluntary dismissal was an intentional act brings the Petitioner's actions within the scope of this Court's ruling in Randle.

Petitioner also, for the first time, takes the position that there were no strategic or tactical reasons for the Petitioner voluntarily dismissing respondent Anderson. The facts below indicate otherwise. Petitioner's trial counsel both testified that they had "reasons" for their decision to voluntarily dismiss respondent Anderson. The procedural posture of the case on June 8, 1984 demonstrates Petitioner's strategic and tactical reasons for voluntarily dismissing Mr. Anderson, be it with or without prejudice.

Petitioner, months prior to the June 11, 1984 trial date, had obtained a payment from Misener's primary insurance carrier. That payment was in excess of $300,000. Petitioner proceeded to pursue his punitive damage claim against Anderson, Misener, and

International. The $300,000 payment was well in excess of the compensatory value of Petitioner's knee injury and the only remaining value of the case was the potential punitive damages against the "deep pocket" defendants Misener and International, Misener's excess insurance carrier. Anderson, an employee of relatively modest means, would hardly constitute a punitive damage "target" defendant for Petitioner during the trial of the case. There was, however, a substantial likelihood that Anderson could be a sympathetic defendant in the eyes of the jury. If Anderson's net worth was the touchstone to determine the amount of punitive damages it was certainly to the Petitioner's benefit to have Anderson out of the case. Further, Petitioner would be in a position to argue that the punitive damages would be only assessed against Misener and International and that since Anderson had been dismissed with prejudice there was no way that Anderson would ever have to pay any punitive damages. There is no doubt but that the voluntary dismissal of Anderson was a volitional act. The Petitioner, at the trial court level and at the district court of appeal level, never raised an issue about whether he intentionally dismissed Mr. Anderson. Petitioner intentionally dismissed respondent Anderson and should be estopped to claim otherwise merely to have this Court accept jurisdiction.

Petitioner indicates that "the attorneys for both sides eventually concluded that no prejudice would result to either Anderson or Watson if Anderson were dropped and, that Anderson would be dropped from the case". (Petitioner's brief, p. 1-2.) Attorneys for Misener and International had absolutely no part in

the discussions between Petitioner's attorney and Anderson's attorney. Anderson's attorney stated that he did in fact raise the possibility of Anderson being dismissed from the case but that he and Petitioner's counsel never discussed whether the dismissal would be with or without prejudice. Petitioner's attempts to distinguish this case from Randle by alleging that somehow Petitioner was "duped" into performing an unintentional act is contradicted by the position Petitioner has taken at the trial court and at the district court of appeal.

The present factual situation is almost identical to the factual situation presented in Randle. In Randle the plaintiff's counsel intentionally voluntarily dismissed the defendant and later asked the trial court for relief from that dismissal. In the present case Petitioner's counsel intentionally voluntarily dismissed Anderson and later requested the Court to grant it relief from that dismissal. There is no material factual difference. The Second District Court of Appeal was inherently correct in applying the clear ruling of this Court in Randle, to the facts of this case. The Second District Court of Appeal followed this court's decision as it was required to do. Hoffman v. Jones, 280 So.2d 432 (Fla. 1973).

B. There is no conflict between the decisions of the Second District Court of Appeal and other district courts of appeal

Petitioner, as an alternative, asserts that there is a conflict between the Second District Court of Appeal decision and this case and decisions of the Third and Fourth District Courts of

Appeal. However, both the Third and Fourth District Courts of Appeal have impliedly rescinded from their decisions which Petitioner claims are conflicting with the Second District Court of Appeal decision in this case.

Petitioner asserts a conflict between the Second District Court of Appeal decision in this case and the Third District Court of Appeal decision in Atlantic Associates, Inc. v. Laduzinski, 428 So.2d 767 (Fla. 3d 1983). Petitioner also asserts that the Second District Court of Appeal decision in this case is inconsistent with the decisions of the Fourth District Court of Appeal in Shampaine Industries, Inc. v. South Broward Hospital District, 411 So.2d 364 (Fla. 4th DCA 1982) and Bender v. First Fidelity Savings and Loan Ass'n of Winter Park, 463 So.2d 445 (Fla. 4th DCA 1985). It was most certainly this conflict that lead this Court to grant review of Miller v. Fortune Insurance Co., 453 So.2d 489 (Fla. 2d DCA 1984), Supreme Court Case No. 65,794. However, since the Third and Fourth District Courts of Appeal have both impliedly rescinded from their conflicting decisions, this Court no longer has conflict jurisdiction and this case together with Miller should have their petitions for review denied. Bailey v. Hough, supra.

The Third District Court of Appeal has impliedly rescinded from its decision in Atlantic Associates. Petitioner asserts that Atlantic Associates is inconsistent with the Second District Court of Appeal decision in this case, as well as the decisions in United Services Automobile Association v. Johnson, 428 So.2d 334 (Fla. 2d DCA 1983), and the Second District Court of Appeal

decision in Miller. Petitioner asserts that the logic, reasoning, and rationale of United Services, Miller, and the Second District Court of Appeal below are identical. Petitioner is correct since each of those decisions involves the Second District Court of Appeal applying this Court's clear ruling in Randle.

The Third District Court of Appeal has, subsequent to its decision in Atlantic Associates, demonstrated that it now accepts the reasoning and rationale of both Randle and United Services in its decision in Nationwide Carpet and Drapery Co., Inc. v. McMillian, 444 So.2d 1162 (Fla. 3d DCA 1984). Nationwide was decided approximately one year after Atlantic Associates and specifically adopts the reasoning and decision of United Services, the case with which Petitioner asserts Atlantic Associates is in conflict. Therefore, no conflict exists between the Second District and the Third District at this time. The non-existence of such a conflict cannot substantiate this Court's granting conflict jurisdiction in the present case.

Petitioner also asserts that there is a conflict between the decisions of the Fourth District Court of Appeal in Shampaine Industries, Inc. v. South Broward Hospital District, supra, and Bender v. First Fidelity and Savings Ass'n of Winter Park, supra and the Second District Court of Appeal decision in this case and in Miller and United Services. The conflict no longer exists since the Fourth District Court of Appeal in South Florida Nursing Services, Inc. v. Palm Beach Business Services, Inc., _____ So.2d _____ (Fla. 4th DCA 1985), 10 FLW 2111 (decided September 11, 1985), impliedly recedes from its decision in Shampaine, and

Bender and specifically adopts the ruling of this Court in Randle and the Second District Court of Appeal in Miller. Petitioner alleges that there is a conflict between the decisions of the Fourth District Court of Appeal and the decision of the Second District Court of Appeal in this case and in Miller. The Fourth District's implied rescission from its decision in Shampaine and Bender and the adoption of the reasoning of Miller indicates that there is no longer a conflict between the decisions of the Fourth and Second District Courts of Appeal.

The non-existence of any present conflict between the decisions of the Third and Fourth District Courts of Appeal and those of the Second District Court of Appeal dictates that this Court deny the petition for review. This Court should only grant review to:

> "'Cases including principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority' between decisions" (Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958).

The absence of a real and embarrassing conflict between decisions of the District Courts of Appeal requires that this Court deny the petition for review.

## CONCLUSION

Respondents request that this Court deny the Petition for Review. The Second District Court of Appeal clearly and unequivocally applied this Court's decision in Randle to the

similar fact situation presented in this case. There is no conflict between the Second District Court of Appeal opinion and any prior decision of this Court.

There is no conflict between the decision of the Second District Court of Appeal in this case and decisions of the Third and Fourth District Courts of Appeal. The Third and Fourth District Courts of Appeal in their most recent decisions on the subject, Nationwide Carpet and Drapery Company, Inc. v. McMillian, supra, and South Florida Nursing Services, Inc. v. Palm Beach Business Services, Inc., supra, demonstrate their rescission from earlier decisions and their adoption of the rule of law created by this Court in Randle, and as reiterated by the Second District Court of Appeal in United Services Automobile Association v. Johnson, supra, and Miller v. Fortune Insurance Company, supra. This Court should deny the Petition for Review.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Brief were mailed to E. C. Rood, Jr., Rood and Associates, 200 Pierce Street, Tampa, Florida 33602, and to Adam H. Lawrence, Lawrence and Daniels, 1700 New World Tower, 100 North Biscayne Bouelvard, Miami, Florida 33121, this 14th day of November, 1985.

Thomas J. Roehn

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