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

JURISDICTIONAL BRIEF OF APPELLANT WELLS FARGO ARMORED SERVICES CORPORATION

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STATEMENT OF THE CASE AND FACTS

Appellant seeks review 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. The basis of jurisdiction is Article V, Section 3(b)(3), Fla.Const. (1980), and Rule 9.030(a)(2)(A)(iv), Fla.R.App.P. The facts of the case are as follows[1]:

Appellant Wells Fargo Armored Services Corporation (Wells Fargo), sued Sunshine Security and Detective Agency, Inc. (Sunshine Security). Final default judgment was entered against Sunshine Security. On appeal, the Third District reversed "for further proceedings" on the grounds that the complaint failed to state a cause of action. 496 So.2d 246 (Fla.3rd.DCA 1986). App.B. Upon remand, Appellant amended, adding parties and theories of recovery. App.C. Sunshine Security obtained a dismissal on the grounds that the statute of limitations precluded recovery. 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." App.A,2. The Third District stated that the

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[1] References to matters other than the subject decision are for clarification and identification of parties only. Reaves v. State, 485 So.2d 829, 830, n.3 (Fla. 1986). All emphasis is supplied unless otherwise indicated.

defaulted defendant was entitled on remand to entry of judgment in its favor, and that "this result is required whether the final judgment for the plaintiff is entered upon a jury verdict or, as here, upon a default." Id. The Third District relied in part upon Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 13 F.L.W. 726 (Fla. Dec.22, 1988), and Dober v. Worell, 401 So.2d 1322 (Fla. 1981). Nevertheless, the Third District acknowledged that Coudry v. City of Titusville, 438 So.2d 197 (Fla.5th.DCA 1983) and Florida Air Conditioners, Inc. v. Colonial Supply Co., 390 So.2d 174, 176 (Fla.5th.DCA 1980), would support a different result.

Following that decision Appellant timely filed a "Notice of Appeal", later amended to state the basis of this Court's jurisdiction.

ISSUES ON JURISDICTION

A. WHETHER THE DECISION CONFLICTS WITH BRUMBY v. CITY OF CLEARWATER AND STOSSEL v. GULF LIFE INSURANCE CO., AND WITH FIFTH AND FOURTH DISTRICT DECISIONS SUPPORTING AMENDABILITY AFTER REVIEW OF FINAL JUDGMENTS?

B. WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO HEAR THE CAUSE BASED UPON ITS IMPACT ON APPELLANT AND ON FUTURE MOTION PRACTICE?

SUMMARY OF ARGUMENT

This Court has jurisdiction to review decisions of District Courts that "expressly and directly" conflict with decisions of other courts of appeal or of this Court. The instant decision so conflicts with Brumby v. City of

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Clearwater, 108 Fla. 633, 149 So. 203 (Fla. 1933) and Stossel v. Gulf Life Insurance Co., 123 Fla. 227, 166 So. 821 (1936) on the principles of amendability after reversal of a default judgment; and with Coudry, supra; Florida Air Conditioners, supra; Grady v. Grady, 395 So.2d 643 (Fla.4th. DCA 1981), pet.denied, 402 So.2d 610 (Fla. 1981); and Phrazer Co. v. Lawyers Title Insurance Corp., 508 So.2d 731 (Fla.5th.DCA 1987). The decision misapplies Arky,Freed and Dober which are inapposite. Thus, the conflict remains.

Because the decision would have serious impact on pleading and motion practice, and because it has resulted in manifest injustice and a denial of Appellant's rights of access to the courts and trial by jury, this Court should exercise its discretion to review and to reverse the decision of the Third District.

ARGUMENT

A. CONFLICT EXISTS WITH BRUMBY v. CITY OF CLEARWATER AND STOSSEL v. GULF LIFE INSURANCE CO., AND WITH FIFTH AND FOURTH DISTRICT DECISIONS SUPPORTING AMENDABILITY AFTER REVIEW OF FINAL JUDGMENTS.

In Brumby, supra, this Court reviewed an order vacating a decree pro confesso entered against the city of Clearwater. Brumby had sought to require specific performance of a contract by the city. The decree was reversed for failure to state a cause of action, and this Court stated:

> The order appealed from should be affirmed and, unless the complainant can within a near date to be fixed by the circuit court so amend

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> his bill of complaint as to show some power or authority vested in the municipality ... the bill should be dismissed.

149 So. at 204. On rehearing, the decision was modified to preclude amendment because any power or authority to enter into the contract would necessarily be unconstitutional. This Court's rule is thus that amendment should be permitted when a default judgment is erroneously entered on a substantively insufficient complaint, unless cure by amendment is impossible. See also, Kellerman v. Commercial Credit Co., 138 Fla. 133, 189 So. 689 (Fla. 1939).

Moreover, reversal and remand for further consideration returns a cause to the trial court "in the same status as if the order or decree which is reversed had never been made." 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). Eradication of the default leaves the complaint, summons, and return. A complaint may be amended at any time before filing of a responsive pleading, and dismissal on motion is with leave to amend. Quinlan v. Mott, 375 So.2d 589 (Fla.5th.DCA 1979); Rule 1.190, Fla.R.Civ.P.

The instant decision conflicts with these rules of law, for it requires entry of judgment in favor of the defendant without opportunity to amend. The defendant is

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placed in a better position than had the order "never been made." Stossel, supra.

In Coudry and Phrazer Co., supra, the Fifth District reviewed summary judgments entered for defendants. In each, judgment was affirmed with leave to the plaintiff to amend on remand to state a new cause of action.

In Florida Air Conditioners, supra, a creditor sued two individuals to collect a business debt, alleging common-law and statutory bases for their liability. The defendants moved to dismiss the statutory theory, claiming the statute was not in effect when the debt accrued. The motion was denied. During trial the plaintiff struck the common-law theory. The Fifth District reversed the plaintiff's recovery because the statute was inapplicable. On remand, the trial court denied the plaintiff's motion to re-allege the common-law theory. The Fifth District reversed because "...appellants, having changed their position relying on the erroneous ruling of the trial court, should be returned to their position before such ruling." 390 So.2d at 176.

In Grady, supra, the Fourth District reversed a declaratory judgment that determined a husband was entitled to continue receiving income from a wife's relative's testamentary trust after dissolution of the marriage, but permitted amendment on remand.

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These cases can not be reconciled with the instant decision. If a plaintiff may amend after erroneous entry of judgment at a later stage in the proceedings, preclusion of amendment at an earlier stage is manifestly unjust.[2]

Dober and Arky,Freed do not dispose of this conflict. In Dober, the Plaintiff against whom summary judgment was entered had been aware of an avoidance to the defendants' statute of limitations defense, but chose not to raise it until appeal. This Court held that it is "inappropriate for a party to raise an issue for the first time on appeal from summary judgment." 401 So.2d at 1324. Dober did not involve reliance on a favorable trial court ruling.[3]

In Arky,Freed, supra, Bowmar Instrument Corporation raised a new theory of legal malpractice 12 days

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[2] Nor should amendment depend upon record evidence suggesting an unpled theory, since the defaulting party has obviated the necessity of any evidence at all.

[3] This Court did not specifically disapprove a Third District decision allowing amendment after summary judgment. The pre-Arky,Freed Third District would still have allowed amendment at the time the first appeal was decided. Forte v. Tripp & Skrip, 339 So.2d 698 (Fla.3rd.DCA 1976). This Court did recede from any suggestion that a party may raise an avoidance for the first time on appeal as may be read into Gold Coast Crane Service, Inc. v. Watier, 257 So.2d 249 (Fla. 1971). That case stated as a general rule that whenever an unpled cause of action appeared, summary judgment should be affirmed with leave to amend on remand. To the extent such a rule is distinct from the principle of waiver of an affirmative defense, vestiges of Gold Coast may remain.

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before trial against its former lawyer. The trial court ruled that the complaint encompassed the theory. The Third District disagreed and reversed the judgment entered in favor of Bowmar upon jury verdict. However, the court gave Bowmar permission to amend to add the theory on remand, distinguishing Dober as not involving a reliance on a favorable trial court ruling. 527 So.2d at 213, n.3. This Court reversed because Bowmar first raised the unpled theory on the eve of trial and opposed a continuance for Arky, Freed to prepare to defend against it. This Court explained that Bowmar's "reliance" was no different from reliance on erroneous evidentiary rulings at trial. The timing of reliance upon a favorable trial court ruling thus seems pivotal.

Reliance on a ruling at the pleading stage renders Dober and Arky,Freed non-dispositive. Both cases involved situations materially at variance with this case. Misapplication of them creates conflict with the above-stated cases and with the principles of "law of the case". This Court has jurisdiction to resolve this conflict. Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980); Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981).

B. THE COURT SHOULD EXERCISE ITS DISCRETION TO HEAR THE CASE BECAUSE OF THE DECISION'S IMPACT UPON PETITIONER AND UPON FUTURE PLEADING AND MOTION PRACTICE.

Having established that jurisdiction exists, the remaining issue is whether discretion should be exercised in

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this case. Cf., The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988). Two facts commend review of this case. One is the decision's potential impact on pleading and motion practice; the other is its impact on Appellant.

The decision below makes two things clear. A defendant who allows default to be entered and prevails on appeal need never prepare a defense. Correspondingly, a plaintiff who avails himself of the default rule may lose the opportunity for a fair trial on the merits. Therefore, new consideration must be given to the use of motions under Rule 1.140, Fla.R.Civ.P. Heretofore defendants had four ways to challenge the sufficiency of the complaint: by motion directed to the complaint; by answer; by motion for judgment on the pleadings; or at trial by motion for directed verdict. Only if a defendant waited for trial did the plaintiff risk losing the opportunity to amend. Arky, Freed, supra, at 727 (only at close of evidence would Bowmar not have been able to amend; amendment permissible if continuance not opposed).

This decision presents a fifth option which totally precludes amendment. If a complaint is probably defective, allowing default to be entered may be the best defense strategy. Although the certainty of entry of adverse judgment is absolute as opposed to the risk of adverse judgment if one waits to raise insufficiency of pleadings until trial, the dollars and cents cost is much

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lower than lying in wait until trial. If the lawyer's estimation of the substantive content of the complaint is correct, the defendant's litigation savings may be substantial. In many cases, this cost may exceed the original amount in controversy. It would not serve the client's interest to fail to consider, or in many cases, to recommend this strategy.

Yet this would place the plaintiff's lawyer in a position of having to choose between default provisions designed to facilitate his client's claim when a defendant, properly served, remains mute, and refusal to do so because of the risk of a technical insufficiency that might otherwise be curable if the opponent just spoke. The system would in many cases revert to the style of "trial by ambush" so often decried by all courts.

The impact upon Appellant is clear. The ruling of the Third District has blocked the courthouse door and emptied the jury box. Sunshine Security has avoided being called upon to defend itself, even though the Third District leaves unanswered the question whether the other theories alleged and parties joined were viable. This result is unjust when plaintiffs who are met with opposition are afforded opportunity to amend right up until the eve of trial, and other plaintiffs who avail themselves of the default rule after defective service may re-enter the courthouse and obtain a full adversarial proceeding. The

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instant result violates Appellant's constitutional rights of access to the court and to trial by jury.

CONCLUSION

This Court has jurisdiction, because there is express and direct conflict of the instant decision with those discussed above. This Court should exercise its discretion to hear the case because of its unjust result and its potential impact on pleading and motion practice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction was served by mail this 17th. day of April, 1989, on: Mallory Horton, Esq., HORTON, PERSE & GINSBERG, 44 West Flagler Street, Miami, Florida.

Respectfully submitted,

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