IN THE SUPREME COURT OF FLORIDA

DONALD E. WATSON,

Plaintiff/Petitioner,

vs.

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

Defendants/Respondents.

CASE NO.: 67806
(2nd DCA Case No. 85-697)



# JURISDICTIONAL BRIEF OF PLAINTIFF/PETITIONER IN SUPPORT OF NOTICE TO INVOKE DISCRETIONARY JURISDICTION ON THE GROUNDS OF EXPRESS AND DIRECT CONFLICT

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## STATEMENT OF THE CASE AND FACTS

Petitioner, Donald E. Watson, files this brief under Fla.R. App.P.9.120, and Fla.R.App.P.9.030(a)(2)(A)(iv), and asserts that express and direct conflict exists between the decision of the Second District Court of Appeal in this case, and decisions of the Third and Fourth District Courts of Appeal, over the meaning of this Court's decision in Randle-Eastern Ambulance Service,Inc. v. Vasta,360 So.2d 68 (Fla.1978).

Watson was injured when his vehicle was struck by a vehicle driven by respondent, Lauren Frank Anderson. Anderson's vehicle was owned by his employer, respondent Misener Marine Construction Company. Anderson and Misener were insured by respondent International Insurance Company.

Approximately two weeks before the scheduled June 11, 1984 trial date, Anderson's attorney began asking Watson's attorneys whether they would consider dropping Anderson from the case. Watson's attorneys made two pre-conditions clear to Anderson's attorney - that Anderson's departure would not prejudice Watson's case against the two remaining defendants, and that if Anderson recanted or changed his deposition testimony at trial, Watson would have the right to refile the lawsuit against him. Although Anderson's attorney assured Watson's attorneys that Anderson would not change his testimony, Anderson's attorney understood the threatened consequence if his client did, in fact, testify inconsistently.

The attorneys for both sides eventually concluded that no

prejudice could result to either Anderson or Watson if Anderson were dropped, and that Anderson would be dropped from the case. Watson received nothing of value in return for dropping Anderson. No settlement papers or releases were executed. Watson merely desired, by dropping Anderson, to simplify his case against Misener and International.

On June 8, 1984, while the only attorneys for Watson who were familiar with the case and who had agreed to drop Anderson were out of the office, their secretary prepared and mailed to the parties and the trial judge a Notice of Voluntary Dismissal. The Notice read:

> The Plaintiff, Donald E. Watson, by his undersigned attorney, files this his Notice of Voluntary Dismissal of the Defendant, LAURN FRANK ANDERSON, with prejudice.

The secretary who prepared this Notice had not been given instructions to add the words "with prejudice" to the document. In fact, the policy of her office, that had been previously communicated to all secretaries, was always to prepare dismissals "without prejudice" unless specific instructions to the contrary were given. The secretary admitted that she had not been instructed to deviate from that office policy.

Anderson's attorney testified that he did not know any "sane" attorneys who, without any financial consideration to their clients, would add the words "with prejudice" to their dismissals. He conceded that he was "surprised" to discover the words "with prejudice" in Watson's Notice.

Following a hearing in which Watson's attorneys, Anderson's attorney, and the secretary who prepared the Notice testified, the

trial judge found:

> [t]hat 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.

The respondents herein perfected an interlocutory appeal of this Order to the Second District Court of Appeal. Citing Randle-Eastern Ambulance Service, Inc. v. Vasta, and its own decisions in Miller v. Fortune Insurance Co.,453 So.2d 489 (Fla,2nd DCA 1984) and United Services Automobile Ass'n v. Johnson, 428 So.2d 334 (Fla.2nd DCA 1983), the District Court held that, notwithstanding the secretary's error, the mere filing of the Notice of Voluntary Dismissal divested the trial judge of jurisdiction to expunge the words "with prejudice" from the Notice. The order of expungement was thereupon reversed. (Appendix)

## SUMMARY OF ARGUMENT

The present decision, and other decisions of the Second District Court of Appeal which hold that under Randle-Eastern a trial judge has no jurisdiction to expunge the inadvertent words "with prejudice" from a notice of dismissal or remedy a mistaken dismissal, expressly and directly conflict with decisions of the Third and Fourth District Courts of Appeal which hold precisely to the contrary.

## ARGUMENT

In Randle-Eastern Ambulance Service,Inc. v. Vasta, supra, this court held that an intentional voluntary dismissal divests

the trial judge of jurisdiction to reinstate the dismissed proceeding. The "apparent rigidity" and punitiveness of this rule was thought to be justified by the unavoidable harm a dismissing plaintiff could work on his adversary and on the courts. The harm took several forms. First, while a dismissed defendant could recover his costs, the dismissal would still leave him uncompensated for his inconvenience, his own attorneys fees, and for the instability in his daily affairs caused by never knowing when or if the dismissed action would be reinstated. Secondly, the public would suffer loss because of the plaintiff's "precipitous or improvident use of judicial resources". Thirdly, the plaintiff's unbridled right to a Rule 1.420(a) dismissal gave him limitless power to "block action favorable to a defendant which the trial judge might be disposed to approve". Finally, the rule was premised upon the policy of the law not to relieve counsel from the unintended consequences of their "volitional" acts and "tactical" decisions. Id.at 68-69.

None of these justifications for the rule in Randle-Eastern are applicable to a case like the present one. Here, the words "with prejudice" appeared in the Notice of Dismissal as a result of secretarial error and inadvertence, and not as a result of an attorney's tactical or volitional choices. Nor was the dismissal filed out of a desire to block pending judicial action that might be beneficial to the defendant. In the present case, it was the defendant who perceived a voluntary dismissal to be in his best interests and actively sought such a dismissal from the plaintiff. The defendant, although faced with the possibility that the dis-

missed lawsuit could be refiled against him if he testified inconsistently, decided that he would rather risk testifying as a witness under a voluntary dismissal, than as a party subject to compensatory and punitive damages. Thus, neither of the players in the policy justification scenarios of Randle-Eastern -- the unwilling, out-maneuvered and victimized defendant, or the scheming, exploitative and tactical plaintiff -- is present here.

Nevertheless, the Second District Court of Appeal, in the instant case, misapplied Randle-Eastern and held that even if the mistaken use of the words "with prejudice" in the Notice of Dismissal was a result of secretarial error or excusable neglect, the Randle-Eastern doctrine deprived the trial judge of jurisdiction to expunge those words from the Notice. The Court acknowledged the contrary holdings of the Fourth District Court of Appeal on this issue, which will be discussed below, with a "but see" signal. The Second District's misapplication of Randle-Eastern constitutes a basis for conflict jurisdiction. McBurnette v. Playground Equipment Corp.,137 So.2d 563 (Fla.1962).

In concluding that the trial judge had no jurisdiction to strike the words "with prejudice", the Second District also relied upon its earlier opinions in Miller v. Fortune Insurance Co., supra,and United Services Automobile Ass'n v. Johnson, supra. In Miller,a case virtually identical to the present one, a secretary had inadvertently added the words "with prejudice" to a notice of voluntary dismissal. The trial judge refused to delete the words. The District Court denied certiorari under the authority of Randle-Eastern and thus approved the action of the trial judge. The

Court, however, recognized the conflict between its holding and that of the Fourth District:

> In denying certiorari and holding in accordance with Randle, we consider that we are in conflict with the holding in Shampaine Industries, Inc. v. South Broward Hospital District, 411 So.2d 364 (Fla.4th DCA 1982).

Id. at 490. This Court granted discretionary review of the Miller case under its conflicts jurisdiction. The case has been fully briefed and is now awaiting oral argument. Miller v. Fortune Insurance Co., (Supreme Court, Case No. 65,794).

United Services Automobile Ass'n v. Johnson, supra, the second case on which the Court below relied, also involved a situation in which a party who should have been kept in the case was inadvertently dismissed as a result of inadvertence and mistake in the office of the plaintiff's attorney. The trial judge had set aside the dismissal, but the Second District reversed, holding that the dismissal deprived the trial judge of all remedial jurisdiction under Fla.R. Civ.P. 1.540. United Services Automobile Ass'n., as will be shown, is thus also squarely in conflict with the Third and the Fourth Districts' decisions on this issue.

Three opinions of the Fourth District Court of Appeal, McKibbin v. Fujarek, 385 So.2d 724 (Fla.4th DCA 1980), Shampaine Industries, Inc. v. South Broward Hospital District, and Bender v. First Fidelity Savings & Loan Ass'n of Winter Park, 463 So.2d 445 (Fla.4th DCA 1985), are in direct conflict with Miller v. Fortune Insurance Co., United Services Automobile Ass'n. v. Johnson, and the present case, in the Second District, on the issue of the jurisdiction of a trial judge to strike the words "with prejudice" from

a voluntary dismissal.

McKibbin v. Fujarek rejected the idea that a trial judge had no jurisdiction to strike the words "with prejudice" from a notice of dismissal. Although the words "with prejudice" were found to be words of substance that could not be deleted as simple clerical errors under Fla.R.Civ.P. 1.540(a), the District Court concluded that, if their appearance in the notice was as a result of "mistake, inadvertence, or excusable neglect", they could be expunged under Fla.R.Civ.P. 1.540(b).

In Shampaine, as in the present case and Miller, the words "with prejudice" found their way into a notice of voluntary dismissal as a result of secretarial error. The District Court cited McKibbin for the principle that the issue was not one of jurisdiction under Randle-Eastern, but of the applicability of Fla.R.Civ.P. 1.540. Where a trial judge finds that the words "with prejudice" are a consequence of secretarial error, and not of an attorney's volitional, tactical or strategic choice, the Court held, the rule in Randle-Eastern is not implicated. Shampaine then went further and held that any voluntary dismissal, whether with or without prejudice, could be stricken under Fla.R.Civ.P. 1.540(b), if the circumstances underlying its drafting or filing reflected the type of mistake, inadvertence, or excusable neglect contemplated by that remedial Rule. Id. at 367.

Recognizing that its decision might not be consistent with certain language in Randle-Eastern, the Fourth District Court of Appeal in Shampaine certified the following question:

> May Florida Rule of Civil Procedure 1.540(b) be used to afford relief if a party can demonstrate

> that a voluntary dismissal was filed as the result of a secretarial error, mistake, inadvertence or excusable neglect?

Apparently, the parties in Shampaine never formally presented the certified question to this Court. Miller v. Fortune Insurance Co., 453 So.2d at 491, n.1.

Thereafter, however, once more, in Bender v. First Fidelity Savings & Loan Ass'n of Winter Park, the Fourth District, citing Shampaine, approved a trial court order which allowed the plaintiff, for reasons not expressed in the opinion, to amend its notice of voluntary dismissal to change "with" to "without" prejudice. Bender is also pending before this Court (Supreme Court, Case No.66,716).

The Third District Court of Appeal, in Atlantic Associates, Inc. v. Laduzinski, 428 So.2d 767 (Fla.3rd DCA 1983), has allied itself squarely with the Fourth District. That decision affirmed an order expunging the term "with prejudice" from a notice of voluntary dismissal following a finding by the trial judge, under Fla.R. Civ.P. 1.540(b), that the term had been placed in the notice as the result of inadvertence and error. The Third District cited Shampaine and McKibbin for the principle that:

> Since Rule 1.540 allows a court to correct mistakes and errors at any time, Rule 1.540 may be used to afford relief to all litigants who can demonstrate the existence of the grounds set out in the Rule.

Id., at 768.

It is thus clear that the opinions of the Second District Court of Appeal on the authority and jurisdiction of a court to strike the words "with prejudice" from a notice of voluntary dismissal are in direct and express conflict with the opinions of the

Third and Fourth District Courts on that same issue.

The inter-District conflict over whether inadvertent language may be expunged from a notice of dismissal is but one manifestation of the legal incongruities that are flowing, unchecked, from some District Courts' misapplications of the rule in Randle-Eastern. For example, in Piper Aircraft Corp. v. Prescott, 445 So.2d 591 (Fla. 1st DCA 1984), Randle-Eastern was literally turned on its head and cited to bar reinstatement of an action dismissed as the result of the defendant's "artifice or misrepresentations" practiced on the plaintiff!

As the concurring opinion in Piper Aircraft also notes, id. at 594-596, the District Courts have been forced to ingeniously fabricate ways of reconciling Randle-Eastern's strictures with the equitable circumstances of each case. The opinion notes cases, for example, in which Randle-Eastern has been held not to apply, where the plaintiff was dropping a party under Fla.R.Civ.P. 1.250, rather than a cause of action under Fla.R.Civ.P. 1.420(a);[1] where the notice of dismissal would work a type of fraud on the court, such as by depriving the court of its inherent powers to effectuate its own prior orders; and where Fla.R.Civ.P. 1.540(a) would authorize relief for "clerical" as opposed to substantive errors in the notice of dismissal.

Yet another inroad has been carved by this Court, in Wiggins v. Wiggins,446 So.2d 1078 (Fla.1984), which held that an award of statutory attorneys fees could be made even after the trial court had ostensibly lost jurisdiction following the filing of a notice

1 The dropping of Anderson as a party, rather than the dismissal of a cause of action, is in fact all that was intended by the Notice of Dismissal in this case.

of voluntary dismissal.

The rule in Randle-Eastern clearly applies only to tactical, volitional and strategic dismissals. Yet, the District Courts' widely divergent interpretations of when, to what, and to whom Randle-Eastern applies strongly suggest a need for this Court to revisit that opinion. Particularly in need of clarification in order to resolve the conflict between the Districts, is the question of whether Randle-Eastern bars every exercise of jurisdiction over a dismissed defendant, and the Notice of Dismissal itself, under Fla.R.Civ.P. 1.540, however honestly inadvertent the language of the Notice and innocently mistaken the dismissing plaintiff.

## CONCLUSION

For the foregoing reasons, the decisions of the Second District in this case, in Miller v. Fortune Insurance Co., and in United Services Automobile Ass'n.,misapply the rule in Randle-Eastern, as well as expressly and directly conflict with the decisions of the Third and Fourth Districts in McKibbin, Shampaine, Bender, and Atlantic Associates. Because of these conflicts, and because of the apparently unsettled parameters of Randle-Eastern, this Court should grant discretionary review in this case. If review is granted, an expedited briefing schedule should be imposed and this case consolidated for oral argument with Miller v. Fortune Insurance Co.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing brief and the accompanying Appendix were mailed to Michael S. Rywant, Esq., Prugh & Rywant, 250 Hyde Park Avenue, Tampa, Florida 33606; H. Vance Smith, MacFarlane, Ferguson, Allison & Kelly, P. O. Box 1531, Tampa, Florida 23601; and Thomas J. Roehn, Annis, Mitchell, Cockey, Edwards & Roehn, P.A., P.O. Box 3433, Tampa, Florida 33601, this 25th day of October, 1985.

_____
Adam H. Lawrence