IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 73,835

WELLS FARGO ARMORED SERVICES CORPORATION,

Appellant,

vs.

SUNSHINE SECURITY AND DETECTIVE AGENCY, INC., etc., et.al.,

Appellees.

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

INITIAL BRIEF ON THE MERITS OF PETITIONER WELLS FARGO ARMORED SERVICES CORPORATION

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TABLE OF CONTENTS

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TABLE OF CITATIONS

CASES:

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STATEMENT OF THE CASE AND FACTS

This Petition seeks reversal of an order of the Third District Court of Appeal affirming a judgment of dismissal with prejudice on the grounds that prior appellate reversal of a default judgment requires entry of judgment in favor of the defendant.[1] The facts of the case are as follows:[2]

On December 13, 1983, employees of Appellant Wells Fargo Armored Service Corporation (hereinafter Wells Fargo), went to the Hialeah branch of the Intercontinental Bank to pick up money. While doing so, the employees were robbed of approximately $440,000. About a day later, one of the guards employed by Defendant/Appellee Sunshine Security and Detective Agency, Inc. (hereinafter Sunshine Security), the security company working for the bank, confessed to participation in the robbery. 496 So.2d 246. Upon his confession, approximately $289,290 was recovered at the home of one of his relatives. R.1-2. Wells Fargo subsequently paid over the balance of the money stolen, plus interest, to

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[1] The first appearance of this case in the Third District Court of Appeal was as case number 86-688. The decision in that proceeding is reported at 496 So.2d 246 (Fla.3rd.DCA 1986).

[2] References to the Record on Appeal are "R.#", except for references to prior briefs, which are by title and case number, and references to the hearing on January 15, 1986, which are "T.#". All emphasis is supplied unless otherwise indicated.

Intercontinental Bank, and received an assignment of rights to proceed against Sunshine Security. R.2., par.11.

On April 13, 1984, suit was filed by Wells Fargo against Sunshine Security, seeking recovery of money paid to the bank. R.1-5. That complaint alleged the assignment of rights by the bank, and that Sunshine Security was liable for the loss occasioned by its employee's participation in the robbery. R.2, par.11; R.3, par.13. Summons issued on April 13, 1984, and service was made on Jacinto A. Alfonso as president and registered agent. R.8-9.

The corporation failed to serve or file any paper as required by law, and on October 30, 1984, an order of default was entered by the Clerk of the Circuit Court. R.10.

On April 17, 1985, a motion to amend and amended complaint were filed. R.14-19. The pleading alleged the existence of insurance, added the carrier as a Defendant, added Jacinto Alfonso individually, and included theories of negligent employment and conversion as against Sunshine Security. No order authorizing the filing of that amended complaint appears, but its certificate of service shows it was served by mail on Mr. Alfonso.

On May 17, 1985, Sunshine Security filed a motion to set aside default, with an affidavit of Mr. Alfonso denying service of the complaint and summons. R.25-27. The matter was heard on January 15, 1986, and decided adversely to Sunshine Security. R.42; T.1-170. At that hearing,

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Sunshine Security referred to a ruling of the trial court authorizing amendment of the complaint but observed that Mr. Alfonso personally had not been served. T.68. See, Brief of Appellant, Case Number 86-688 in the Third District Court of Appeal, page 5.

On January 23, 1986, Sunshine Security filed a motion for rehearing directed solely to the issue of service. R.45. That motion was denied February 24, 1986. R.52. The same day final judgment was entered on the default. R.54B. On March 5, 1986, the judgment was amended. R.54C.

On March 6, 1986, Sunshine Security filed a new motion for rehearing, raising, inter alia, new objections to entry of default judgment: the complaint failed to allege that the conspirator in the robbery was Sunshine Security's employee; Sunshine Security had a meritorious defense, i.e., that it could not be liable to Wells Fargo in the absence of proof of negligent hiring; the amended complaint had not been properly served; and that damages were unliquidated and therefore must be tried.

Sunshine Security filed a Notice of Appeal on March 18, abandoning the second motion for rehearing. R.63. In that appeal, Sunshine Security argued that the trial court erred in: failing to set aside the default due to lack of proper service of either complaint; failing to set aside the default due to substantive insufficiency of

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the complaint; and, failing to set damages for trial. Brief at 6-8.

The Third District reversed the default judgment, on the grounds that the "original complaint ... on which the default was based" did not state a cause of action. The complaint alleged an act of Sunshine Security's employee that the Third District found was beyond the course and scope of his employment, and thus could not be imputed to Sunshine Security on the theory of respondeat superior, although the Third District observed that Sunshine Security was guarding Intercontinental Bank under contract at the time of the robbery. All remaining grounds urged for reversal were specifically rejected, and the cause was remanded to the trial court "for further proceedings." 496 So.2d 246 (Fla.3rd.DCA 1986). A motion for entry of an order on the mandate was filed by Sunshine Security. R.211-214. Mandate was filed November 17, 1986. Order on the mandate was entered January 8, 1987, dismissing the original complaint.

Thereafter, Appellant filed an amended complaint, and a motion to add parties and theories of recovery. R.227-235, 237-244. Sunshine Security filed a motion to dismiss on the grounds that the statute of limitations precluded recovery. R.251-294, 297-300. Alias summons directed to Jacinto Alfonso, individually, and to additional defendants issued May 4, 1987.

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Sunshine Security then moved for recusal of the trial judge. R.268-269. On June 30, 1987, orders of recusal were signed, and an order transferring the cause was filed July 8, 1987. The motions to amend were finally heard by the new presiding judge, and an order was entered authorizing amendment on January 29, 1989.

Sunshine Security, Jacinto Alfonso, and Margaret Alfonso, individually and as trustees of the since-dissolved Sunshine Security, filed an additional motion to dismiss. R.297-300. The trial court entered an order dismissing the amended complaint upon the statute of limitations defense. R.355-356.

Wells Fargo appealed, and the Third District affirmed upon the doctrine of "law of the case," ruling that reversal of the default judgment "precluded ...reopening the case and filing an amended complaint upon remand." Although neither party had presented the applicability of law of the case to new theories and parties as an issue, the Third District cited that doctrine as "appearing on the record" and thus constituting a basis for affirmance.

Petitioner sought discretionary review in this Court. An order accepting jurisdiction and directing the filing of briefs on the merits was entered on July 14, 1989.

ISSUE ON THE MERITS

A. WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRONEOUSLY RULED THAT A PLAINTIFF MAY NOT AMEND AFTER REVERSAL OF A DEFAULT JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS.

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SUMMARY OF ARGUMENT

This Court has previously ruled that a Plaintiff may amend following reversal of a default judgment for failure of the initial complaint to state a cause of action, except where the complaint indicates amendment is not possible. Brumby v. City of Clearwater, 108 Fla. 633, 149 So. 203 (Fla. 1933). This Court has also ruled that reversal and remand for further proceedings returns the case to the lower court in the same posture as if the erroneous ruling had never been made. Stossel v. Gulf Life Insurance Company, 123 Fla. 227, 166 So. 821 (1936). The Third District Court of Appeal may not fashion a new rule; only this Court may recede from or overrule its enunciated rules of law. Petitioner thus clearly had a right to amend upon remand at the time of the reversal of the default judgment. Denial of that right to amend offends the constitutional guarantees of access to the courts, trial by jury, and due process.

The Third District reached a result contrary to Brumby because it misapplied the doctrine of "law of the case." That doctrine prohibits relitigation of issues decided, or departure from rules settled, in a prior appeal. Because amendability of the complaint was not in issue, that issue was not determined in the first appeal. The Third District ruled that the default was based upon the initial

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complaint, and only the original complaint was determined to be substantively insufficient.

Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So.2d 561 (Fla. 1988) was erroneously relied upon as establishing a new rule of finality that would have the effect of sub silentio overruling of Brumby and Stossel. Procedural distinctions render that case inapposite. Moreover, Fourth and Fifth District cases standing for the proposition that the concept of finality does not always preclude amendment following reversal of judgment, demonstrate a proper balance between competing concerns for finality and amendability.

Finally, equitable considerations underlying the discretion of a court to refrain from application of law of the case render it inappropriate in the instant cause.

ARGUMENT

For the reasons set forth below, Petitioner respectfully submits the decision and/or decisions of the Third District Court of Appeal should be quashed.

A. THE DOCTRINE OF LAW OF THE CASE DOES NOT PRECLUDE AMENDMENT AFTER REVERSAL OF A DEFAULT JUDGMENT FOR SUBSTANTIVE INSUFFICIENCY OF THE INITIAL COMPLAINT.

1. The doctrine of law of the case is not applicable.

The doctrine of "law of the case" is a "limited application" of res judicata. Finston v. Finston, 160 Fla. 935, 37 So.2d 423 (Fla. 1948). It requires the same identity of parties, issues, and causes of action, and "may

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be invoked by either party as to such questions as were actually considered and decided on the first appeal." Id., at 424. As an application of res judicata, law of the case is in the nature of an affirmative defense that may be waived. Rules 1.110(d), 1.140(h), Fla.R.Civ.P. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981); Danford v. City of Rockledge, 387 So.2d 968 (Fla.5th.DCA 1980).

At the time of the first appeal, there was pending in the trial court an amended complaint raising issues of negligent employment and conversion, and purporting to add parties. The only issue placed before the Third District at that time, relating to that amendment, was whether it was properly served upon Defendant Sunshine Security. The decision of the Third District was that the default judgment was "based upon the initial complaint", and that that complaint was defective.[3] Clearly, no determination was

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[3] Petitioner submits that the first decision of the Third District was also erroneous. The essence of the contract between Sunshine Security and Intercontinental Bank was the safeguarding of the money against robbery. As the agent of Sunshine Security, the purpose of the conspirator's job was to defend against robbery. Failure to do so, whether by neglect or design, constitutes a failure of the employer to fulfill the appointed task. See, Nicholas v. Miami Burglar Alarm Co., 339 So.2d 175 (Fla. 1976); Coral Gables Federal Savings & Loan Association v. City of Opa-Locka, 516 So.2d 989 (Fla.3rd.DCA 1987), rev.denied, 528 so.2d 1181 (Fla. 1988); McCord v. Sentry Protection, Inc., 427 So.2d 1132 (Fla.5th.DCA 1983); Fincher Investigative Agency, Inc. v. Scott, 394 So.2d 559 (Fla.3rd.DCA 1981), pet.denied, 402 So.2d 609 (Fla. 1981); Singer v. I.A.

(Footnote Continued)

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made that the proposed amended complaint was insufficient to state a cause of action, that there was no way that any cause of action could ever be stated as against Sunshine Security arising out of the robbery, or that other parties might not be vulnerable to suit for losses arising out of the robbery. Because there was no "actual consideration and determination", there can be no law of the case. Finston, supra.

This result is in accord with cases construing application of the broader doctrine of res judicata. It is clear that where dismissal of a prior complaint is based upon failure to state a cause of action, that judgment does

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(Footnote Continued)
Durbin, Inc., 348 So.2d 370 (Fla.3rd.DCA 1977). Because Wells Fargo stepped into the shoes of the bank upon payment of the balance of the stolen funds, it may enforce the right to damages arising out of Sunshine Security's failure to protect against the robbery. Cf., North American Accident Insurance Co. v. Moreland, 60 Fla. 153, 53 So. 635 (Fla. 1910). To the extent the failure to protect was wilful or intentional, punitive damages are appropriate.

Moreover, having accepted jurisdiction, this Court may correct all errors appearing of record, including those which may now constitute law of the case. Rule 9.040(a), Fla.R.App.P.; Friddle v. Seaboard Coast Line Railroad Co., 306 So.2d 97 (Fla. 1974); Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974). Cf., Harris v. Lewis State Bank, 482 So.2d 1378 (Fla.1st.DCA 1986)(Court establishing law of the case may reconsider and reverse prior ruling).

Alternatively, Petitioner submits that if this Court agrees that such a contractual duty was not adequately pleaded at the outset, or that the first decision of the Third District may not be disturbed by this Court, then quashal of the decision under review should be with leave to amend to set forth more clearly the nature of Sunshine Security's duty to Intercontinental Bank upon discovery of its contract with the bank.

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not bar a second suit for viable causes of action arising out of the same factual circumstances which led to the filing of the first suit. Kautzmann v. James, 66 So.2d 36 (Fla. 1953)(judgment not conclusive on merits where demurrer relates to insufficiency of allegations); Overstreet v. Barnard, 303 So.2d 408 (Fla.3rd.DCA 1974)(dismissal of declaratory action does not bar subsequent action for damages based upon the written instruments); Bricklayers, Masons, Plasterers v. Acme Tile and Terrazzo Company, 112 So.2d 43 (Fla.2nd.DCA 1959)(filing of second suit not precluded by dismissal of first action with leave to amend where amendment not made in first suit). See, also, Mackin v. Applestein, 404 So.2d 789 (Fla.3rd.DCA 1981)(judgment negating coverage due to allegations of intentional misconduct by putative insured does not bar amendment to allege implied malice by tortfeasor so as to reassert coverage and re-join carrier).

Moreover, since law of the case was not raised by the motion to dismiss as to any new theories or parties[4], it

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[4] Petitioner submits that had the defense been raised in the motion, dismissal would still have been improper. Because the asserted defense does not appear on the face of the amended complaint, it should be raised by answer. Rule 1.140(b), Fla.R.Civ.P. A litigant is then entitled to trial of the issues which would establish or negate the defense. Wells Fargo waived a similar procedural objection to determination of the statute of limitations defense. Initial Brief of Appellant, Case No. 88-1157, Third District Court of Appeal, page 9.

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should not have been considered by the Third District, sua sponte, as grounds for affirmance of an otherwise erroneous dismissal.[5] Reliance upon law of the case as an alternative basis for affirmance of the dismissal with prejudice offends the very principles the Third District purports to apply, since this affirmative defense was clearly derived from the Third District's own review of the record, and not from the issue and argument presented by the parties. Cf., Dober, supra. Thus, as was the case in Arky, Freed, the Third District places itself in the position of

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[5] For purposes of the statute of limitations, the statute is tolled when the action is commenced. This occurs with filing, not service, of a complaint. Commencement in a pending suit occurs when a motion to amend, subsequently granted, is filed with the proposed amended complaint. Smith v. Metropolitan Dade County, 338 So.2d 878 (Fla.3rd.DCA 1976); R.A. Jones & Sons, Inc. v. Holman, 470 So.2d 60 (Fla.3rd.DCA 1985). But, see, Troso v. Florida Insurance Guaranty Association, Inc., 538 So.2d 103 (Fla.4th.DCA 1989)(filing of amendment without leave is a nullity; leave to amend without filing of amendment insufficient if statutory period expires). Thus the amended complaint was timely filed as to all defendants, even assuming arguendo that there could be no relation back. Cf., Drady v. City of Tampa, 215 So.2d 493 (Fla.2nd.DCA 1968)(lapse of statutory period through no fault of plaintiff's while proceeding pending on appeal entitles amendment despite expiration of statutory period); Argenbright v. J.M.Fields Co., 196 So.2d 190 (Fla.3rd.DCA 1967), cert.denied, 201 So.2d 895 (Fla. 1967)(party having notice of claim and knowledge of service on incorrect corporation may not invoke statute of limitations defense); Scarfone v. Marin, 442 So.2d 282 (Fla.2nd.DCA 1983) (amendment relates back if arising out of same occurrence, despite change in legal theory); Meltsner v. Aetna Casualty & Insurance Company, 177 So.2d 43 (Fla.3rd.DCA 1965), cert.denied, 184 So.2d 886 (Fla. 1966)(claims arising out of same transactions not time barred).

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effectuating a cure of what otherwise constitutes a decision of strategy or professional judgment.

In sum, the doctrine of law of the case was not applicable, nor was it raised as to the new counts and parties. There is no reason on the record to depart from the rule established by Brumby, which Petitioner submits is dispositive. See also, Kellerman v. Commercial Credit Co., 138 Fla. 133, 189 So. 689 (Fla. 1939). See, generally, Beverly Beach Properties, Inc. v. Nelson, 68 So.2d 604 (Fla. 1953), cert.denied, 348 U.S. 816, 99 L.Ed. 643, 75 S.Ct. 27 (1954).

There is similarly no reason to create or maintain conflict with the Fourth and Fifth Districts as to the availability of amendment upon reversal of a judgment. Phrazer Co. v. Lawyers Title Insurance Corp., 508 So.2d 731 (Fla.5th.DCA 1987); Coudry v. City of Titusville, 438 So.2d 197 (Fla.5th.DCA 1983); Grady v. Grady, 395 So.2d 643 (Fla.4th.DCA 1981), pet.denied, 402 So.2d 610 (Fla. 1981); Florida Air Conditioners, Inc. v. Colonial Supply Co., 390 So.2d 174 (Fla.5th.DCA 1980). Petitioner respectfully adopts herein all arguments as to the Brumby and Fourth and Fifth District cases stated previously in Petitioner's Brief on Jurisdiction. See, also, Holley v. Mt. Zion Terrace Apartments, Inc., 382 So.2d.98, 99-100, n.3 (Fla.3rd.DCA 1980)(reversal of summary judgment for landlord in wrongful death suit; amendment upon remand left open).

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2. Reversal of the default judgment for further proceedings returned the case in a posture in which amendment was proper.

Under Stossel, supra, upon reversal and remand, the cause returned to the lower court in the same posture it was in at the time of entry of the erroneous order, as though such order had never been entered. At that time, although the parties understood the trial court would allow amendment, there was no order authorizing it. Petitioner sought to amend the complaint further in April, 1987, incorporating all previous amendments. Due in part to the pendency of Sunshine Security's first appeal, then the pendency of Sunshine Security's Motion to Recuse, the order authorizing amendment was not entered until 1988.[6] In 1987,

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[6] Petitioner notes that an order may have been unnecessary, since an amendment may be filed any time before a responsive pleading is served. However, Sunshine Security did not initially file a supersedeas bond following entry of the judgment, so Wells Fargo had been involved in attempts to collect the judgment during the pendency of the first appeal. As a result of those efforts, Wells Fargo discovered fraudulent transfers of assets had been made to evade Wells Fargo's claim against Sunshine Security. A motion to implead persons holding assets was filed and an order entered authorizing that impleader during the pendency of the appeal. R.153-154, 181-185. Sunshine Security posted a supersedeas bond and moved to stay further proceedings on July 21, 1986. R.196-200. The posture of the case upon remand was thus a bit out of the ordinary, and, in an abundance of caution, Wells Fargo sought and obtained the order authorizing amendment appearing in the record, which incorporated the theories against the principals of the Defendant corporation as individuals and the causes of action to set aside fraudulent conveyances. R.296. In fact, Sunshine Security responded again to the amended complaint

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that complaint was served on additional parties for the first time. Thus, the posture of the case was that amendment to add theories and parties was pending at the time of entry of the erroneous order. The order on the mandate merely dismissed the original complaint. Dismissal for failure to state a cause of action permits amendment. Quinlan v. Mott, 375 So.2d 589 (Fla.5th.DCA 1979); Rule 1.190, Fla.R.Civ.P. At the same time, the impleaded parties were still present, so there can be no argument that the court lost jurisdiction.

Amendment was thus proper, and Petitioner adopts all arguments stated in its Brief on Jurisdiction as to the authority and applicability of Stossel v. Gulf Life Ins. Co., 123 Fla. 227, 166 So. 821 (1936). Cf.,Broward County v. Perdue, 432 So.2d 742 (Fla.4th.DCA 1983)(defendant may reassert motion to dismiss after reversal of default); Smith v. Smith, 118 So.2d 204 (Fla. 1960).

3. The Third District misapplied this Court's decision in Arky, Freed.

The Third District reached a result contrary to the above principle, because it misread this Court's reversal of its decision in Arky, Freed. The Third District has implicitly read Arky, Freed as such an expansion of the

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before that order was entered, apparently conceding the appropriateness of amendment and the propriety of service of the amended pleading. R.251-254.

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concept of finality, as to effectively overrule the above cited cases supporting the opposing concept of judicial favor for amendment.[7] It then applies the re-defined reach of "finality" to its own first decision herein, so as retroactively create "law of the case".

There is no question that some balance must be stricken between these opposing concepts. The concept of finality, stripped of concern for a plaintiff's right to judicial recourse, would have the effect of requiring entry of a defense judgment any time a deficiency of allegation or service occurred. Conversely, the favor bestowed upon amendment, stripped of concern for expectations of finality in the judicial process, would have the effect of endless remand and relitigation.

Petitioner submits the balance is properly stricken by the Fourth and Fifth Districts which the Third District cited as supporting a contrary rule of law to its decision below. Those cases appear to strike a balance upon a case-by-case basis in which reliance on favorable rulings of the trial court, the absence of any true waiver of defenses, and the lack of trial on the merits, militate in

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[7] Petitioner adopts herein those arguments made previously as to the distinctions between Dober and Arky, Freed and the circumstances of this case, as well as its previous comments in its Brief on Jurisdiction as to the effect of Dober on Gold Coast Crane Service, Inc. v. Watier, 257 So.2d 249 (Fla. 1971).

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favor of amendability.[8] By contrast, the Arky, Freed case involves a situation in which reliance on the trial court's ruling came late, trial was had on the merits, and the opposing party had been precluded from adequate preparation of its defense. The circumstances presented by this case fall so clearly within the parameters favoring amendment, that not to allow amendment offends constitutional guarantees of access to the courts, trial by jury, and due process. To date, the defendants in this case have not even had to file an answer, much less proceed to trial. It can not be said that their interest in finality outweighs Petitioner's interest in access to a judicial remedy.

This is particularly true where the issue of amendability was not decided in the first appeal, and remand was for further proceedings. Wells Fargo has found itself in a position of complying with a rule it never had the opportunity to contest. Had the Third District's initial decision stated that theories of negligent employment and conversion were unavailable, or that addition of other parties was precluded by appeal of the default judgment, Wells Fargo might then have sought review and/or filed a

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[8] Arky, Freed supports this case-by-case balancing of the competing concerns, for this Court noted in its decision that that case did not present "sufficiently different" facts to require a result different from the line of cases in which a plaintiff proved an unpleaded theory at trial. 537 So.2d at 563.

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second suit. Instead, the parties and the lower court all proceeded under a perceived permission to entertain a "whole new ball game" and were not on notice of any decision to the contrary until the second appeal. At that time, it was clearly too late to seek review of the operative rulings. Article I, Sections 9, 21, Fla. Const.; Brickell Station Towers, Inc. v. JDC (America) Corp., 14 F.L.W. 1703 (Fla.3rd.DCA, July 18, 1989); Southern Industrial Tire, Inc. v. Chicago Industrial Tire, Inc., 541 So.2d 790, 791 (Fla.4th.DCA 1989); Miceli v. Gilmac Developers, Inc., 467 So.2d 404, 406 (Fla.2nd.DCA 1985).

Instead, because Arky, Freed had not yet been decided by the Third District or reversed by this Court when the first appeal in this cause was heard, the prevailing rule in the Third District was to allow amendment in accord with those cases in the Fourth and Fifth Districts. Forte v. Tripp & Skrip, 339 So.2d 698 (Fla.3rd.DCA 1976); Holley, supra. Amendment was therefore proper.

4. Equitable considerations underlying the court's discretion not to apply the doctrine compel reversal of the instant decision.

Even when the doctrine of law of the case is properly raised and is applicable, a court has discretion not to apply it. As set forth in Smith, supra, a court may refuse to apply law of the case on grounds of justice and fairness at any time, as for example where the court reconsiders its earlier ruling, or where the application of

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the rule would work an obvious injustice. In this case, in light of the injustice worked upon Petitioner, discretion not to apply the law of the case should be exercised in favor of Petitioner. Having succeeded to Intercontinental Bank's rights to proceed against Sunshine Security, and there being no dispute as to Sunshine Security's employee's involvement in the robbery, Wells Fargo should be permitted its day in court to prove up Sunshine Security's liability, whether arising ex contractu or ex delicto. So, too, Wells Fargo should not be precluded from any recourse against additional defendants not served at the time of the first appeal.

CONCLUSION

The Third District Court of Appeal erroneously applied the doctrine of law of the case to issues and parties that were not before the court on the first appeal. The decision should be quashed, with directions to reverse the order of dismissal entered by the trial court, and to remand the cause for all such other proceedings, including further amendments, as the lower court deems just. Alternatively, both decisions should be quashed, with directions to reinstate the default judgment against Sunshine Security and to remand for such other proceedings against other parties as the lower court deems just.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief on the Merits was served by mail this 8th. day of August, 1989, on: Mallory Horton, Esq., HORTON, PERSE & GINSBERG, 44 West Flagler Street, Miami, Florida.

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