IN THE SUPREME COURT OF FLORIDA

CASE NO.: 67,806

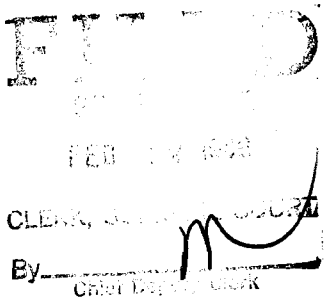
DONALD WATSON,

Petitioner,

vs.

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

Respondents.



PETITIONER'S INITIAL BRIEF ON THE MERITS AND APPENDIX

EDWARD C. ROOD, ESQ.
ROOD & ASSOCIATES
200 Pierce Street
Tampa, Florida 33602

-and-

LAWRENCE & DANIELS
Suite 1700 New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132
(305) 358-3371

Attorneys for Petitioner

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 67,806

DONALD WATSON,

Petitioner,

vs.

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

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS AND APPENDIX

EDWARD C. ROOD, ESQ.
ROOD & ASSOCIATES
200 Pierce Street
Tampa, Florida 33602

-and-

LAWRENCE & DANIELS
Suite 1700 New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132
(305) 358-3371

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities (Cont'd)

STATEMENT OF THE CASE AND FACTS

Petitioner Donald Watson's complaint alleged that he was injured by respondent Laurn Frank Anderson, who, intoxicated and driving a car owned by Anderson's employer, respondent Misener Marine Construction Company, negligently collided with Watson's vehicle. Watson sought compensatory and punitive damages from Anderson and Misener and from their liability carrier, International Insurance Company. (A-5)[1].

Approximately two weeks before the scheduled June 11, 1984 trial date, Anderson's attorney, in person and by telephone, began asking Watson's attorneys to voluntarily dismiss or drop Anderson from the case. (A-45:8; 18; 30; 39; 44). Watson's attorneys considered these requests. They had no real need to keep Anderson in the lawsuit (A-45:30); and they knew that the fewer parties and lawyers there were opposing them, the faster and less expensive the trial would be. (A-45:19; 39).

Watson's attorneys were not willing to dismiss or drop Anderson, however, until two specific matters were resolved to their satisfaction. First, they wanted to be absolutely sure that if Anderson was dropped or dismissed no harm or prejudice could result to Watson's case. (A-45:8; 10; 30; 47).

---

1. Record citations are to the documents in the Appendix filed by the respondents in the Second District Court of Appeal. E.g., "(A-45:10)", means document number 45 at page 10.

Both sides researched the law of voluntary dismissal and jointly concluded that Watson would not be prejudiced if he dropped or dismissed Anderson from the lawsuit. (A-45:32-33).

Secondly, Watson's attorneys wanted to be sure that if Anderson were to recant or change his deposition testimony at trial, after he had been dropped or dismissed as a party, they would have the right to refile their suit against him. Although Anderson's attorney assured Watson's attorneys that Anderson - who claimed to have no recall of the accident - would not change his deposition testimony, Anderson's attorney was completely aware of the threatened consequences to his client if Anderson were, in fact, to testify inconsistently. (A-45:9; 45-47).

Both sides understood that the threat to refile against Anderson would have been an idle one if the dismissal of Anderson had been "with prejudice". In the words of one of Watson's attorneys:

> [O]ur specific agreement was that if he changed his testimony, we would have a right to file an action directly against him, which we could not have done if this Motion had been filed with prejudice. So, it was my clear understanding that it was going to be done without prejudice.

(A-45:33-34. A-45:32; 46). In light of the overriding concern of Watson's attorneys that their case not be prejudiced in any way by the dismissal, and that they retain a remedy against

Anderson if he did not testify truthfully, the only way their agreement could have been implemented was if Anderson's dismissal was without prejudice. (A-45:36). As one of Watson's attorneys stated, "It would have been madness to do it otherwise". (A-45:40).

Not only would a dismissal of Anderson with prejudice have been totally inconsistent with the intentions of Watson's attorneys, but that form of dismissal was almost never used by Watson's attorneys in their practice, under any circumstances, unless it was to conclude a final settlement. The agreement to dismiss Anderson, however, was not a settlement. Watson was to receive nothing of value in return for dropping Anderson. Both of Watson's attorneys stated that it would have been contrary to the way they practiced law to dismiss Anderson with prejudice under these circumstances. (A-45:10-11; 32; 48). Even Anderson's own attorney agreed that he would never have dismissed "with prejudice" under these circumstances and did not know of any "sane" lawyers who would. (A-45:46-47). He conceded that when he saw the words "with prejudice" in the notice of dismissal, he was "surprised". (A-45:10; 46).

Despite these intentions and precautions, on Friday, 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 document captioned

"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.

(A-45:8; 31; A-11).

The secretary who prepared this notice had not been told 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. (A-45:31; 32). Nor had the secretary been instructed to have the document signed and filed. Her directions were merely "to prepare" a document dismissing or dropping Anderson as a party from the lawsuit. (A-45:31; 32; 34-35). Watson's attorneys expected to review the notice before leaving for court the following Monday, and then file it and serve it on the opposing attorneys on the first day of trial. (A-45:41-42).

Watson had never given his attorneys permission to dismiss Anderson "with prejudice". He had merely approved dropping Anderson as a party after receiving assurances from his attorneys that such a move would not harm his case. (A-45:40-41).

When Misener and International discovered that Anderson had been dismissed with prejudice, they sought and

were granted leave to supplement their affirmative defenses to add the defense of res judicata. (A-13:17; 20). Watson promptly moved to expunge the words "with prejudice" from the notice. After an evidentiary hearing (A-45), at which the facts set forth above were presented, the trial judge concluded that the words "with prejudice" had found their way into the Notice as a result of secretarial error, and granted the motion to expunge. (A-45:56). In a subsequent written Order, the trial judge found,

> 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", ...

(A-37).

The Second District Court of Appeal reversed this Order. Anderson v. Watson, 475 So.2d 1315 (Fla.2nd DCA 1985). (Appendix). On February 6, 1986, this Court accepted jurisdiction on Watson's petition for discretionary review.

SUMMARY OF ARGUMENT

The decision of the Second District Court of Appeal below, as in its decisions in Miller v. Fortune Insurance

Co. and United Services Automobile Association v. Johnson, directly and expressly conflicts with decisions of the Third and Fourth District Courts of Appeal on the effect of an inadvertent dismissal "with prejudice" under Fla.R.Civ.P. 1.420(a), and on the jurisdiction of a court to grant relief from such a dismissal under Fla.R.Civ.P. 1.540. The reasoning of the Second District Court of Appeal in concluding that the trial court was without jurisdiction to remedy an accidental dismissal "with prejudice", is deficient in a variety of ways.

First, the Second District Court misinterpreted and misapplied this court's decision in Randle-Eastern Ambulance Service, Inc. v. Vasta. Randle-Eastern created a rule of law only for truly voluntary, but tactically ill-conceived, dismissals holding that such dismissals could not be set aside on the plaintiff's motion. The dismissal in this case, however, which the defendant requested, and which was to have been without prejudice, was inadvertently filed, as a result of secretarial and office error, containing the unintended phrase "with prejudice". Randle-Eastern has no application to this type of "dismissal" and it was error for the Second District Court to justify its reversal of the trial judge's expungement of the words "with prejudice" by relying on that case.

The Second District Court decision also failed to

grant Fla.R.Civ.P. 1.540 its full remedial field of operation. There is no essential difference between a default or a default judgment, and a dismissal with prejudice; yet the type of secretarial and office error committed in this case which routinely justifies relief from a default was held, by the District Court, to be incapable of supporting similar relief from dismissal. The illogic of this distinction should be recognized and rectified.

The Second District Court also indulged in the fiction that Watson's unitary notice of dismissal, which he never intended to file because it contained the inadvertent words "with prejudice", could be conceptually divided into a voluntary intentional component - the bare dismissal - and an involuntary component, namely, the words "with prejudice". Because of its "voluntary" component, said the District Court, the trial judge was without jurisdiction to remedy, or reach the admittedly involuntary and inadvertent component of the notice of dismissal. Here again, the illogic of the Second District Court's reasoning should be recognized and explicitly rejected.

Fla.R.Civ.P. 1.540 can be interpreted so as to reach inadvertent language in Fla.R.Civ.P. 1.420(a) dismissals by construing a dismissal with prejudice as a "final... proceeding" under Fla.R.Civ.P. 1.540(b). The finality of a dismissal with prejudice is just as great as that of a final order or judgment.

Finally, the Second District Court erroneously regarded Watson's Fla.R.Civ.P. 1.420(a) dismissal as instantaneously divesting the trial court of jurisdiction. This construction is at variance with the terms and purposes of the Rule. By the terms of the Rule itself, a trial judge retains jurisdiction after dismissal at least to award costs. Furthermore, the privilege of dismissal was made absolute to protect plaintiffs against incursions by the court, and by unhappy defendants. The Rule was never intended to bar a plaintiff from withdrawing an inadvertent or erroneous dismissal.

The District Courts and this court have already made a variety of inroads into the "rule" of Randle-Eastern that, according to the Second District Court, allegedly bars any exercise by a trial judge of post-dismissal jurisdiction. The dicta in Randle-Eastern that has so troubled the Second District Court, and that has led to such inequitable results as Anderson v. Watson, should be disavowed, or clarified. The decision of the Second District Court in Anderson v. Watson should be quashed.

ARGUMENT

THIS COURT'S DECISION IN RANDLE-EASTERN V. VASTA DOES NOT PRECLUDE A TRIAL COURT FROM EXERCISING JURISDICTION TO DETERMINE WHETHER THE WORDS "WITH PREJUDICE" IN A NOTICE OF VOLUNTARY DISMISSAL WERE PLACED IN THE NOTICE AS A RESULT OF MISTAKE, INADVERTENCE, SURPRISE OR EXCUSABLE NEGLECT UNDER FLA.R.CIV.P. 1.540.

The Second District Court of Appeal, citing Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68 (Fla.1968), 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), held that, notwithstanding the undisputed secretarial error and lapse in office procedure in this case, which caused the phrase "with prejudice" to be included in the Notice of Voluntary Dismissal, the mere filing of the notice divested the trial judge of jurisdiction to expunge those words from the notice. Anderson v. Watson, 475 So.2d 1315 (Fla.2nd DCA 1985). The Second District Court's reliance upon Randle-Eastern represents an unwarranted expansion of the limited rule in that case.

The Second District Court of Appeal has misanalyzed and misapplied Randle-Eastern, in this case.

In Randle-Eastern, this court held that an intentional voluntary dismissal divests the trial judge of jurisdiction to reinstate the dismissed proceeding. The dismissal in Randle-Eastern, however, was taken by the plaintiff's attorney, in open court, in direct response to the trial judge's exclusion of evidence that the attorney considered critical to his case. Despite the attorney's express awareness of a possible statute of limitations problem - he actually stated as he dismissed his case: "If the statute hasn't run we'll have time to refile" - he heedlessly dismissed, without first checking the limitations statute, only to find that the statute had, in fact, run. Randle-Eastern Ambulance Service, Inc. v. Vasta, 345 So.2d 1084 (Fla.3rd DCA 1977).

The "apparent rigidity" and punitiveness of the loss of jurisdiction rule adopted by this court, on the foregoing facts, was thought to be justified by the unavoidable harm that an irresponsible plaintiff could work on the dismissed defendant and on the court. That 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 improvi-

dent use of judicial resources". Thirdly, the plaintiff's unbridled right to a Fla.R.Civ.P. 1.420(a) dismissal endowed him with 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. Randle-Eastern, supra, 360 So.2d at 68-69.

None of these justifications for the rule in Randle-Eastern are applicable to the present case. Here, as the trial judge found, the words "with prejudice" appeared in the Notice of Dismissal as a result of secretarial and office error and inadvertence, and not as a result of an attorney's tactical or volitional choice. The dismissal was not filed out of a desire to block pending judicial action that might be beneficial to the defendant, since the trial had not yet begun. In the present case, in fact, it was the defendant who perceived a voluntary dismissal to be in his best interests and actively pressed the plaintiff for that procedural benefit. The defendant, although faced with the possibility that the dismissed lawsuit could be refiled against him if his trial testimony contradicted his deposition, decided that he would rather risk testifying as a witness, than remain in the case 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, and the scheming, exploitative and manipulative plaintiff - is present here.

In concluding that the trial judge had no jurisdiction to strike the words "with prejudice" in the present case, the Second District Court relied not only upon Randle-Eastern, but 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, thereby approving the action of the trial judge.

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 Court reversed, holding that the dismissal deprived the trial judge of all remedial jurisdiction under Fla.R.Civ.P. 1.540.

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, 411 So.2d 364 (Fla.4th DCA 1982), and Bender v. First Fidelity Savings & Loan Ass'n. of Winter Park, 463 So.2d 445 (Fla.4th DCA 1985), expressly and directly conflict with Miller v. Fortune Insurance Co., United Services Automobile Ass'n. v. Johnson, and Anderson v. Watson, on the issue of the jurisdiction of a trial judge to strike the words "with prejudice" from a dismissal under Fla.R.Civ.P. 1.420(a).

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 the appearance of those words 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 secre-

tarial error, and not of an attorney's volitional, tactical or strategic choice, the court held, the rule in Randle-Eastern is not implicated:

> In the present case appellee's voluntary dismissal with prejudice was found by the trial court on evidence virtually undisputed, to have been entered as the result of secretarial error, not attorney miscalculation. In our view a dismissal with prejudice found to have been entered as the result of secretarial error is simply not a "volitional dismissal" as we understand the term, and we do not believe it was the intention of the Randle court to hold that trial courts are divested of jurisdiction to grant relief in such situations.

Id. at 367. 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.

In Bender v. First Fidelity Savings & Loan Ass'n. of Winter Park, the Fourth District, citing Shampaine, again 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.

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 Court. 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, citing Shampaine and McKibbin, stated:

> Appellee here is not asking the trial court to reinstate his cause of action after taking a voluntary dismissal. Rather, he is asking that language inadvertently included in the voluntary dismissal be expunged. Thus, it is not necessary to reach the jurisdictional issues raised in Randle-Eastern....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. [2] The Third and Fourth District Courts' common sense approach to the jurisdiction of a trial court following a voluntary dismissal, however, represents the only practical accommodation of the narrow rule in Randle-Eastern, the broad remedial purposes of Fla.R.Civ.P. 1.540, and the unfettered right of dismissal granted to a plaintiff under Fla.R.Civ.P. 1.420(a)(1).

Without looking any further than the facts in Randle-Eastern, that case may be distinguished from Anderson v. Watson as one that did not purport to create a rule of law for a truly accidental dismissal. The Randle-Eastern court had before it a plaintiff's attorney who, at trial, and after losing an evidentiary ruling, announced a voluntary dismissal knowing that the statute of limitations may have run and that he might not be able to refile his complaint. The attorney whose sublime indifference to the consequences of his dismissal led to the decision in Randle-Eastern, can hardly be compared to the plaintiff's attorneys in this case. Watson's attorneys researched the question and, with Anderson's attorney, concluded that a voluntary dismissal would not prejudice their case and that the complaint could be refiled.

---

[2] The First District Court of Appeal has chosen to follow the Second District Court's interpretation of Randle-Eastern. Bryant v. Muldrow, 446 So.2d 228 (Fla.1st DCA 1984).

Watson's attorneys did not intend their dismissal to contain the words "with prejudice". They did not instruct their secretary to add the words "with prejudice" to the Notice; their standing orders to their secretaries about including such language in a notice of dismissal were directly to the contrary; and they expected to personally review the Notice before they personally filed it. In fact, other than type the Notice themselves, the plaintiff's attorneys did everything they could to assure themselves and Anderson's attorney, that the dismissal would be without prejudice and would not harm their case in any way. By simply limiting Randle-Eastern to its facts, a reversal of the District Court's decision below is unavoidable.

The Second District Court of Appeal has failed to give Fla.R.Civ.P. 1.540 its proper effect and field of operation in this case.

Considering the types of lapses and omissions that Fla.R.Civ.P. 1.540 was designed to remedy, the District Court's interpretation of that Rule in its decision below is hopelessly at variance with the judicial policy of this State. Florida, through its courts at every level, has generated a vast body of law that expresses a decided preference for resolving legal disputes on the merits, in adversarial proceedings, rather than by unilateral mistake, error or inadvertence.

Nowhere is Florida's public and judicial policy in favor of trials on the merits more clearly reflected than in the law of vacating defaults. In that body of law, secretarial, clerical and office errors which are qualitatively indistinguishable from the errors leading to the inclusion of the words "with prejudice" in Watson's dismissal, have been invariably held to justify setting aside defaults and default judgments under Fla.R.Civ.P. 1.500 and 1.540. See, e.g., Sterling Drug, Inc. v. Wright, 342 So.2d 503 (Fla.1977); North Shore Hospital v. Barber, 143 So.2d 849 (Fla.1962); Kuehne v. Nagel, Inc., 467 So.2d 457 (Fla.3rd DCA 1985); Somero v. Hendry General Hospital, 467 So.2d 1103 (Fla.4th DCA 1985); Bland v. Viking Fire Protection, Inc. of S.E., 454 So.2d 763 (Fla.2nd DCA 1984); Florida Aviation Academy v. Charter Air Center, Inc., 449 So.2d 350 (Fla.1st DCA 1984); City National Bank of N. Miami Beach v. Sheridan, Inc., 403 So.2d 502 (Fla. 4th DCA 1981); Associated Medical Institutions, Inc. v. Imperatori, 338 So.2d 74 (Fla.3rd DCA 1976). There is no persuasive justification, as the Fourth District observed in Shampaine, supra, 411 So.2d at 367, for holding that Fla.R.Civ.P. 1.540 can reach inadvertent defaults, but not inadvertent dismissals. The distinction is especially illusory in the case of a dismissal "with prejudice", which has all the finality of a default judgment.

The Second District Court has also shown that it is not

entirely comfortable with its repeated assertions that all remedial jurisdiction under Fla.R.Civ.P. 1.540 is lost following a dismissal under Fla.R.Civ.P. 1.420(a). The Second District Court has conceded that it might agree with the Fourth District Court's opposite conclusions in Shampaine in a case where the notice of dismissal, whether with or without prejudice, was "mistakenly filed", that is, if the plaintiff "did not intend to dismiss at all". Miller, supra, 453 So.2d at 491. [e.s.]

The Second District's acknowledgment, in dicta, that there might, after all, remain some room for Fla.R.Civ.P. 1.540 to operate following an apparently voluntary dismissal strongly suggests that the automatic-loss-of-jurisdiction theory is simply a semantic exercise and not a substantive dispute. Using any reasonable measure of what is "intentional" action and what is not, a notice of dismissal that is accidentally filed while containing the undesired words "with prejudice", is no more an intentionally filed dismissal than a dismissal which, in its entirety, was not intended to be filed at all. The Second District Court would allow Fla.R.Civ.P. 1.540 to reach the second type of omission, but not the first. Yet every notice of dismissal is a unitary physical document. It either expresses in its totality what its authors intended it to express, or it does not. If it inadvertently does not, and is nevertheless accidentally filed, the most flagrant

type of legal fiction must be created in order to subdivide the single, accidentally filed document into "voluntary" and "involuntary" components.

The applicability of Fla.R.Civ.P. 1.540's remedial objectives to the dismissal in this case would be assured if this Court simply acknowledged that a dismissal "with prejudice" is in fact a "final...proceeding" within the meaning of Fla.R.Civ.P. 1.540(b). In Randle-Eastern, this court impliedly rejected that theory which the Third District had utilized in Randle-Eastern, supra, 345 So.2d at 1085, and in Cooper v. Carroll, 239 So.2d 511 (Fla.3rd DCA 1970). It is significant, however, that both of those cases involved dismissals without prejudice.

A dismissal without prejudice is quite different from a dismissal with prejudice. Only a dismissal with prejudice operates as an adjudication on the merits. Fla.R.Civ.P. 1.420(a)(1).

> Dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by court or jury, can rise no higher than this.

Smoot v. Fox, 340 F.2d 301, 303 (6th Cir.1964), [e.s.]

If a "with prejudice" dismissal "proceeding" thus

produces as final an adjudicative effect as an order or judgment, it should be equally amenable to scrutiny under Fla.R.Civ.P. 1.540(b). See, Noland v. Flohr Metal Fabrications, Inc., 104 FRD 83 (D.Alaska, 1984), wherein the court concluded that an inadvertent voluntary dismissal, even without prejudice, was a "proceeding" under Fed.R.Civ.P. 60(b), the Federal counterpart to Fla.R.Civ.P. 1.540(b).

The Second District Court of Appeal has failed to give Fla.R.Civ.P. 1.420(a) its proper effect and field of operation in this case.

The Second District Court of Appeal's interpretation of the consequences of a voluntary dismissal, in addition to its shortcomings from a Fla.R.Civ.P. 1.540 perspective, also leads to a paradoxical construction of Fla.R.Civ.P. 1.420(a)(1). The Second District concedes that a plaintiff's right to a voluntary dismissal is "absolute". If a plaintiff has the absolute right, after dismissal, to block every attempt by the court or the dismissed defendant to subvert the finality of his dismissal, then there is no reason why he should not have an equally absolute right to waive the benefit of the Rule and, if there has been no detrimental reliance on his dismissal, withdraw it so that the proceedings can continue. As a general rule, a litigant may waive any constitutional, statutory, or

procedural privilege designed for his personal benefit. Gay v. Whitehurst, 44 So.2d 430, 432 (Fla.1950); Fixel v. Clevenger, 285 So.2d 687 (Fla.3rd DCA 1973).

Fed.R.Civ.P. 41(a)(1), from which Florida's Rule 1.420(a) was derived, (Crump v. Gold House Restaurants, Inc., 96 So.2d 215 (Fla.1957),) has been interpreted in precisely this way:

> While there is some authority that the trial court is powerless to vacate dismissal under Rule 41(a)(1)(ii) even upon motion by the plaintiff [citation omitted] we believe the purpose of the rule is to prevent interference by the court, either on its own motion or that of the defendants, but does not proscribe vacation upon plaintiff's motion.

5 Moore's Federal Practice, ¶41.17, at 41-214, n.2. (2nd ed.) Florida's Rule 1.420(a) logically demands the same interpretation.

A related concern that has undoubtedly troubled the Second District Court of Appeal in analyzing the effect of a Fla.R.Civ.P. 1.420(a) dismissal is its belief that if the trial court instantaneously loses jurisdiction when the plaintiff files a voluntary dismissal, then there can be no post-dismissal lag time during which the court could assume jurisdiction to determine the voluntariness of the dismissal. Nothing in Fla.R.Civ.P. 1.420(a), however, mandates an instantaneous loss of jurisdiction. To the contrary, by authorizing the trial

court to assess costs following a voluntary dismissal, that Rule assumes that the trial court's jurisdiction does in fact, continue.

Continuing jurisdiction is not only mandated by the express terms of Fla.R.Civ.P. 1.420 but it exists as an inherent adjunct of a court's adjudicative function. Every court, regardless of rule, possesses the inherent power, or jurisdiction, to determine the continued existence, or absence, of its own jurisdiction. A court may find the presence or absence of jurisdictional facts, just as it finds any other facts, and need not accept, without further scrutiny, any party's unilateral declaration that the court has, or no longer has, jurisdiction. See, Sun Insurance Co. v. Boyd, 105 So.2d 574 (Fla.1958); State ex rel B.F. Goodrich Co. v. Trammell, 140 Fla.500, 192 So.175 (1939). Thus, when a plaintiff, after filing an inadvertent notice of dismissal, disclaims the intent or contents of his notice, the affected tribunal may determine, under the foregoing principles, whether it has been effectively, voluntarily and intentionally ousted of personal jurisdiction.

The Erosion of the Rule in Randle-Eastern

The inter-District conflict over the purposes, effect, and proper sphere of operation of Fla.R.Civ.P. 1.420(a) and

1.540(b), discussed earlier in this brief, is but one manifestation of the legal confusion that is flowing, unchecked, from some District Courts' misapplications of the rule in Randle-Eastern. Another prime example is afforded by Piper Aircraft Corp. v. Prescott, 445 So.2d 591 (Fla.1st DCA 1984), where 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 notes, id. at 594-596, the District Courts have ingeniously fabricated ways of reconciling what they perceive to be Randle-Eastern's extensive reach with the equitable circumstances of each case. The opinion cites 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);[3] 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 from "clerical" as opposed to substantive errors in the notice of dismissal.

---

[3] The dropping of Anderson as a party is, in effect, what the plaintiff intended to accomplish by the Notice of Dismissal in this case.

In Laursen v. Filardo, 468 So.2d 251 (Fla.2nd DCA 1985), a plaintiff was allowed to dismiss the sole initial defendant whom he erroneously had sued, and substitute two new defendants, in the same lawsuit. The fiction employed to continue the trial judge's jurisdiction following the dismissal, and sidestep Randle-Eastern, was that the order of the trial court approving the initial parties'stipulation of dismissal also simultaneously approved the amended complaint attached to the stipulation.

An inroad into Randle-Eastern has also been carved by this Court in Wiggins v. Wiggins, 446 So.2d 1078 (Fla.1984), which held, after dismissing as dicta its earlier contrary language in Randle-Eastern, that an award of attorneys fees - as fees and not as costs - could be made even after the trial court had ostensibly lost jurisdiction following the filing of a notice of voluntary dismissal.

The longer Randle-Eastern - which as argued earlier in this brief, actually contains a very narrow holding - is allowed to stand undefined and unclarified the more conceptually bizarre and procedurally strained will be the efforts of some District Courts to distinguish or circumvent that decision. Randle-Eastern should be limited to its facts.

CONCLUSION

For the foregoing reasons, the decision of the Second District Court of Appeal below expressly and directly conflicts with this court's decision in Randle-Eastern and the decisions of the Fourth and Third District Courts of Appeal in McKibbin, Shampaine, Atlantic Associates, and Bender. The approach of the Third and Fourth District Courts of Appeal provides the only logical, and legally defensible way of reconciling the rule in Randle-Eastern, and the plaintiff's dismissal privilege under Fla.R.Civ.P. 1.420(a) with the broad remedial purposes of Fla.R.Civ.P. 1.540. Any dismissal, whether with or without prejudice, that satisfies the criteria of Fla.R.Civ.P. 1.540, should be subject to expungement on the plaintiff's motion. The decisions of the Third and Fourth District Courts of Appeal should be approved, and the decision of the Second District Court of Appeal, in Anderson v. Watson, should be quashed.

EDWARD C. ROOD, ESQ.
ROOD & ASSOCIATES
200 Pierce Street
Tampa, Florida 33602

-and-

LAWRENCE & DANIELS
Suite 1700 New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132
(305) 358-3371

By: _____
ADAM H. LAWRENCE, ESQ.