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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.

ANSWER BRIEF OF RESPONDENTS ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts is incomplete and argumentative. The following constitutes specific areas of supplementation and disagreement.

On October 21, 1981, the Petitioner Donald E. Watson (hereafter Petitioner) and the Respondent Lauren Frank Anderson (hereafter Anderson) were each operating motor vehicles which came into contact with one another on U. S. Highway 301 in Hillsborough County, Florida. Anderson was driving a vehicle which was owned by Respondent Misener Marine Construction Company (hereafter Misener) and which was insured by United States Fidelity and Guaranty Company (hereafter USF&G) as primary insuror and Respondent International Insurance Company (hereafter International) as excess insuror. Petitioner suffered injuries in the accident and filed this action against Respondents.

Petitioner filed this action seeking to recover damages against Respondents Anderson, Misener, and USF&G (App. 1).[1] Anderson, Misener, and USF&G filed their answer to the Complaint on February 12, 1982 (App. 2). On January 20, 1983, Petitioner filed an Amended Complaint which alleged that Anderson was intoxicated at the time of the subject accident and that Misener was aware of the fact that Anderson was intoxicated and was negligent in permitting Anderson to operate its vehicle while he was intoxicated. Anderson, Misener, and USF&G answered the Amended Complaint (App. 4). A Second Amended Complaint for

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[1]Record Citations are to the documents in the Appendix filed by Respondents in the Second District Court of Appeal.

damages was filed on October 6, 1983 (App. 5). The Second Amended Complaint dropped USF&G from the lawsuit and substituted International, the excess insuror of Anderson and Misener. Due to potential conflicts of interest, each of the Respondents filed its own answer and defenses to the Second Amended Complaint (App. 6).

USF&G was dismissed from the lawsuit and International was substituted because Petitioner had entered into a settlement with USF&G whereby USF&G paid Petitioner the sum of $303,500.00 in exchange for a complete release of USF&G and only a partial release of Misener and Anderson (App. 7-8). International filed a Third Party Complaint against USF&G alleging that USF&G breached its duty of good faith to its excess carrier and to its insured by paying the sum of $303,500.00 to Petitioner and obtaining only a partial release while exposing the excess carrier and the insureds to excess liability and punitive damages liability (App. 9). International also alleged that USF&G had an opportunity to settle the Petitioner's claim within its policy limits but failed to do so and thereby caused the filing of the punitive damage counts and the excess liability counts found in the Second Amended Complaint (App. 9). USF&G moved to dismiss the Third Party Complaint (App. 10). The trial court severed the Third Party Complaint for a later determination.

The jury trial in this case was scheduled to commence on June 11, 1984. On June 8, 1984, the Petitioner filed and served a "Notice of Voluntary Dismissal" which voluntarily dismissed Anderson with prejudice (App. 11). On June 11, 1984, the

Petitioner filed a "Motion in Limine" which asked the trial court to prohibit Misener and International from mentioning to the jury that Anderson had been dismissed from this case (App. 12). As a result of Anderson's dismissal with prejudice, Misener, and International, in the trial court's chambers, on June 11, 1984, made oral motions for leave to amend their answers and defenses to assert the affirmative defenses of res judicata and collateral estoppel (App. 39, pp.3-13).

The trial court initially denied the motion for leave to amend (App. 39, p. 13). However, after hearing argument on several motions in limine the trial court reversed itself and felt that the Respondents were entitled to amend their answers and defenses to assert collateral estoppel (App. 39, pp. 54-61). The trial court continued the trial and allowed Misener and or International to file memoranda of law with respect to their entitlement to amend their answers and defenses (App. 39, p. 73; App. 14).

Misener and International filed written motions for leave to supplement their answer and defenses and supporting memorandum of law (App. 13, 16, 17, and 18). Petitioner filed his memorandum of law in response (App. 15). The trial court granted the Respondent's motions for leave to supplement their answers (App. 20). Supplemental answer and defenses were filed (App. 19 and 21).

Petitioner then filed multiple motions pursuant to Rule 1.540(b), Fla. R. Civ. P., to have his voluntary dismissal with prejudice changed into a voluntary dismissal without prejudice and to have Anderson brought back into the case as a defendant under Rule 1.250, Fla. R. Civ. P. Petitioner filed the following motions:

(1) "Motion to Delete the Words 'With Prejudice'" (App. 22)

(2) "Motion to Determine the Effect of Plaintiff's Notice Filed Herein Entitled Voluntary Dismissal" (App. 23)

(3) "Amended Motion to Delete the Words 'With Prejudice'" (App. 24)

(4) "Motion to Add a Party Defendant" (App. 27)

(5) "Motion to Expunge" (App. 25)

The parties submitted memoranda of law on the issue of whether or not the court had jurisdiction to entertain a Rule 1.540(b) motion to modify the voluntary dismissal with prejudice. Petitioner submitted his memorandum of law (App. 25) and also submitted several affidavits of Petitioner's lawyers' staff (App. 26). International filed its memorandum of law (App. 28). The trial court heard argument on the subject on November 8, 1984 (App. 40) and again on December 12, 1984 (App. 41). The trial court denied the Petitioner's motion to add a party defendant pursuant to Rule 1.250, Fla. R. Civ. P. (App. 29). The trial court also denied all of the Petitioner's other motions seeking relief under Rule 1.540(b) (App. 30). The trial court based its

ruling on its finding that it was not the intent of Rule 1.540(b) to protect the Petitioner's counsel from tactical errors in the filing of the case or preparing it for trial (App. 41, p. 20-21).

International filed a motion for summary judgment on the theory that since there was an adjudication on the merits with respect to Anderson, the vehicle's driver, the Petitioner was not entitled to relief against Misener, the vehicle's owner, or International, the vehicle's insurer, who were only liable vicariously for any negligence of Anderson (App. 31). Petitioner then filed a motion for rehearing asking the court to reconsider its order denying all of Petitioner's motions (App. 32). Petitioner filed yet another motion for rehearing (App. 33). Petitioner filed an amended memorandum of law with respect to his motions for rehearing (App. 34). Petitioner also submitted a "Memorandum Re Cause of Action" (App. 35). Petitioner also filed a new and separate lawsuit against Anderson only. This new lawsuit was filed in Plant City and not in Tampa, the venue of this action (App. 46).

The trial court heard argument upon the Petitioner's motions for rehearing first on January 3, 1985 and then again on January 7, 1985 (App. 42-43). The trial court again reversed itself and ruled that it had jurisdiction to hold an evidentiary hearing on the issue of whether or not the Petitioner was entitled to relief under Rule 1.540(b). The trial court, however, specifically ruled that it did not have jurisdiction over Anderson. Petitioner's counsel specifically agreed with and stipulated to the court's

finding that it did not have jurisdiction over Anderson (App. 43, pp. 33-34). The trial court then issued its order granting the Petitioner's motion for rehearing (App. 36).

The evidentiary hearing upon all of the Petitioner's Rule 1.540(b) motions was held on February 28, 1985 (App. 45). The testimony concerned the "Notice of Voluntary Dismissal" (App. 11). That notice of voluntary dismissal was signed by Jeffrey H. Willis, an associate in the firm of Rood and Webster. The notice of voluntary dismissal states that it was signed by "Jeffrey H. Willis, Esquire for: Edward C. Rood, Esquire".

Anderson's counsel appeared specially for the purpose of objecting to the trial court's exercise of jurisdiction over Anderson.

The Respondents objected to all of the testimony on the grounds that the Court, by its own admission, and by the stipulation of Petitioner's counsel, did not have jurisdiction over Anderson (App. 45, pp. 5-6). Anderson was the only party voluntarily dismissed by the Petitioner's dismissal (App. 11). However, the court heard all of the evidence offered by the Petitioner.

The Petitioner offered the testimony of his attorneys E. C. Rood, E. B. Rood, Jeffrey H. Willis, and their secretary L. Jean Kloeber. E. B. Rood had nothing to do with the preparation, filing, or serving of the notice of dismissal with prejudice (App. 45, pp. 7-23). Jeffrey H. Willis, the attorney associate of the Petitioner's law firm who actually signed the voluntary dismissal

with prejudice, testified that he signed it after he looked at it (App. 23-25). Attorney Edward C. Rood, testified that on Friday, June 8, as he was leaving his office, he told his secretary L. Jean Kloeber:

> "I told her to prepare a document dropping the individual driver -- I don't know if I mentioned him by name or as a party in the lawsuit." (App. 45, p. 31)

E. C. Rood also admitted that at that point in time that particular secretary had never had an occasion to prepare such a document since she had been working for him (App. 45, p. 31). He also admitted that he did not specifically instruct her whether or not the dismissal was to be with or without prejudice (App. 45, p. 32). He also admitted that on June 11, 1984 he prepared a motion in limine which asked the court to prevent Misener and International from mentioning to the jury that Anderson had been dismissed from the lawsuit (App. 45, pp. 36-37). He also admitted that he, and his father, as attorneys for Petitioner, had "reasons" for dismissing Anderson from the lawsuit (App. 45, pp. 38-39).

L. Jean Kloeber, E. C. Rood's secretary, testified that she could not recall whether E. C. Rood told her to drop the driver defendant Anderson with or without prejudice (App. 45, pp. 26-27). She also testified that she prepared the voluntary dismissal with prejudice for Jeffrey Willis' signature (App. 45, p. 27).

She also testified that Attorney E. C. Rood told her that the voluntary dismissal had to be filed by Friday, June 8, 1984 at 5:00 p.m. (App. 45, p. 28).

Respondents' only witness was Michael Rywant, attorney for Anderson. Mr. Rywant testified that there was never any discussions between himself as attorney for Anderson and any of Petitioner's attorneys as to whether or not any dismissal of Anderson would be with or without prejudice (App. 45, pp. 43-45).

The fact that Anderson had been voluntarily dismissed from the case with prejudice was first brought to the court's attention on June 11, 1984 (App. 39). In the court's chambers Misener and International asserted that the dismissal with prejudice of Anderson was an adjudication on the merits which allowed them to raise as an affirmative defense collateral estoppel or res judicata (App. 39, pp. 3-10). The court directed Petitioner's counsel to respond and Attorney E. B. Rood stated:

> "Now, in this case, we brought this suit against the owner and the driver and we have elected, as we have in many cases, in fact we do it in railroad cases, constantly we sue the engineer of the train and the train company and then just before trial dismiss with prejudice the operator of the train and proceed against the owner and that is all that has been done here." (App. 39, p. 11.) (Emphasis added.)

Attorney E. B. Rood denied making that statement during his testimony before the trial court (App. 45, p. 12). In his sworn testimony to the trial court, Attorney E. B. Rood took the position that either the court reporter took his words down wrong or he misstated his words (App. 45, p. 12).

On June 11, 1984, after the court indicated that the Respondents were correct, that is, that the dismissal of Anderson with prejudice was an adjudication on the merits and did give rise to the defense of collateral estoppel or res judicata, the Petitioner's counsel initially denied that the voluntary dismissal had been filed. (App. 39, pp. 63 and 66). However, when the trial court reminded him that the dismissal had been filed with the court on June 8 (App-39, P-66), Petitioner's counsel then requested leave of the court to go and research the law (App. 39, pp. 60-62). Petitioner's counsel stated:

> "We may want to take another action here. I don't see that there's any point what they've said. I would like a chance to look up the law they've just cited, for instance, these --
>
> MR. ROEHN: Federal cases.
>
> MR. E. B. ROOD: The federal cases. Can -- can we have 20 minutes? It might save a lot of time." (App. 39, p. 62.) (Emphasis added.)

After Petitioner's counsel did his research and contacted his office, he came back to the court and told the court that: (1) he knew nothing about the voluntary dismissal (A-39; p-62); (2) he never discussed the voluntary dismissal with anyone (A-39; p-62); (3) that the dismissal had never been filed; (A-39; p-63); (4) that he had previously left instructions with the clerk's office not to file any voluntary dismissals until they had been discussed with him (A-39; p-63); and (5) that Attorney Jeffrey Willis prepared the voluntary dismissal with prejudice on his own and without permission (App. 39, pp. 62-63). E. B. Rood told the

court that his office had left instructions with the Clerk of the Circuit Court of Hillsborough County not to allow anyone to file such a voluntary dismissal without discussing it with him (App. 39, p. 63). E. B. Rood took the position that Mr. Willis prepared the voluntary dismissal with prejudice without permission and without E. B. Rood's knowledge, and without E. B. Rood's permission (App. 39, p. 64). E. B. Rood also made the following statement to the trial court:

> "When I got back, and I had never seen this paper and that's why I asked Tom Roehn to show it to me, it's through error, mistake, whatever you want to call it. I do not think anybody misled my young associate of what it was. I think it's just through carelessness or somebody not checking with me by telephone, although I was out of town, about what should have been done." (App. 39, p. 65).

E. B. Rood also made the statement that an associate in his office made a mistake with respect to the preparation and filing of the notice of voluntary dismissal (App. 39, pp. 67, 72).

Shortly after the hearing on June 11, Petitioner submitted his "Memorandum Re Defendant's Motion to Amend" (App. 15). In that memorandum Petitioner set forth "the factual situation." In that factual situation, the Petitioner took the position that the voluntary dismissal with prejudice was as a result of the attorneys E. B. Rood and E. C. Rood leaving the city and "leaving this matter of dropping the party to personnel remaining in the office" (App. 15, p. 1). On October 9, in his "Amended Motion

to Delete the Words 'With Prejudice'", Petitioner took yet another position. In the amended motion Petitioner took the position that Attorney E. C. Rood specifically instructed his secretary to drop Anderson without prejudice (App. 24). At the evidentiary hearing on the issue, however, Petitioner took his next position, that is, that E. C. Rood did not specifically instruct his secretary as to whether or not dismissal should be with or without prejudice and it was therefore a secretarial error when she made the wrong legal decision (App. 45).

After hearing the evidence, the trial court granted the Petitioner's motion to expunge the words "with prejudice" (App. 37). The Respondents filed their timely notice of appeal of a non-final order pursuant to Rule 9.130(A)(5), Florida Rules of Appellate Procedure (App. 38). The Second District Court of Appeal reversed the trial court on the basis of this court's decision in Randle-Eastern Ambulance, Inc. v. Vasta, 360 So.2d 68 (Fla. 1978).

SUMMARY OF ARGUMENT

THE TRIAL COURT ERRED IN RULING THAT PETITIONER'S FILING OF THE VOLUNTARY DISMISSAL WITH PREJUDICE WAS THE RESULT OF CLERICAL ERROR.

Rule 1.540(b), Fla. R. Civ. P., was designed to protect the court from errors in judgments or orders. The rule has been interpreted to authorize the courts to allow parties to amend or correct clerical errors in the preparation of pleadings and documents. Miller v. Fortune Insurance Co., Case No. 65,794, 11 FLW 85, March 6, 1986. However, this court has specifically ruled that Rule 1.540(b) was not designed to allow courts to protect attorneys from their own tactical errors.

The trial court record is devoid of any evidence to support the trial court's finding that the filing of the voluntary dismissal with prejudice in this case was as the result of clerical error. The uncontested evidence established that the voluntary dismissal with prejudice was prepared for the signature of Attorney Jeffrey H. Willis. Attorney Jeffrey H. Willis reviewed the voluntary dismissal with prejudice and then signed it. It was then served upon all parties and delivered to the court. Petitioner's contention that the secretary is at fault is totally contradicted by the record. Attorney E. C. Rood merely told his recently hired secretary to "prepare a pleading dropping the defendant driver as a party to this action" without specifying

whether or not the dropping or dismissal would be with or without prejudice. Such an ambiguous instruction should not be corrected by Rule 1.540(b) relief.

The multiple explanations for the voluntary dismissal with prejudice that were provided by Petitioner's counsel show on their face that the filing of the voluntary dismissal with prejudice was a volitional act of counsel and not as the result of a secretary's error.

ARGUMENT

THE TRIAL COURT ERRED IN RULING THAT PETITIONER'S FILING OF THE VOLUNTARY DISMISSAL WITH PREJUDICE WAS THE RESULT OF CLERICAL ERROR.

This court's recent decision in Miller v. Fortune Insurance Co., Case No. 65,794, decided March 6, 1986, 11 FLW 85, answers all of the jurisdictional questions raised by Petitioner.[2] However, it does not dispose of this case. Rather, Miller indicates that the decision of the Second District should be affirmed but on grounds other than the jurisdictional issue. The trial court erred in ruling that Petitioner's filing of a voluntary dismissal with prejudice was the result of a clerical error. The Second District Court of Appeal, because of its reliance upon this court's decision in Randle-Eastern Ambulance, Inc. v. Vasta, 360 So.2d 68 (Fla. 1978) never addressed the Respondents' argument that the evidence presented to the trial court did not demonstrate the existence of an "error" that would justify Rule 1.540(b) Fla. R. CIV. P. Relief.

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[2]Petitioner did not raise his jurisdictional arguments either at the trial court or before the Second District Court of Appeal. Petitioner stipulated at the trial court that the court did not have jurisdiction over Anderson (App.-43; p. 33-34). Petitioner admitted in his brief before the Second District that the issue before the court was "not whether the Court had jurisdiction of Anderson" (p. 9 of Petitioner's Answer Brief in the Second District). Petitioner should be estopped to raise his jurisdictional issus for the first time in this court.

This court, in Miller, ruled that the type of errors which could be corrected by Rule 1.540(b) relief were "... clerical substantive errors" (11 FLW at 86). The type of mistake envisioned by Rule 1.540(b) has been described in Danner v. Danner, 206 So. 2d 650 (Fla. 2d DCA 1968):

> "It is manifest from the foregoing cases, two granting relief and two denying it, that the mistake relied upon by plaintiff wife in the case sub judice is not the type of mistake contemplated by present Rule 1.540(b). The mistake envisioned by the Rule is the type of honest and inadvertent mistake made in the ordinary course of litigation, usually by the Court itself, and is generally for the purpose of 'setting the record straight'. Here the mistake that the wife asserts was her alleged misplacing of confidence in her husband's intentions and good faith; in short, in a miscalculated reliance upon her husband's promises." (206 So. 2d at 654.) (Emphasis added.)

The "error" in the present case is not clerical, but rather tactical and not the type which qualifies for relief. Further, the trial court's order which granted the Petitioner's requested relief, styled "Order Granting Plaintiff's Motion to Expunge" (App. 37), is clearly not supported by the facts of the case. The entire foundation of the trial court's decision was the trial court's clearly erroneous finding that the voluntary dismissal was prepared and filed before it was reviewed by Petitioner's attorneys.

The order makes the following finding:

> "That the words 'with prejudice' were placed in said Notice of Voluntary Dismissal, and that said Notice was filed before Plaintiff's attorneys had an opportunity to examine the Notice, through the mistake, inadvertence or excusable neglect of the secretary who prepared

> said Notice, and further, that the Court has the authority to grant the motion to expunge the two words 'with prejudice', and it is thereupon: . . . ." (App. 37.) (Emphasis added)

The trial court's order is not only unsupported by the facts, it is contradicted by the uncontested facts. The only evidence offered to the trial court concerning the preparation and signing of the notice of voluntary dismissal (App. 11), was the testimony of L. Jean Kloeber and Jeffrey Willis. Both Ms. Kloeber and Mr. Willis testified that the notice of voluntary dismissal was prepared by Ms. Kloeber, after rather nonspecific and haphazard directions from Attorney E. C. Rood. All of the witnesses testified that the document was then presented to Attorney Jeffrey Willis for his review and execution. Mr. Willis testified that he was presented with the notice of voluntary dismissal, that he reviewed it, or at least read it, that he signed it, and he then signed the certificate of service on the document. Ms. Kloeber testified that she then filed and served the notice of voluntary dismissal pursuant to the explicit direction from E. C. Rood to have it filed by five (5) p.m. on Friday, June 8, 1984. The court's statement that the words "with prejudice" were placed in the notice of voluntary dismissal, and that the notice was filed before Petitioner's attorney had an opportunity to examine it is totally contrary to the only testimony presented to the court. Mr. Willis testified that he had the opportunity to examine the notice. He did examine it. He also read it and then signed it. E. C. Rood also knew that

the dismissal had been filed. On June 11, 1984, prior to any mention of the subject by the respondents, E. C. Rood served and filed a Motion in Limine asking the court to preclude the respondents from mentioning that Anderson had been dismissed from the case. This dismissal was not created and filed by a secretary prior to an attorney's review. The attorneys knew exactly what was being done.

The trial court's opinion is totally predicated upon a clearly erroneous factual determination. The trial court's decision that there was a secretarial error was based upon a conclusion that the Petitioner's attorneys did not see the notice of voluntary dismissal before it was filed with the court and served upon respondents. There is no evidence to support that conclusion. This Court has a duty to reverse. Holland v. Gross, 89 So.2d 255 (Fla. 1956); Shaffran v. Holness, 102 So. 2d 35 (Fla. 2d DCA 1958). The Second District ruled in Shaffran, after reviewing a factual basis for a non-jury judgment:

> ". . .; yet where a decree is manifestly against the weight of the evidence, or contrary to, and unsupported by the legal effect of the evidence, then it becomes our duty to reverse such decree." (102 So. 2d at 40.)

In Holland, supra, this court ruled:

> "A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the

> nature of a legal conclusion. 3 Am. Jr. 471. When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous' and the appellate court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety. We may not be required to state wherein the lower court has 'failed to give legal effect to the evidence' when we reverse on that ground, but under such circumstances propriety dictates that we should." (89 So.2d at 258)

This court must reverse the trial court because there is no factual basis to support the trial court's decision. Other district courts of appeal have ruled similarly to the decision in Shaffran, supra. Adams v. McDonald, 356 So. 2d 864 (Fla. 1st DCA 1978); Design Engineering Corp. of America v. Pan Aviation, Inc., 448 So. 2d 1112 (Fla. 3d DCA 1984); Hull v. Miami Shores Village, 435 So. 2d 868 (Fla. 3d DCA 1983); Trueba v. Pawley, 407 So. 2d 945 (Fla. 3d DCA 1982); Zinger v. Gatlis, 382 So. 2d 379 (Fla. 5th DCA 1980).

The trial court's conclusion that the notice of voluntary dismissal was prepared and filed through the mistake, inadvertence, or excusable neglect of a secretary is equally unsupported by the facts. Petitioner dismissed Anderson with prejudice. Petitioner had "reasons" behind the dismissal (App. 45, pp. 38-39). Petitioner counsel told the trial court that he always dismisses employee drivers with prejudice and this is all that was done here (App. 39, p. 11).

E. C. Rood, the attorney who signed every pleading in this case, testified that he merely told a newly-hired secretary to prepare a document which "dropped the defendant driver Anderson from the lawsuit". E. C. Rood admitted that he did not tell the newly-hired secretary whether or not the dismissal should be with or without prejudice. The newly-hired secretary, L. Jean Kloeber, testified that she could not recall whether E. C. Rood told her to dismiss the driver with or without prejudice. The lack of specific instructions and the careless manner in which the ultra-significant step of dismissing a defendant was left to an untrained, newly-hired secretary, is not the mistake, inadvertence or excusable neglect of the secretary; it was the error of an attorney that should not be remedied by Rule 1.540(b) relief. The Petitioner's error was tactical, not secretarial, as it was in Miller v. Fortune Insurance Co., supra.

At first blush, Petitioner's argued facts appear identical to those in Miller. However, unlike Miller where the secretary swore she mistakenly typed the words "with prejudice" on the dimissal and the attorney swore that he relied upon standard office practice and failed to catch the error, here the Petitioner's counsel advised the trial court that he always dismisses drivers with prejudice (App. 39, p. 11). This admission demonstrates the tactical error. L. Jean Kloeber, the scapegoat secretary of this case, did not swear that she typed in the wrong words, as was done in Miller. She said she didn't recall what words E. C. Rood called out for her to use as he ran and out the

door. E. C. Rood said he didn't specify which words to use. He told her "prepare a document dropping the defendant driver from the lawsuit". These events take the case out of the "standard operating procedure" that the Petitioner would have this court to believe existed in such a careless handling of a signficant event. The facts remove this case from the result but not the rationale in Miller.

Petitioner argues that the threat to Rywant, that he would refile the lawsuit against Anderson if Anderson did not testify at trial as he did in deposition, conclusively establishes that "both sides" knew the dismissal was to be without prejudice. This argument demonstrates Petitioner's true tactical error. Rywant and Petitioner's attorneys both testified that at no time did anyone mention whether the dismissal would be with or without prejudice. Further, even if Anderson had testified adversely to Petitioner and Petitioner obtained a bad result against Misener and International, Petitioner could not have re-sued Anderson. Hinton v. Iowa National Mutual Ins. Co., 317 So.2d 832 (Fla. 2d DCA 1975). The threat of refiling was an empty one. Petitioner's tactical errors are evident.

The question legitimately is asked: what could possibly be the Petitioner's tactical or strategic reason for voluntarily dismissing Anderson with prejudice? To understand those tactical reasons, it is necessary to review the procedural history of the case and what the Petitioner was attempting to recover with the jury trial.

Petitioner, months prior to trial, had collected $303,500 from USF&G. That amount of money was clearly in excess of the compensatory value of the Petitioner's knee injury and provided Petitioner with a $300,000 war chest to set out upon his search to recover pure punitive damages against Misener and International on the volatile and topical issue of Anderson's alleged drinking and driving. The alleged culprit, Anderson, was still a defendant in the action on June 8, 1984, and still the person who a jury might believe would have to pay any punitive damage award. Anderson, a blue collar worker of modest means, would hardly be the type of defendant that a jury would assess the enormous punitive damage award the Petitioner was seeking. On the contrary, his presence in the case would most likely diminish the size of the punitive damage award. Petitioner could, however, by voluntarily dismissing Anderson with prejudice, argue to the jury that it was Misener and its excess insurance company that would be paying any punitive damage award. The jury would not feel constrained in its award either by Anderson's modest assets nor by the fact that he was a rather sympathetic individual.

The above are undoubtedly the "reasons" which the Petitioner's attorneys admitted that they had for voluntarily dismissing Anderson. Why should the dismissal be with prejudice? So the Petitioner could argue to the jury that Anderson would never be held liable for the punitive damages. These tactical reasons, taken in conjunction with the fact that Attorney Willis,

unlike plaintiff's counsel in Miller, read, reviewed, executed and served the voluntary dismissal with prejudice, shows that the errors were tactical and strategic and of an attorney rather than the inadvertence of poor L. Jean Kloeber. It is not L. Jean Kloeber's fault that she did not obtain a law degree and research the significance of a voluntary dismissal. It was Petitioner's attorney who gave incredibly ambiguous instructions to a newly hired secretary to perform what is an extremely significant task, relying on a "standard operating procedure" that did not fit the situation.

However, even if L. Jean Kloeber did err when she attempted to follow the instructions which E. C. Rood called out to her as he ran out the door, Mr. Willis, an attorney at law, admitted to The Florida Bar, associated with the Petitioner's law firm, had the opportunity to inspect, modify, change, amend, or retain the notice of voluntary dismissal. These facts distinguish this case from Miller. The fact that an attorney at law reviewed the notice of voluntary dismissal and signed it establishes that the dismissal was filed not as the result of a secretarial error and before an attorney could review it, but rather as the result of either an attorney's volitional decision or an attorney's miscalculation of law. Willis signed and served the dismissal, his actions intervened after Kloeber's alleged error. She may not have known what she was doing but he surely did. Miller's facts do not control in the present situation.

It is most enlightening to review the various positions which the Petitioner has taken with respect to the notice of voluntary dismissal. Initially, in answering the Respondent's arguments requesting leave to amend their answers, Petitioner's counsel E. B. Rood clearly accepted, acquiesced to, and adopted the voluntary dismissal with prejudice (App. 39, p. 11). In chambers, as the issue was being argued, E. B. Rood looked the trial court in the eye and told the trial court that he always voluntarily dismissed drivers immediately before trial as he did in railroad cases, that is all he did in this case (App. 39, p. 11). However, after the trial court indicated that it felt that the Respondents were correct, that is, that the dismissal with prejudice did allow the Respondents to amend their answers to assert the affirmative defenses of collateral estoppel or res judicata, Petitioner's attorneys denied that the dismissal had ever been filed. When again they were proven wrong, E. B. Rood requested an opportunity to have a recess to research the law and contact his office and to "<u>. . . take another action here</u>" (App. 39, p. 62). Interestingly, after that investigative and legal research recess, E. B. Rood, in chambers, again looked the trial court in the eye and accused his associate Jeffrey Willis of filing the voluntary dismissal on his own and without the approval and knowledge of Rood (App. 39, pp. 62-63). E. B. Rood on several occasions told the court that Willis had filed the voluntary dismissal, that he was not supposed to have filed it until E. B. Rood reviewed it, and that specific instructions had

been given to the Clerk of the Circuit Court of Hillsborough County not to file pleadings until E. B. Rood had an opportunity to inspect them. E. B. Rood clearly told the court that Jeffrey H. Willis prepared and served the voluntary dismissal without knowledge or without approval.

The Petitioner's next fall back position was that the task of filing the notice of voluntary dismissal was left to the office staff (App. 15, p. 1). Finally, presumably after Petitioner's counsel had an opportunity to do all the research and learn that attorney error would not justify relief under Rule 1.540(b), but that there had to be some secretarial error, Petitioner took the position that L. Jean Kloeber was the root of the entire problem. Further, and even more interestingly, Petitioner took the position that E. C. Rood told L. Jean Kloeber to prepare the dismissal without prejudice (App. 24). However, when L. Jean Kloeber would not support that position, Petitioner again changed his position to state that L. Jean Kloeber was not given any specific instructions and that she did it on her own and that therefore it was all her fault. The Petitioner presented multiple choice excuses. The findings contained in the order granting the Petitioner's motion to expunge are totally unsupported by any of the facts presented to the trial court. This court must reverse.

CONCLUSION

This court's decision in Miller v. Fortune Insurance Co., supra, establishes that the trial court did indeed have jurisdiction to address Petitioner's request for Rule 1.540(b) relief. The trial court, however, erred in finding that the notice of voluntary dismissal was filed through clerical error on the basis that it was prepared and filed prior to its being examined or reviewed by Petitioner's counsel. The uncontradicted facts at the trial court establish that Petitioner's attorneys directed the preparation of the document, a voluntary dismissal with prejudice, as they do in many of their cases (App. 39, p. 11), and also that they reviewed, examined, and signed the document prior to its being filed. The trial court's decision is based upon facts that are not only unsupported by the record but clearly contradicted by the record. This Court must reverse and direct the trial court to reinstate the words "with prejudice" in the notice of voluntary dismissal.

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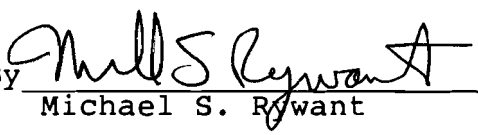
By 
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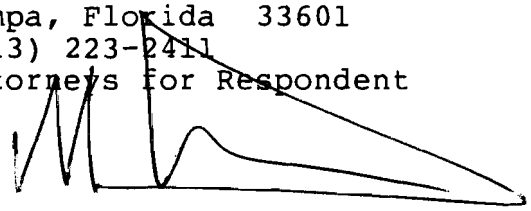
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Edward C. Rood, Esquire, Rood and Associates, 200 Pierce Street, Tampa, Florida 33602, (813) 229-6591 and Lawrence and Daniels, Suite 1700, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132 (305) 358-3371, this 18th day of March, 1986.

_____
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