W00A

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 67,806

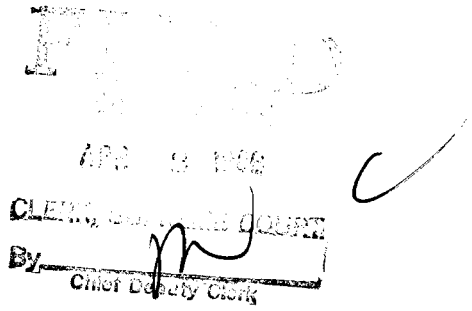
DONALD WATSON,

Petitioner,

vs.

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

Respondents.



PETITIONER'S REPLY BRIEF ON THE MERITS

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 REPLY BRIEF ON THE MERITS

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

ARGUMENT

Respondents concede that this court's decision in Miller v. Fortune Insurance Co., 11 F.L.W. 85 (Fla.1986) resolved, in petitioner's favor, the issue of whether a trial court has jurisdiction to expunge the words "with prejudice" from a notice of voluntary dismissal. Respondents insist, however, that the trial judge's conclusion, in this case, that the words "with prejudice" were included in the notice of voluntary dismissal as a result of mistake, inadvertence or excusable neglect, lacks any support in the record. This position is patently frivolous.

Respondents open their argument by misstating the breadth of this court's holding in Miller, supra. This court did not limit a trial judge's post-dismissal authority merely to the correction of "clerical substantive errors in a voluntary notice of dismissal". Rather, this court approved and adopted the statement in Shampaine Industries v. South Broward Hospital District, 411 So.2d 364 (Fla.4th DCA 1982), "that Rule 1.540(b) may be used to afford relief to all litigants who can demonstrate the existence of the grounds set out under the rule". Miller, at 86. The remand in Miller thus directed the trial judge to "conduct a hearing to determine if the facts establish mistake, inadvertence or excusable neglect for relief under Rule 1.540(b)". Id.

The trial judge in the present case conducted just such a Rule 1.540(b) hearing. He heard and observed witnesses for both sides and concluded from what he saw and heard that the appearance of the words "with prejudice" in the notice of dismissal was a

result of secretarial error. (A.45:56). His finding is overwhelmingly supported by the record.

The respondents' answer brief in this case is nothing more than a highly selective cull of those isolated and disputed facts in the transcript that respondents believe support their thesis that the inclusion of the words "with prejudice" in the notice of dismissal was tactical rather than inadvertent. The controlling statement of facts in this case, however, is the one contained in the petitioner's initial brief on the merits. The facts in that statement are the ones supporting the decision below, and thus are presumably the facts upon which the trial judge relied in concluding that grounds for relief under Rule 1.540(b) were present in this case. We refer the court to that statement of facts.

The trial judge's factual finding with which the respondents most vigorously disagree is contained in the underlined portion of the following quote from the trial judge's written order:

> 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... (A.37).

Before discussing the overwhelming record support for the underlined finding, two points must be made about the merits of the respondents' procedural response to this finding. First, the disputed finding is simply a parenthetical clause set off by commas from the operative portion of the trial judge's decision.

Eliminating the clause entirely would still leave an order finding that "the words 'with prejudice' were placed in said Notice of Voluntary Dismissal...through the mistake, inadvertence or excusable neglect of the secretary who prepared the Notice". Thus, even a successful attack on the underlined finding would in no way weaken the trial judge's ultimate decision that grounds for relief existed under Rule 1.540(b).

Secondly, it is well settled law that appellate courts review decisions, not the reasons for decisions. "[T]rial court decisions are presumptively valid and should be affirmed, if correct, regardless of whether the reasons advanced are erroneous". Vandergriff v. Vandergriff, 456 So.2d 464, 466 (Fla. 1984); Blake v. Xerox Corp., 447 So.2d 1348, 1351 (Fla.1984). The respondents' strategy of attacking the trial judge's decision by attacking a reason for his decision is one so completely at variance with settled appellate procedure that that strategy may be branded as frivolous on its face.

Their procedural improprieties aside, the respondents' argument that the underlined finding lacks all support in the record is palpably untrue. Undisputed evidence at the hearing showed that two, and only two, attorneys in the offices of Rood & Associates - E.B. Rood and E. C. Rood - had responsibility for the petitioner's case. Both of these attorneys were out of the office when the notice of dismissal was prepared and filed. There is, again, not the vaguest suggestion in the transcript that attorneys other than the Roods were familiar with, had handled, or had been responsible for the case from its inception.

Jeffrey Willis, an associate in the Roods' offices, was asked by E. C. Rood's secretary to sign the notice only because he happened to be the last attorney left in the office late that Friday. Prior to that evening, Willis never had the slightest contact with the case:

> I know nothing about it. I knew nothing about the case or whose case it was or what type of case it was. (A.45:25).

Willis obligingly signed the notice on behalf of E. C. Rood's secretary only after asking for and receiving assurance from E.C. Rood's secretary that E. C. Rood wanted the form prepared and signed. (A.45:25). However, E.C. Rood's secretary had not been authorized to obtain Willis' or any other attorney's signature, or to file the notice before her boss had reviewed the notice. As E. C. Rood testified:

> I didn't tell her to have the document signed. I told her to prepare it...I was going to look at it Sunday and hand it to Counsel on Monday. I gave her no instruction to send it out or have it signed. (A.45:42).

Despite this testimony, the respondents seriously attempt to portray Willis' uninformed, accommodational act of signing the notice upon the misguided request and unauthorized assurance of E. C. Rood's secretary, as Willis' own tactical, volitional decision to dismiss Watson's lawsuit with prejudice. The trial judge was obviously correct in finding that this course of events demonstrated inadvertence, mistake or excusable neglect, and that

E. C. Rood's secretary was the focus of the confusion. The respondents' repeated assertions, in the face of the above facts, that the record is totally devoid of evidence supporting the trial judge's conclusion that "the...Notice was filed before plaintiff's attorneys had an opportunity to examine [it]", are blatantly frivolous.

Respondents next argue that because E. C. Rood did not specifically tell his secretary before he left that day whether the notice should be with or without prejudice, his 'carelessness' made the choice of words "with prejudice" in the notice his, not his secretary's. Somehow, according to the respondents, E. C. Rood's alleged failure to give explicit directions to his secretary converted the notice into a tactically filed document. (Brief at 19). In expounding this extraordinary theory, respondents also ignore E. C. Rood's testimony that

> We have had conversations in the office before and [my secretary's] general instructions are to always prepare a Motion without prejudice unless she has specific instructions to the contrary...(A.45:31).

Respondents next speculate, over the course of several pages, why the petitioner's attorneys intentionally placed the words "with prejudice" in the notice. This blatant exercise in arguing matters - and untrue matters - outside the record also neatly begs the question resolved in the Rule 1.540(b) hearing which was: whether the inclusion of the words "with prejudice" in the notice was tactical or inadvertent. (Brief at 20-22).

Respondents' argument is nothing less than a grand and illogical assertion that "the inclusion of the words 'with prejudice' must have been intentional because plaintiff intended to include those words in his notice".

Respondents close with an attempt to impeach one witness for the plaintiff, E. B. Rood, based upon certain alleged inconsistent statements. (Brief at 23-24). Respondents forget, however, that they raised the identical matters in their cross-examination of E. B. Rood, that he fully explained his actions and the reasons for his actions under oath, and that the trial judge resolved all credibility issues against respondents. (A.45:7-23).

This court must read the short 57 page hearing transcript to fully appreciate how substantially and firmly rooted in competent evidence the trial judge's conclusion, that the words "with prejudice" were the result of mistake, inadvertence or excusable neglect, really was. This court has stated that

> No authority needs to be cited for the proposition that this court is not entitled to substitute its judgment for that of the trial court on questions of fact, likewise of credibility of the witnesses as well as the weight to be given to the evidence by the trial court.

Goldfarb v. Robertson, 82 So.2d 504, 506 (Fla.1955). The number of District Court of Appeal and Supreme Court authorities for these and related principles that narrowly circumscribe the scope of appellate review of a trial court's factual findings is truly

vast. See, e.g., Hertzog v. Hertzog, 346 So.2d 56 (Fla.1977); Strawgate v. Turner, 339 So.2d 1112 (Fla.1976); Crain & Crouse, Inc. v. Palm Bay Towers, Corp., 326 So.2d 182 (Fla.1976).

The foregoing principles are fully applicable to Rule 1.540(b) proceedings. A trial court's factual conclusion that the criteria of Rule 1.540(b) have been satisfied cannot be reversed on appeal absent a gross abuse of the trial court's exceedingly broad discretionary fact-finding powers. See, e.g., Sterling Drug, Inc. v. Wright, 342 So.2d 503 (Fla.1977); Farish v. Lums, Inc., 267 So.2d 325 (Fla.1972); North Shore Hospital, Inc. v. Barber, 143 So.2d 849 (Fla.1962); B. R. Fries & Assoc., Inc. v. Meagher, 448 So.2d 1211 (Fla.3rd DCA 1984); Horn & Hardart, Florida, Inc. v. Dietz, 417 So.2d 1039 (Fla.4th DCA 1982).

An application of the foregoing principles reveals the utter frivolity of the respondents' factual attack on the trial judge's findings, and demands that the decision of the Second District Court of Appeal below - a decision factually indistinguishable from Miller v. Fortune Insurance Co. - be quashed, and the decision of the trial judge approved.

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

-and-

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

By: 
ADAM H. LAWRENCE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Michael S. Rywant, Esq., Mitchell, Alley, Rywant & Vessel, P.O. Box 2003, Tampa, FL 33601; H. Vance Smith, Esq., MacFarlane, Ferguson, Allison & Kelly, P. O. Box 1531, Tampa, FL 33601; and Thomas J. Roehn, Esq., Annis, Mitchell, Cockey, Edward & Roehn, P.A., P.O. Box 3433, Tampa, FL 33601, this 1st day of April, 1986.

ADAM H. LAWRENCE