IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 73,8[illegible]

WELLS FARGO ARMORED SERVICES CORPORATION,

Petitioner,

vs.

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

Respondents.

AMENDED

JURISDICTIONAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

The Petitioner's statement of the case and facts is substantially correct, with the following exceptions:

The Petitioner was the Appellee in SUNSHINE SECURITY AND DETECTIVE AGENCY, INC. v. WELLS FARGO ARMORED SERVICES CORPORATION, 496 So.2d 246 (Fla. 3d DCA 1986) and upon remand filed and amended complaint naming "new parties" and raising "new theories of recovery."

Although the Third District Court of Appeal, as the Petitioner alleges, affirmed upon the doctrine of "the law of the case," the Court nevertheless recognized that there were other grounds upon which the dismissal of the complaint could be sustained, namely, on the grounds of the statute of limitations. In this regard, the Court said:

> "We recognize that the trial court dismissed the amended complaint on statute of limitations grounds. Nonetheless, it is well settled that a trial court may be right for any reason appearing in the record, and the law of the case reason for affirmance is obvious from this record."

The Petitioner filed an amended notice to invoke the discretionary jurisdiction of this Court, which was served on March 13, 1989. These proceedings were begun by a notice of appeal served on March 7, 1989. Inasmuch as the amended notice to invoke discretionary jurisdiction was filed and served some 34 days after the rendition of the decision sought to be reviewed, the Respondent brings the same to the attention of this Court for such disposition as is justified and warranted. The rule covering the invocation of this Court's jurisdiction

is set forth in Rule 9.120(b) of the Rules of Appellate Procedure. Notice filed by the Petitioner and served on March 7, 1989 indicates that the "notice of appeal" was directed to the order of the Third District Court of Appeal rendered on February 7, 1989, which affirmed the dismissal of the amended complaint on the grounds that the complaint was barred by the doctrine of law of the case. The notice was not in compliance with the rule aforesaid or Rule 9.900(d) of the Rules of Appellate Procedure under Forms.

Since no appeal would lie to this Court from the opinion and decision of the District Court of Appeal in this cause the Respondent respectfully suggests that the amended notice to invoke the discretionary jurisdiction was late and consequently, not in compliance with the rules. Notwithstanding this defect, the Respondent, without waiving same, will reply to the Petitioner's brief on jurisdiction.

SUMMARY OF ARGUMENT

There is no conflict betweent the decision and opinion of the District Court of Appeal in this case and the many cases referred to by the Petitioner, especially BRUMBY v. CITY OF CLEARWATER, 108 Fla. 633, 149 So. 203 (Fla. 1931) and STOSSEL v. GULF LIFE INSURANCE CO. 123 Fla. 227, 166 So. 821 (1936). In BRUMBY, it was found that the contract sued upon was void from the inception. Consequently, there was no legal basis upon which a valid cause of action could be premised. STOSSEL concluded that there was a cause of action and remanded for further proceedings.

Although the Respondent has not filed a motion to dismiss (and is not sure such a motion is allowed under the rules), nevertheless, the notice to invoke the discretionary jurisdiction of this Court was filed some 34 days after the rendition of the opinion and decision. The notice was styled "Amended Notice to Invoke Discretionary Jurisdiction" although the original notice was styled "Notice of Appeal." We leave it to the Court's discretion as to whether or not the amended notice was timely filed.

The remand in the ititial opinion in this case (496 So.2d 246) was "* * * for further proceeding." The trial court was obligated and did set aside the default and final judgment. Later the trial court permitted the filing of an amended complaint. The District Court recognized that the amended complaint was dismissed on statute of limitation grounds. In that regard, the Court noted the well recognized appellate rule that a trial court may be right for any reason appearing in the record and proceeded to point out that the law of the case reason for affirmance was obvious from the record.

The argument with regard to the decision's potential impact on pleading and motions practice is wholly without merit. First, there is no provision in the appellate rules upon which to premise the discretionary jurisdiction of this Court and secondly, there is no apparent reason in this case to conclude that the decision impacts pleading and motions practice.

Jurisdiction should be denied.

ARGUMENT

It is contended that the decision and opinion sought to be reviewed here is in conflict with BRUMBY v. CITY OF CLEARWATER, supra; STOSSEL v. GULF LIFE INSURANCE CO., supra, and a host of decisions from the Fourth and Fifth Districts supporting the right to amend a complaint after review and reversal of a final judgment.

A cursory examination of BRUMBY v. CITY OF CLEARWATER and STOSSEL v. GULF LIFE INSURANCE CO., supra, will readily demonstrate the inapplicability of and the fact that there is no apparent conflict between the decisions in those cases and the opinion and decision in the case at bar.

1. BRUMBY involved an appeal from an order vacating a decree pro confereo against the City of Clearwater on a complaint for specific performance. This Court found that the contract sued upon was void from its inception and that neither party acquired any rights under it. Consequently, the decree appealed was affirmed. There is no element of conflict in that decision and the case at bar. Likewise in STOSSEL there is a total lack of conflict.

ARKY, FREED, STEARNS, WATSON, GREER, WEAVER & HARRIS, P.A. v. BOWMAR INSTRUMENT CORP., 537 So.2d 561, 13 F.L.W. 726 (Fla. Dec. 22, 1988), was not cited by the appellate court for the proposition that the opinion sought to be reviewed was in conflict with that case because of the signal citation used by the appellate court in Arky, Freed. The Court will note that the signal used in the opinion in Arky, Freed was a CF citation

which means to compare. In short, Arky, Freed was not cited as a direct authority by the District Court but was to be compared and used to illustrate the possible applicability of the Appellant's argument in that cause.

2. In ARKY, FREED, supra, this Court at page 562 said:

> "It is our view that a procedure which allows an appellate court to rule on the merits of a trial court's judgment and then permits the losing party to amend his initial pleading to assert matters not previously raised renders a mockery of the 'finality' concept in our system of justice." (Emphasis supplied)

Petitioner seems to argue that there might have been some case which the Petitioner might have pled that was encompassed in the amended complaint which the Third District Court of Appeal found to be legally without merit, that is to say, that the case cited by the Petitioner deal with those instances in which there was sufficient facts in the record from which a valid cause of action could have been pled or was pled. Whereas, in the case which the Petitioner seeks to have reviewed here, there is no merit of any kind and that case was disposed of by the District Court of Appeal on the basis that the complaint in the cause initially wholly failed to state a cause of action, 496 So.2d 246. (Emphasis supplied)

The cases cited by the Petitioner, BRUMBY v. CITY OF CLEARWATER; STOSSEL v. GULF LIFE INSURANCE CO., supra, and practically all, if not all of the cases cited by the Petitioner, deal with factual situations in which there could be premised a cause of action and where in some instances the appellate court in reversing the trial court would remand the causes so that a

cause of action which was encompassed within the factual framework of the cases could be made the basis for a valid or good cause of action.

The Petitioner also seems to amalgamate in its argument the two opinions by the Third District Court of Appeal, the opinion and decision 496 So.2d 246 as well as the opinion and decision sought to be review in this cause.

In this regard, it is pointed out that in the first opinion and decision in this cause at 496 So.2d 246, the Third District Court of Appeal held point blank that the cause of action alleged in the complaint failed to state a valid cause of action. This was so for the simple reason that the complaint in the initial action alleged that an employee of SUNSHINE SECURITY AND DETECTIVE AGENCY, who was then acting as a guard at one of the local banks in Miami, Florida, had conspired with an employee of the bank to rob the WELLS FARGO truck of one or as many of the packets of monies as they could when a stop was made by the truck of WELLS FARGO at a Hialeah bank. That the guard supplied by SUNSHINE SECURITY conspired with the bank guard and they in turn were able to commit a robbery of a money pouch containing $440,000. The District Court pointed out and rightfully so that this was not within the course and scope of the agency of SUNSHINE SECURITY's employee and was no more than an employee stepping aside to join in a criminal conspiracy of his own for his own purposes and not for the benefit of his employer. (Emphasis supplied)

When the cause reoccurred in the trial court, the Petitioner here pleaded almost verbatim the charges made in their original complaint and added three additional charges, alleging new causes of action, with new individuals or defendants who had not previously been a part of the orginal action. Not only did the District Court of Appeal affirm the dismissal of the amended complaint, but also pointed out that the trial judge had dismissed the amended complaint with prejudice on the grounds that the statute of limitations had run on the alleged claim. The Court said:

> "We recognize that the trial court dismissed the amended complaint on statute of limitations grounds. Nonetheless, it is well settled that a trial court may be right for any reason appearing in the record, and the law of the case reason for affirmance is obvious from this record."

We conclude from that statement by the District Court that the statute of limitations ground was a basis for the dismissal but that the more obvious basis was the law of the case theory.

The Petitioner argues that it would have been better for the Petitioner who was the Plaintiff in the trial court to have foregone the obtaining of a default judgment for the reason that a plaintiff who had availed himself of a default would lose the opportunity for a fair trial on the merits and that a defendant who allows a default to be entered against him may prevail in an appeal and need never prepare a defense. This is not only a false premise, but one that has no basis in law or fact in this case.

The original complaint in this cause was found not to have

stated a cause of action having been premised upon facts that could not be legally sustained. Therefore, it is rather specious to argue that one who allows a default to be entered and prevails on appeal may never have the necessity of preparing a defense. This, of course, is rather clouded logic but it simply points out the fact that the Petitioner has no basis upon which to urge a review of the case in question because it was unable to demonstrate in the District Court of Appeal that it had a cause of action initially that could or should have survived the setting aside of the default and final judgment.

The Petitioner has failed to point out in any respect a specific area in which the opinion of the District Court of Appeal in the case sought to be reviewed was expressly and directly in conflict with the decision of another District Court of Appeal or of this Court on the same question of law. Petitioner simply begs the question by analogizing that a Plaintiff's lawyer would be placed in a precarious position of having to chose between a default designed to facilitate the cause and foregoing the default because of the risk of technical insufficiency, which might be otherwise curable if the opponent just spoke. They consider this to be a system which may encourage a "trial by ambush." This is an argument which should be addressed to another forum, but does not justify a basis for a review of the decision here.

Lastly, the Petitioner claims that the ruling sought to be reviewed has blocked the courthouse door and emptied the jury box and that such an impact to this Petitioner is clear and

foreboding. It suggests that such a result is unjust when the Petitioner who is met with opposition or afforded an opportunity to amend up to 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, and that such result violates the Petitioner's constitutional rights of access to the Court and trial by a jury.

The specific fallacy of the Petitioner's complaint is that there was somewhere hidden in the complaint and the amended complaint a probable cause of action which the appellate court refused to permit it to employ. This argument, of course, is against a background and in contrast to the fact that the appellate court specifically found in the first opinion that the complaint failed to state a cause of action and pointed out the reasons why such a cause of action did not exist. After some three and one-half to four years later additional parties and additional causes of action do not improve upon the right of the Petitioner here to have a review in this Court of the opinion and decision of the District Court of Appeal.

The Petitoner's contention that the decision sought to be reviewed would have a potential impact on pleading and motions practice and also on the Petitioner is specious on its face. Obviously, any adverse ruling has an impact upon the losing party. If, as the appellate court's decision holds, there was a failure to state a cause of action, the Petitioner's argument that it would have an impact on pleadings and motions practice is without merit.

Lastly, the Petitioner complains that a defendant who allows a default to be entered and prevail on appeal need never prepare a defense. This is true in the case at bar where the complaint and the amended complaint failed to state a cause of action. Why should a defendant be required to prepare a defense when the plaintiff's complaint failed to state a cause of action? To state the proposition is to demonstrate its weakness.

CONCLUSION

The opinion and decision of the District Court of Appeal is not expressly or directly in conflict with a decision of this Court or another district court of appeal on the same question of law. The request for review should be denied.

Respectfully submitted,

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BY: Mallory H. Horton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENTS was served by U.S. mail this 8 day of May, 1989, upon:

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