

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 75,125

ARNALDO CURBELO, M.D., et al,

Petitioners, :

vs. :

HOWARD F. ULLMAN, etc., :

Respondent. .

DISCRETIONARY REVIEW OF A DECISION OF
THE THIRD DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT,
HOWARD F. ULLMAN

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INTRODUCTION

This answer brief is filed on behalf of Howard F. Ullman, Esquire, as Personal Representative of the Estate of Francia Perez, Deceased.

STATEMENT OF THE CASE AND FACTS

This was an appeal from an order entered on motion filed pursuant to Rule 1.540, reviewable under Rule 9.130. The record on appeal consisted of the appendix ("A."), filed with the initial brief.

This medical negligence wrongful death action was brought by Ullman against Dr. Arnaldo Curbelo, Hialeah Medical Center, and Filiberto Raul Martin, R.N. (A. 7). All three were served with process, all three failed to answer, and all three suffered a default (A. 7). Upon notice to all parties, the case was tried to the court on the issue of damages only (A. 11-46). Dr. Curbelo appeared and participated on his own behalf, as well as on behalf of the Hialeah Medical Center, which he owns (A. 13, 33-45). At no time did any of the defendants object to the trial being conducted non-jury (A. 11-46).

Final judgment was entered in favor of Ullman and against Martin, Dr. Curbelo, and Hialeah Medical Center on December 1, 1988 (A. 1). Neither Dr. Curbelo nor Hialeah Medical Center did anything after entry of final judgment against them, until February 22, 1989. On that date, they served their motion for relief from judgment pursuant to Rule 1.540 (A. 2-3).

On this record the Third District held that, in claiming error in failure to conduct a trial by jury, the proper vehicle for asserting error was by appeal, and not by motion to set aside judgment pursuant to Rule 1.540. The Third District relied upon Rutshaw v. Arakas, 549 So.2d 769 (Fla. 3d DCA 1989) ("It is well settled that a 1.540 motion cannot be employed as a substitute for a timely appeal, much less for a timely preservation of error in the underlying action itself." 549 So.2d at 770).

SUMMARY OF ARGUMENT

Dr. Curbelo attended and participated in the non-jury trial without objection. Judgment was entered with notice. Any error in the conduct of the trial or in entry of judgment must be timely raised before trial, during trial, or after trial by appropriate post trial motion. An adverse judgment may also be challenged by timely notice of appeal. Rule 1.540 is not a substitute for timely motion or timely appeal. See, Rutshaw v. Arakas, 549 So.2d 769, 770 (Fla. 3d DCA 1989) and cases cited.

ARGUMENT

Rule 1.540 is intended to provide relief from judgment under a limited set of circumstances. It is not a substitute for timely objection prior to entry of judgment. It

is not intended as a substitute for the new trial mechanism prescribed by Rule 1.530 after entry of judgment. Nor is Rule 1.540 a substitute for timely appellate review of alleged judicial error. Metropolitan Dade County v. Certain Lands upon which Assessments are Delinquent, 471 So.2d 191, 193 (Fla. 3d DCA 1985); Sands v. Wooten, 439 So.2d 1037, 1038 (Fla. 3d DCA 1983); Barrios v. Draper, 423 So.2d 1002, 1003 (Fla. 3d DCA 1982); Pompano Atlantis Condominium Association, Inc. v. Merlino, 415 So.2d 153, 154 (Fla. 4th DCA 1982); Fiber Crete Homes, Inc. v. Division of Administration, State of Florida, Department of Transportation, 315 So.2d 492, 493 (Fla. 4th DCA 1975).

In Saunders v. Saunders, 346 So.2d 1057 (Fla. 1st DCA 1977), final judgment after default was entered on affidavit and without trial of any sort. As the First District recognized, "a defendant, even after a default judgment is entered, is entitled to notice and an opportunity to participate in the trial on damages." 346 So.2d at 1058. In Ansel v. Kizer, 428 So.2d 671 (Fla. 2d DCA 1982), the Rule 1.540 motion alleged that the final judgment was void "because it was entered without notice to appellants or their attorney." 428 So.2d at 672. The judgment on damages after default and without notice to the defendant was properly set aside. A judgment entered without notice may be attacked under Rule 1.540 after discovery of the entry of the adverse judgment. Here, Dr. Curbelo had notice and opportunity to participate in the trial on damages, and in fact participated in the trial on damages.

The per curiam opinion in Employee Benefit Claims, Inc. v. Diaz, 478 So.2d 379 (Fla. 3d DCA 1985), gives no facts. Presumably, the facts are the same as the facts in the cases cited, a non-jury trial conducted without notice or attendance by the appellant.

None of the cases relied upon by Dr. Curbelo support relief under Rule 1.540 after notice, attendance, and participation in the non-jury trial without objection.

It was Mr. Ullman who originally requested the jury trial and, after the defaults were entered, withdrew his request for a jury (R. 22). The defendants fully participated in the non-jury trial, without objection, and thereby waived their right to jury trial. Robinson v. Malik, 164 So.2d 19, 20 (Fla. 3d DCA), cert. den., 169 So.2d 386 (Fla. 1964). In Hightower v. Bigoney, 156 So.2d 501 (Fla. 1963), this Court said, "It is settled that one may by affirmative plea or by silence waive his right to a jury trial (e.s.)" 156 So.2d at 503. Only when the litigant demands a jury trial in proper manner does it then become the duty of the court to provide a jury trial. Id.

Reliance upon Barth v. Florida Construction Service, Inc., 327 So.2d 13 (Fla. 1976) is misplaced, as that case involved a defendant's demand for jury trial on a compulsory counterclaim. In Barth, the main action was tried non-jury and, thereafter, the trial court proceeded to rule on the counterclaim without benefit of jury trial and over the defendant's objections. 327 So.2d at 14. On those facts, this Court remanded with instruction to conduct jury trial on the counterclaim. The non-jury trial of the main action was not disturbed. Here, the defendants never requested a jury trial on their own behalf and never objected when Mr. Ullman withdrew his request for jury trial. The defendants fully participated in the non-jury trial without objection.

Like the patricidal orphan, Dr. Curbelo urges his pro se status as excuse for not objecting at trial, not moving for new trial, and not seeking timely appellate review. Dr. Curbelo is of sufficient intellect and education to become a licensed medical doctor.

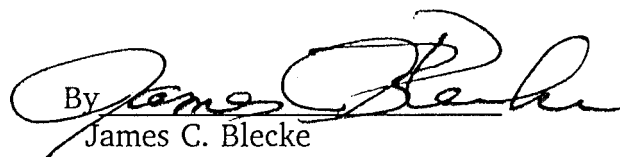
The defendants were advised repeatedly to obtain counsel, but they chose to proceed pro se. At page three of the trial transcript there is a comment from the trial court indicating explanations made "on previous occasions." (T. 3). And as the court later stated during the trial:

You do understand that a default judgment has already been entered against the two of you, and we are only here for a matter of damages. The paperwork has continuously been sent to you, and I have continuously told you to get yourself a lawyer, but -- [T. 26].

The record does not reflect whether the advice given to the defendants occurred at previous hearings or in ex parte communication between the defendants and the trial court. Regardless of when these communications took place, it is clear on the record that the trial court had previously advised the defendants of their rights and encouraged their retention of counsel. That Dr. Curbelo chose to ignore the trial court's advice through trial does not entitle him to Rule 1.540 relief from the consequences of his choice. Appellate review is limited to issues timely raised and ruled upon below.

CONCLUSION

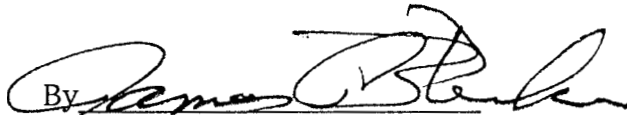
The district court decision should not be disturbed.

By 
James C. Blecke

CERTIFICATE OF SERVICE

I **HEREBY** CERTIFY that a true and correct copy of the foregoing was mailed to: PAMELA BECKHAM, ESQ., 2180 SW 12 Avenue, Miami, Florida 33129; KENNETH CARUSELLO, ESQ., 328 Minorca Avenue, Coral Gables, Florida 33134; MANUEL R. MORALES, ESQ., 19 West Flagler Street, Biscayne Building - Suite 711, Miami, Florida 33130; EDWARD N. WINITZ, ESQ., Two Datan Center, Suite 1718, 9130 South Dadeland Boulevard, Miami, Florida 33156 and HOWARD F. ULLMAN, ESQ., 115 NW 167 Street, Capital Bank Building - Penthouse, North Miami Beach, Florida 33169, this 3d day of August, 1990.

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