

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,125

THIRD DISTRICT CASE NO. 89-1241

ARNALDO CURBELO, M.D. and
HIALEAH MEDICAL CENTER FOR
WOMEN, INC.,

Defendants/Petitioners,

vs .

HOWARD F. ULLMAN, ESQUIRE,
as Personal Representative
of the Estate of FRANCIA
PEREZ, Deceased,

Plaintiff/Respondent.

-----/

PETITIONERS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This initial Brief on the Merits is filed on behalf of the Petitioners, ARNALDO CURBELO, M.D. (hereinafter CURBELO) and HIALEAH MEDICAL CENTER FOR WOMEN, INC. (hereinafter HIALEAH MEDICAL CENTER), to the Supreme Court of Florida for a review of the decision of the District Court of Appeal, Third District, rendered on October 24, 1989. The record on appeal consists of the appendix ("App.") filed under separate cover with the Petitioners' Initial Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

The Plaintiff in the Trial Court, brought a Complaint for medical malpractice which included a demand for trial by jury pursuant to Fla. R. Civ. P. 1.430. (App. 8-9).

A Default was then entered against the Defendants for failure to answer.

After notice was given to all parties, a non-jury trial was conducted on the issue of damages. (App. 11-46).

Although the Petitioner, CURBELO, appeared pro se at the non-jury trial and as the principal of petitioner, HIALEAH MEDICAL CENTER, at no time was any form of waiver made as to the Petitioner's right to rely on the Respondent's demand for jury trial. (App. 11-46).

Final Judgement was entered in favor of the Respondent on December 1, 1988. (App. 10). Petitioners then retained counsel and on February 22, 1989 moved for Relief from Judgement pursuant to Fla. R. Civ. P. 1.540. (App. 5-6).

In their Motion, Defendants/Petitioners stated that the judgement entered against them was void or entered by mistake because the hearing was conducted non-jury when a jury trial had been demanded in the Complaint and Defendants/Petitioners did at no time waive said right to a trial by jury. (App. 5-6).

The Trial Court granted their Motion for Relief from Judgement on April 18, 1989. (App. 7).

The Third District rendered its opinion on September 5, 1989 reversing the Trial Court, despite their agreement that the Trial Court was in error to conduct a non-jury trial where it had been demanded and not affirmatively waived. (App. 3-4).

Defendants/Petitioners, CURBELO and HIALEAH MEDICAL CENTER, timely filed a Motion for Rehearing and the Court entered

a corrected opinion on October 24, 1989. (App. 1-2).

This petition followed.

ISSUE PRESENTED FOR REVIEW

WHETHER THE THIRD DISTRICT ERRED IN REVERSING THE TRIAL COURT'S DECISION TO GRANT THE PETITIONERS' MOTION FOR RELIEF FROM JUDGEMENT PURSUANT TO FLA. R. CIV. P. 1.540, RELIEVING THE PETITIONERS FROM A VOID JUDGEMENT AND JUDICIAL MISTAKE IN CONDUCTING A NON-JURY TRIAL ON DAMAGES WHEN A PARTY TIMELY DEMANDED A JURY TRIAL AND ALL PARTIES DID NOT CONSENT TO THE WAIVER OF JURY TRIAL UNDER FLA. R. CIV. P. 1.430.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Third District because it is contrary to other decisions in the Third District as well as other districts. Furthermore, it carves out an exception to the right to trial by jury guaranteed by Art. I, Section 22, Fla. Const.

Once a jury trial is demanded by any party, it cannot and shall not be denied without the consent of all parties. Fla. R. Civ. P. 1.430. In the instant case, the Respondent withdrew his demand for jury trial, yet the Petitioners made no such withdrawal. This Court in Barth v. Florida State Constructors Service, Inc., 327 So. 2d 13,15 (Fla. 1976), stated that once a demand for jury trial has been made, it takes affirmative action, such as a specific waiver in writing or by announcement in open Court, to waive that constitutional right. There is no evidence

of such a writing or statement in the instant case.

Secondly, there are several Florida cases on point which state that where a non-jury trial was conducted after a jury was demanded and not waived with the consent of all parties, the judgement is void and subject to review under Fla. R. Civ. P. 1.540, because it was entered by mistake. See Saunders v. Saunders, 346 So.2d 1057, 1058 (Fla. 1st DCA 1977); Pruitt v. Brock, 437 So.2d 768 (Fla. 1st DCA 1983); and Ansel v. Kizer, 428 So.2d 671 (Fla. 2d DCA 1982).

ARGUMENT

The issue presented in this case is:

WHETHER THE THIRD DISTRICT ERRED IN REVERSING THE TRIAL COURT'S DECISION TO GRANT THE PETITIONERS' MOTION FOR RELIEF FROM JUDGEMENT PURSUANT TO FLA. R. CIV. P. 1.540, RELIEVING PETITIONERS FROM A VOID JUDGEMENT AND JUDICIAL MISTAKE IN CONDUCTING A NON-JURY TRIAL ON DAMAGES WHEN A PARTY TIMELY DEMANDED A JURY TRIAL AND ALL PARTIES DID NOT CONSENT TO THE WAIVER OF JURY TRIAL UNDER FLA. R. CIV. P. 1.430.

The right to have a jury trial is one of the most fundamental rights in our democratic system. It is recognized as such in the Magna Carta, Declaration of Independence, the Federal Constitution, and the Constitutions of various States, Florida included. The Federal Rules of Civil Procedure have declared that the right of trial by jury, as declared by the Seventh Amendment to the Constitution, must be preserved to the parties inviolate. The Florida Rules of Civil Procedure are virtually identical to these Federal Rules. "It is a right which

is justly dear to the American people, and whether guaranteed by the Constitution or provided by Statute, should be zealously guarded by the Courts." 47 Am. Jur. 2d Jury Section 12 (1969).

Fla. R. Civ. P. 1.430 sets out that:

(a) Right Preserved. The right of trial by jury as declared by the Constitution or by the State shall be preserved to the parties inviolate.

(d)... a demand for trial by jury may not be withdrawn without the consent of the parties.

While it is true that a legislature is not precluded by the Constitutional guarantee of trial by jury from providing that in civil actions a party shall not be ent'tled to a jury trial unless a party files a timely demand, the Plaintiff/Respondent in the instant case had made such a demand. Waiver of the right to a jury trial is to be "strictly construed and not to be lightly inferred". Poller v. First Virginia Mortgage and Real Estate Investment Trust, 471 So.2d 104 (Fla. 3d DCA 1985).

Once a trial by jury has been seasonably demanded, it works to the benefit of all parties to the case, and no withdrawal of such a demand without the consent of all parties will be recognized. Jayre Incorporated v. Wachovia Bank and Trust Company, 420 So.2d 937 (Fla. 3d DCA 1982); Barge v. Simeton, 460 So.2d 939 (Fla. 4th DCA 1984); and Division of Administration State of Florida Department of Transportation v. Davis, 511 So.2d 686 (Fla. 4th DCA 1987). Additionally, a party's right to a jury trial continues even when he fails to show up for a trial or a

default is entered against him. See Ansel, Supra, at 672; Loiselle v. Gladfelter, 160 So.2d 740 (Fla. 3d DCA 1964); cert. discharged, 165 So.2d 767 (Fla. 1964).

The record reflects that although Defendant/Petitioner attended and participated in the non-jury trial, he at no time expressly or orally waived the previous demand for trial by jury. The Petitioner, unrepresented by counsel at the non-jury trial, was not questioned by the Trial Judge as to whether or not he understood the consequences of a non-jury trial or whether or not he wished to waive this fundamental right. Nevertheless, this right to a jury trial was conferred upon Petitioner the moment a demand for jury trial was made by the Respondent. Stewart v. Universal Investments Unlimited, Inc., 553 So.2d 385 (Fla. 3d DCA 1989). In Stewart, the Third District held that when the Appellant did not affirmatively waive the right to a trial by jury, the Appellee could not deprive the adverse party of his constitutional right by merely serving a Notice for Non-Jury Trial upon the Appellant. In Barth, Supra, the Petitioner received the Respondent's Notice of Non-Jury Trial and the order thereon, and this Court held that waiver was not made as to the right to a trial by jury.

It has been established in Florida that for a jury trial waiver to be valid, the waiving party must communicate his waiver by an affirmative action in the form of a written stipulation or announcement in an open Court by and among all parties. Barth, Supra, at 15; Van Prooven v. Maples, 403 So.2d

509 (Fla. 5th DCA 1981); Laing v. Fidelity Broadcasting Corporation, 436 So.2d 959 (Fla. 5th DCA 1983); Barge, Supra, at 940. In Chenery v. Crans, 497 So.2d 267 (Fla. 2d DCA 1986) the Second District held that acquiescence to a non-jury trial did not amount to a waiver of the right to a jury trial on a claim for damages, thus compelling them to reverse the Trial Court's Final Judgment and remand for a jury trial.

Similarly, in Kies v. Florida Insurance Guaranty Ass. iation, Inc., 435 So.2d 410 (Fla. 5th DCA 1983), the Fifth District Court held that after the Plaintiffs in a civil case made a timely demand for a jury trial, acquiescence to, and full participation in a complete non-jury trial without any objection, created no estoppel and constituted no waiver of the right to a jury trial because it required affirmative action, such as that stated above, to waive that constitutional right.

Thus, a party's withdrawal of its demand for a trial by jury attempted by filing a withdrawal and service of a copy thereof upon the adverse party has been held ineffective as against the adverse party and should be found ineffective in the instant case. The filing and service of a withdrawal of demand by the Respondent in the instant case fails to conform to Fla. R. Civ. P. 1.430 and Florida common law requiring the "consent of the parties", which in turn calls for intentional, affirmative actions in the form of writing or oral stipulation in open Court, by all parties.

The Third District was wrong in reversing the Trial

Court and the Trial Court was correct in granting Petitioners' Motion for Relief from Judgement. The basis of the Third District's reversal of the Trial Court ruling was that the Petitioners should not have been afforded relief pursuant to Fla. R. Civ. P. 1.540 and that they should have appealed.

The First District, in its opinion in Pruitt v. Brock, 437 So.2d 768 (Fla. 1st DCA 1983), shed some light on this issue. They described the three mechanisms which a dissatisfied party may pursue, specifically, the Motion for Rehearing, direct appeal, and the Motion for Relief from Judgement. They correctly explained that although the Motion for Relief from Judgement is not "intended to serve as a substitute for the new trial mechanism" or for appellate review, it is designed to provide relief from judgements "under a limited set of circumstances". Supra, at 772-773. Mistakenly conducting a non-jury trial when a party is entitled to a jury trial is an example of these "circumstances". The pro se Defendants/Petitioners at the Trial Court level failed to timely motion for a rehearing or seek an appeal, thus leaving no alternative but to seek relief from judgement pursuant to Fla. R. Civ. P. 1.540 (b) set out in part as follows:

(d) Mistakes; Inadvertance; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgement, decreer order or proceeding for the following reasons: (1) mistakes: inadvertance, suprise, or excusable neglect: ...or (4) The judgement or decree is void:...

The Pruitt Court then quoting the opinion from

Alexander v. First National Bank of Titusville, 275 So.2d 272, 273 (Fla. 4th DCA 1973), said "Rule 1.540 was thus designed to provide a party with a convenient and orderly method for attacking a final judgement, even after the time for Appeal has expired". Pruitt, Supra, at 773.

In defining "mistake" as stated in Rule 1.540, the First District in Saunders v. Saunders, 346 So. 2d 1057 (Fla. 1st DCA 1977) described it as occurring when a non-jury trial on damages is conducted after a jury demand has been made in the action, despite the party's default on any issue of liability. Supra, at 1058. The rationale of this holding is that a party may intentionally default as to liability and desire a jury verdict as to damages only. Supra, at 1058.

Similarly, the Second District in Ansel v. Kizer, 428 So. 2d 671 (Fla. 2nd DCA 1982) agreed that the entry of a Final Judgement without a jury trial after a jury trial had been demanded and not withdrawn with the consent of all parties, resulted in a "void" judgement, and that a Motion pursuant to Fla. R. Civ. P. 1.540 to vacate the Final Judgement should have been granted by the Trial Court. Supra at 672.

Both Saunders and Ansel allowed relief under Rule 1.540 of the Florida Rules of Civil Procedure under virtually identical circumstances as in the case sub judice.

A Motion for Relief from Judgement pursuant to Fla. R. Civ. P. 1.540 is appropriate to seek relief from a judgment entered after non-jury trial on damages, where jury trial was

demanded in the Complaint and not withdrawn by consent of the parties. Employee Benefit Claims, Inc. v. Diaz, 478 So.2d 379 (Fla. 3d DCA 1985). The Employee Benefit decision directly conflicts with the same Court's decision in the instant case.

CONCLUSION

The Third District erred in reversing the Trial Court's decision to grant the Petitioners' Motion for Relief from Judgement pursuant to Fla. R. Civ. P. 1.540, relieving the Petitioners from a void judgement and judicial mistake. The Petitioners were entitled to a jury determination as to damages. This right vested in the Petitioners when Respondent made his demand. At no time did the Petitioners affirmatively waive their right to a jury trial. Petitioners then filed a timely Motion for Relief from Judgement which was a legally sufficient basis for finding mistake and a void judgement.

Based on the foregoing, Petitioners, ARNALDO CURBELO, M.D. and HIALEAH MEDICAL CENTER FOR WOMEN, INC., respectfully request that this Honorable Court quash the Third District's opinion and reinstate the Trial Court's Order granting Petitioners' motion under Fla. R. Civ. P. 1.540.

Respectfully submitted,

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