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

JURISDICTIONAL BRIEF OF RESPONDENT, HOWARD F. ULLMAN

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARYOFARGUMENT 2

ARGUMENT 3

CONCLUSION 4

CERTIFICATE OF SERVICE 4

TABLE OF AUTHORITIES

Cases

Ansel v. Kizer,
428 So.2d 671 (Fla. 2d DCA 1982) 3

Employee Benefit Claims, Inc. v. Diaz,
476 So.2d 379 (Fla. 3rd DCA 1985) 4

Lynch v. Peoples **Gas** System, Inc.,
267 So.2d 81 (Fla. 1972) 2, 4

Rutshaw v. Arakas,
549 So.2d 769 (Fla. 3d DCA 1989) 2, 3

Saunders v. Saunders,
346 So.2d 1057 (Fla. 1st DCA 1977) 3, 4

Wilson v. Southern Bell Telephone and Telegraph Co.,
327 So.2d 220 (Fla. 1976) 2, 4

Others

Rule 1.540, Florida Rules of Civil Procedure 1, 2, 3

Rule 9.130, Florida Rules of Appellate Procedure 1

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vs. :

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INTRODUCTION

This jurisdictional 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 proper 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), for the proposition, "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

When the facts are materially different, the constitutionally required direct conflict does not exist. E.g., Wilson v. Southern Bell Telephone and Telegraph Co., 327 So.2d 220 (Fla. 1976). The cases relied upon by the petitioners involved factual and procedural circumstances of an entirely different character. The following from Lynch v. Peoples Gas Svstem, Inc., 267 So.2d 81 (Fla. 1972), is apropos:

> Under the factual situation revealed by the record here, the District Court's conclusion, and the cases cited in support

thereof, are correct. Such conclusion leaves this Court bereft of jurisdiction.

Here, the District Court's conclusion and the case cited in support thereof are correct. None of the cases relied upon by petitioner are in any way similar to the factual circumstances presented here. There is neither express nor direct conflict with any other reported decision.

ARGUMENT

There is no conflict with Ansel v. Kizer, 428 So.2d 671 (Fla. 2d DCA 1982), because in Ansel, the final judgment was "entered without notice to appellants or their attorney." 428 So.2d at 672. A judgment entered without notice may be attacked under Rule 1.540 after discovery of the entry of the adverse judgment. Here, unlike Ansel, the defendants 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.

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. Here, unlike Saunders, the defendants had notice and opportunity to participate in the trial on damages, and in fact participated in the trial on damages. Where the facts are materially different, no jurisdictionally significant conflict can exist. Wilson v. Southern Bell Telephone and Telegraph Co., 327 So.2d 220 (Fla. 1976); Lynch v. Peoples Gas System. Inc., 267 So.2d 81 (Fla. 1972).

Employee Benefit Claims, Inc. v. Diaz, 476 So.2d 379 (Fla. 3rd DCA 1985), is a Third District decision. This court has no jurisdiction to consider alleged intra-district conflict.

CONCLUSION

The petition for discretionary review should be denied.

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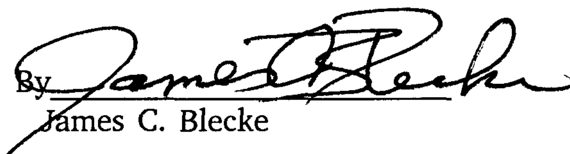

By ______________________
James C. Blecke

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., 4770 Biscayne Blvd., Suite 950, Miami, Florida 33137 and HOWARD F. ULLMAN, ESQ., 115 NW 167 Street, Capital Bank Building - Penthouse, North Miami Beach, Florida 33169, this 21st day of December, 1989.

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By
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