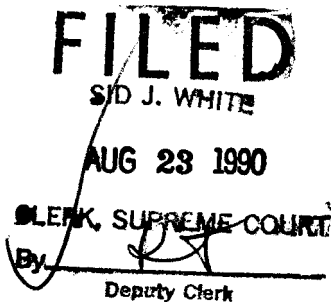
IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,125



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' REPLY BRIEF

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TABLE OF CITATIONS

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PETITIONERS' REPLY BRIEF

INTRODUCTION

This Reply Brief 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.**

SUMMARY OF ARGUMENT

Where a non-jury trial was conducted after 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. Similarly, if 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).**

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ARGUMENT

As the Respondents correctly stated in their Answer Brief, Rule 1.540 is intended to provide relief from judgement under a limited set of circumstances. This is one of those situations.

Respondent relies on Metropolitan Dade County v. Certain lands upon which assessments are delinquent, 471 So.2d 191 (Fla. 3d DCA 1985) which is dissimilar to the instant case.

First, the Trial Court in Metropolitan Dade initiated the correction of the error three (3) years after the Order was entered in violation of the one year limitation set down by Rule 1.540(b). In the case **sub** judice, the Petitioner attempted to correct judicial error less than ninety (90) days after the Order was entered.

Secondly and much more fundamental, are the reasons for the erroneous judgements. In Metropolitan Dade the Court became concerned about the possibility of error in the Master's fee arrangement. On the other hand, Petitioner, in the case at bar, was denied his fundamental right to a jury trial on damages.

Furthermore, the case of Pruitt v. Brock, 437 So.2d 768 (Fla. 1st DCA 1983), supports the contention that Rule 1.540 was designed to aid parties such as the Petitioner, who found themselves in circumstances such as those presented here.

The Respondent is correct in recognizing that the cases of Saunders v. Saunders, 346 So.2d 1057 (Fla. 1st DCA 1977), Ansel v. Kizer, 428 So.2d 671 (Fla. 2d DCA 1982), and Employee Benefit Claims, Inc. v. Diaz, 478 So.2d 379 (Fla. 3rd DCA 1985) deal with

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the issue of notice, attendance, and participation in a non-jury trial. The judgement in this case was void for the same reasons that the judgements were void in Saunders, Ansel, and Employee Benefit cases: the fundamental right to trial by jury was violated.

Petitioners' reliance on Barth v. Florida State Constructors Service, Inc., 327 So.2d 13 (Fla. 1976) is not misplaced. In Barth and in the case sub judice, a jury was demanded and a non-jury trial was held without objection. There were no affirmative actions taken by the Defendants in either case waiving their constitutional right to a jury trial. Additionally, the facts of Barth virtually mirror those of Hightower v. Bigoney, 156 So.2d 501 (Fla. 1963), which Respondent has relied upon.

CONCLUSION

For the foregoing reasons as well as those arguments presented in Petitioners' Initial Brief on the Merits, 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 Petitoners' Motion under Fla. R. Civ. P. 1.540.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered this 22nd day of August, 1990 to: JAMES C. BLECKE, ESQUIRE, 705 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130.

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/reply