017

IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

CASE NO.: 74,149
DCA - 4: 88-3337

IN RE: THE MARRIAGE OF

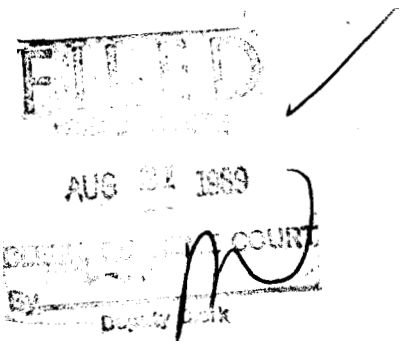
JEFFREY SKINNNER,

Appellant,

and

LISA SKINNER,

Appellee.
_____/



AMENDED ANSWER TO APPELLANT'S MAIN BRIEF

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

CARYN S. GRAINER, P.A.
Attorney for Appellee
601 South Ocean Drive
Hollywood, Florida 33019
Telephone: (305) 922-9100
Florida Bar No.: 303429

MICHAEL K. DAVIS, ESQUIRE
Attorney for Appellant
6045 S. W. 45th Street
Davie, Florida 33314
Telephone: (305) 584-1650
Florida Bar No.: 395463

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

It is Appellee's position that the Fourth District Court Of Appeals correctly denied the relief sought by Appellant and that this Supreme Court should respond to the question of great public importance accordingly.

In this Answer To Initial Brief, the Appellant will be referred to as "Petitioner" or "Husband ". The Appellee will be referred to as "Respondent" or "Wife".

STATEMENT OF CASE

The Appellee, LISA SKINNER, takes exception with the Appellant's Statement Of The Facts/Case and accordingly provides the following to inform the Court of corrected and/or omitted facts:

The Fourth District Court Of Appeal certified to this Court the following question of great public importance:

DOES THE DISTRICT COURT OF APPEAL HAVE JURISDICTION TO CONSIDER A PETITION FOR WRIT OF CERTIORARI FILED THEREIN TO REVIEW A NON FINAL ORDER WHICH IS REVIEWABLE BY APPEAL BUT WHERE NO NOTICE OF APPEAL WAS FILED IN THE TRIAL COURT?

This cause was brought before the Fourth District Court Of Appeal as a Petition For Writ Of Certiorari which was nevertheless, denied on April 12, 1989. The Court certified the above stated question.

The Appellant, JEFFREY SKINNER, sought review of an Order granting Appellee, LISA SKINNER'S, Motion For Relief From Judgment and an Order to pay a medical bill to Appellee by Petition For Writ Of Certiorari. The Fourth District Court Of Appeal designated it as a Non Final Appeal. The Court dismissed the Petition because Appellant failed to file a Notice Of Appeal in the Trial Court, as is a requirement of an Interlocutory Appeal.

Appellant invoked Discretionary Jurisdiction of this

Court to review the decision by the Fourth District Court Of Appeal.

A Statement was filed by Appellant upon Order of the Fourth District Of Appeal, designating that no Notice Of Appeal was filed in the Circuit Court.

STATEMENT OF FACT

Appellee, LISA SKINNER, provides the following to inform the Court of corrected and omitted facts in reference to the Statement Of Facts supplied by the Appellant:

Appellant, JEFFREY SKINNER, filed a Petition For Dissolution Of Marriage against Appellee, LISA SKINNER. The Trial Court heard Wife's Emergency Motion For Temporary Relief and, on August 20, 1987 entered an Order that the Husband, JEFFREY SKINNER, was to maintain health insurance, (among other relief) for the benefit of the Wife and the minor child. The Court reserved jurisdiction to allocate responsibility as between the parties for any and all medical expenses.

On December 30, 1987, an Order was entered granting the Wife's Amended Motion For Contempt, ordering the Husband to pay the Wife's medical bills, which included the payment of a Chiropractic bill to Dr. Jeffrey Frachtman.

Upon the failure of the Husband to comply with the Order, the Wife filed a Motion For Contempt on March 31, 1988.

Between the Court Order of December 30, 1987 and the Wife's Motion For Contempt, dated March 31, 1988, the parties were granted a Final Judgment Of Dissolution Of Marriage, dated February 8, 1988, which incorporated therein a Property Settlement Agreement which contains a general and a mutual release section, but does not expressly waive the medical bill payment previously ordered to be paid by the Husband.

The Motion For Contempt regarding the payment of the

medical bill was heard and denied on April 27, 1988 based upon lack of jurisdiction.

The Wife thereafter filed a Motion For Rehearing and it was denied on May 24, 1988. During said hearing, the Wife's attorney cited case law that the Husband was still responsible for the medical bill by the Court Order dated December 30, 1987.

On November 14, 1988, Judge Hinckley entered an Order granting Wife's Motion For Relief From Judgment pursuant to Rule of Civil Procedure 1.540(b)(1), and Ordered the Husband to pay the Wife's medical bill owed to Dr. Frachtman as previously Ordered on December 30, 1987.

Appe11ant filed a Petition For Writ of Certiorari to review the Order of November 14, 1988.

ARGUMENT I

THE FOURTH DISTRICT COURT OF APPEALS PROPERLY DISMISSED APPELLANT'S PETITION FOR WRIT OF CERTIORARI BECAUSE APPELLANT FAILED TO FILE A NOTICE OF APPEAL AT THE TRIAL COURT LEVEL.

The Appellee contends that the Order granting the Appellee/Wife's Motion For Relief Of Judgment and Ordering the Appellant/Husband to pay the medical bill previously Ordered by the Court was made well within the confines of the law and the Rules Of Civil Procedure. Furthermore, Appellant contends that the Fourth District Court Of Appeal did not err in dismissing Appellant's Petition For Writ Of Certiorari since the Notice Of Appeal was not filed in a lower tribunal.

It is apparent from Appellant's Main Brief that Appellant contends that Judge Hinckley's Order was final. As a result, the Appellant filed a Petition For Writ Of Certiorari. As the Fourth District Court Of Appeals noted, this action was in error of the Rules Of Appellate Procedure, specifically Rule 9.130(a)(3)(5), which clearly states that such an Order is Non Final.

The proper remedy of procedure is a direct Appeal requiring a notice in a lower tribunal. Lampkin-Asam V. District Court Of Appeal, 364 So.2d. 469 (FLA. 1978).

The Argument set forth by counsel for Appellant is primarily that a Writ of Certiorari should be treated as a Notice Of Appeal in the lower tribunal, because of error in interpretating

Judge Hinckley's Order as final.

In Fennel v. Trailways, 169 So.2d 858 (FLA. 3rd DCA 1964); Radio Communications Corp. v. Oki Electronics of America, Inc., 277 So.2d. 289, (FLA. 4th DCA 1973); Mac Papers, Inc. v. Coin Machine Acceptance Corp., 210 So.2d. 463 (FLA. 3rd DCA 1968), the Court clearly permits a Non Final Judgment which is interloctory to be treated as a Writ Of Certiorari, because it is authorized under FS 59.45. There is no authority, including case law, statute and rule, mandating the reverse. Secondly, the rule specifically recites areas of jurisdiction permitting certiorari. Amendments to the rules along with the committee notes share that specificity. (Florida Rules Of Appellant Procedure 9.130 in 1977 revision of the committee notes)

The committee notes, which clearly outline the purposes behind the drafting of these rules, clearly state that since the "most urgent interlocutory orders are appeallable under this rule, there will be very few cases where certiorari will provide relief". Taylor v. Board Of Public Instruction Of Duval County, 131 So.2d. 504, (FLA. 1st DCA 1961).

Stein v. Bayfront Medical Center, 287 So.2d. 401 (FLA. 2nd DCA 1973), which Appellant also cites, is clearly contrary to Appellant's Argument in the case at bar. The Court clearly states in Stein v. Bayfront Medical Center, 287 So.2d 401 (FLA. 2nd DCA 1973), that an interlocutory appeal was not the proper procedure in that case.

In Mac Papers, Inc. vs. Coin Machine Acceptance Corp., 210 So.2d 463 (FLA. 3rd DCA 1968), the Court states that the

Order was non appeallable, contrary to the case at bar, where the Order was Non Final and appeallable by interlocutory appeal, pursuant to Florida Rules Of Civil Procedure 9.130. (also note Radio Communication Corp. v. Oki Electronics Of America, Inc., 277 So.2d. 289, (FLA. 4th DCA 1973)

Appellee also requests this Court to note Rule Of Appellate Procedure 9.030(b)(2)(A), which specifically states that the District Court Of Appeal has certiorari jurisdiction of all Non Final Orders not prescribed by Florida Rule Of Appellate Procedure 9.130. The committee notes, which state the purposes of this Rule and any changes, place importance on the burgeoning case load and efficient use of limited Appellate resources. It is Appellee's position that to merely place emphasis on Appellant's Argument that where a paper is filed should not be controlling would force the higher Court's of this State to do the work of counsel in deciding where and why review is being sought on an ad hoc basis, thereby ending all distinquishments between Writs Of Certiorari and direct appeals. The Rules clearly state how to file an Appeal - final or Non Final.

Historically, it is well established that the purpose of a Writ Of Certiorari is to provide Appellant with a remedy in those cases in which it clearly appears that there is no full, adequate and complete remedy available by appeal after a Final Judgment. Taylor v. Board Of Public Instruction of Duval County, 131 So.2d. 504, (FLA. 1st DCA 1961).

Futhermore, the remedy of Certiorari only can be provided when Appellant has met the heavy burden of showing that a

clear departure from the essential requirements of law would otherwise result in irreparable harm. Malone v. Vostin, 410 So.2d. 569 (FLA. 1st DCA 1982).

Since a Writ Of Certiorari has distinguishable characteristics and purposes from a direct appeal, which includes the requirement of a Notice Of Appeal to the lower tribunal, Appellant's Argument that a Writ Of Certiorari should be treated as a Notice Of Appeal is without merit. Clearly, this Court, by implementing the Rules Of Appellate Procedure, require that the Notice Of Appeal be filed in the lower Court in order to invoke Appellate jurisdiction. Even if an Appeal is considered untimely beause no Notice Of Appeal was filed in the lower Court, Appellant may raise the issue again on Appeal from the Final Judgment in the Case. Miscoff v. Crossfox Condominium Association, 640 So.2d. 987 (FLA. 4th DCA 1984).

MARY OF ARGUM

Based upon the Argument contained herein, the Appellee would submit that the Fourth District Court Of Appeal ruling in this cause is correct and that the question of great public importance should be responded to in light of that opinion.

Respectfully submitted,

CARYN S. GRAINER, P.A.
Attorney for Appellee
601 South Ocean Drive
Hollywood, Florida 33019
Telephone: (305) 922-9100
Florida Bar No.: 303429

BY: _____
CARYN S. GRAINER, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Amended Answer To Appellant's Main Brief was mailed to MICHAEL K. DAVIS, ESQUIRE, Attorney For Appellant, 6045 S. W. 45th Street, Davie, Florida 33314 this 18th day of August, 1989.

CARYN S. GRAINER, P.A.
Attorney for Appellee
601 South Ocean Drive
Hollywood, Florida 33019
Telephone: (305) 922-9100
Florida Bar No.: 303429

BY: _____
CARYN S. GRAINER, ESQUIRE