76,427

FILED
SID J. WHITE
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By ______
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TITUSVILLE ASSOCIATES, LTD., a Florida limited partnership, by and through Michael J. Levitt, its general partner; and MICHAEL J. LEVITT, individually and as general partner,

Petitioners/Defendants,

v.

BARNETT BANKS TRUST COMPANY, N.A., a national banking association, as Trustee,

Respondents/Plaintiffs.

CASE NO. 76,427

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT (CASE NO. 89-830)

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This action arose over a dispute between the parties concerning the amount of indebtedness under a guarantee and letter of credit. A non-jury trial was set for August 29, 1988.[1] (A. 4). On August 9, 1988, plaintiff/respondent, Barnett Banks Trust Company ("Barnett"), filed and served a motion for summary judgment on defendants/petitioners, Titusville Associates, Ltd. and Michael J. Levitt (collectively, "Titusville"). (A. 4). No notice of hearing was served with the motion. On August 19, 1988, 10 days before the hearing on the motion for summary judgment, Barnett served a notice setting the hearing for the morning of the trial. (A. 4). At the hearing, Titusville objected and argued that Barnett failed to serve the notice 20 days before the date fixed for the hearing, as required under Rule 1.510(c), Florida Rules of Civil Procedure. (A. 4-5).

In support of its objection, Titusville argued that Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984) requires that the notice of hearing be served at least 20 days before the date fixed for the hearing. (A. 5). In Wakefield, the moving party served the motion for summary judgment eight days before the date of the hearing. Wakefield reversed a summary final judgment "because only eight days transpired

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1 Citations to the Appendix will be designated "(A. ___)." (A. 1-10) include pages to the May 3, 1990, opinion of the First District Court of Appeal; (A. 11-12) include pages to the First District's Order on Motion for Rehearing; and (A. 13) is the opinion of the Fourth District Court of Appeal in Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984).

between the date of the Notice and the date of the hearing whereas the rules clearly require 20 days notice." (A. 13). The trial court below followed Wakefield, sustained Titusville's objection and did not entertain Barnett's motion for summary judgment. (A. 5).

Thereafter, the factual disputes in the case were presented for trial and, after two full days of testimony and documentary evidence presented by both sides, the trial court entered a final declaratory judgment concluding that "the greater weight of the evidence [d]id not support Barnett's claims and that, instead, the greater weight of the evidence support[ed] the counterclaim of defendants Titusville and Levitt." (A. 5).

Barnett then appealed to the First District Court of Appeal. Barnett argued that (1) the trial court erred in refusing to hear its motion for summary judgment and (2) it was entitled to judgment as a matter of law. Barnett alternatively contended that the evidence presented at trial did not support the declaratory judgment in favor of Titusville. The First District reversed on the first two issues and found it unnecessary to address the third. (A. 1-2).

Regarding the timeliness of the notice of hearing on Barnett's motion for summary judgment, the First District expressly disagreed with Wakefield and further attempted to distinguish the facts in Wakefield from those in the present case. (A. 6). The court concluded that:

> In Wakefield, it is unclear whether the motion for summary judgment was timely filed within the 20 day period. We distinguish Wakefield on that basis. We also conclude

> that the Wakefield court erroneously interpreted Rule 1.510(c). (A. 6). (Emphasis added.)

The First District then held that Rule 1.090(b), Florida Rules of Civil Procedure, not Rule 1.510(c), governs the notice of hearing requirements with respect to a motion for summary judgment. (A. 6).

On May 18, 1990, Titusville moved for a rehearing and requested that the First District certify this case as one in conflict with the Fourth District's opinion in Wakefield. On July 6, 1990, the First District denied Titusville's motion for rehearing and request to certify. (A. 11). On August 3, 1990, Titusville filed its notice to invoke the discretionary jurisdiction of this Court based upon a direct and express conflict between the decision of the First District in the present case and that of the Fourth District in Wakefield.

SUMMARY OF ARGUMENT

This Court has jurisdiction because two district courts of appeal have provided a different answer to the same question. The question is whether Rule 1.510(c), Florida Rules of Civil Procedure, requires that the notice of hearing on a motion for summary judgment be served at least 20 days before the date "fixed" for the hearing. The Fourth District in Wakefield said yes. The First District in the instant case said no. There is conflict.

The conflict is also direct and express since it can be discerned from the four corners of each opinion. The Wakefield decision contains few extraneous facts and, particularly, none which address whether the motion for summary judgment was untimely served. However, the Wakefield opinion clearly states that the "Notice" was untimely served, and that the rules of civil procedure "clearly" require 20 days notice on a motion for summary judgment. (A. 11). The First District acknowledged this in its opinion and, in fact, expressly disagreed with the Fourth District's interpretation of Rule 1.510(c). (A. 6).

This Court should exercise its discretion to resolve this issue since there now is a lack of uniformity in the courts of this state in applying Rule 1.510(c). The issue is particularly important because of the potential for summary judgments to intrude upon constitutional rights of due process and trial.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THERE IS A DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION OF THE FIRST DISTRICT IN THE INSTANT CASE AND THAT OF THE FOURTH DISTRICT IN WAKEFIELD.

This Court has jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, because the decision of the First District below directly and expressly conflicts with that of the Fourth District in Wakefield. This Court has unanimously held that a conflict exists either (1) where an announced rule of law conflicts with other appellate expressions of law or (2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a

prior case." See, Neilsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960); City of Jacksonville v. Florida First National Bank, 339 So.2d 632 (Fla. 1976). A conflict exists in the instant case under either ground.

The First District held below that a notice of hearing on a motion for summary judgment does not have to be served at least 20 days before the date fixed for the hearing. (A. 6-7). Barnett served its notice of hearing on its motion for summary judgment 10 days before the date set for the hearing. (A. 4). On the other hand, in Wakefield, the Fourth District "reversed a summary final judgment because "only eight days transpired between the date of the Notice and the date of the hearing whereas the rules clearly require 20 days notice." (A. 13) (emphasis added). In fact, the First District acknowledged its disagreement with the Wakefield decision when it said: "We also conclude that the Wakefield court erroneously interpreted Rule 1.510(c)." (A. 6). Thus, the announced rule of law by the First District on the issue of the timeliness of a notice of hearing differs from that announced by the Fourth District in Wakefield.

Moreover, although the instant case and Wakefield involve substantially the same controlling facts with respect to this precise issue, each court reached a different result. The controlling facts of each case are that a notice of hearing on a motion for summary judgment was served less than 20 days before the date fixed for the hearing. The First District held that notice was timely; the Fourth District held it was untimely. The First District reached a different result because it did not

confine its analysis to the four corners of the Wakefield opinion. Instead, it strained to distinguish the instant case from Wakefield by reading into Wakefield facts which did not exist. Nowhere in the Wakefield opinion did the Fourth District mention or even suggest that the motion for summary judgment was untimely served. In fact, the Fourth District referred to a specifically defined "Notice" by capitalizing the "N" and by reiterating, in the same sentence, that "the rules clearly require 20 days notice" (A. 13) (emphasis added). Moreover, although the First District stated that Titusville failed to contend that it did not have sufficient time to prepare for the hearing (A. 6), the Wakefield decision is silent on that issue and, in fact, stands as a bright line rule of law requiring 20 days notice.[2]

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2 Other district court decisions have construed prior summary judgment rules consistently with Wakefield. In Fernandez v. Moreno, 176 So.2d 587 (Fla. 3d DCA 1965), a motion for summary judgment was served by the plaintiff over five months before trial. Although two separate notices of hearing were served, no hearing was ever held. On the day of trial, at the plaintiff's request, the court granted a summary judgment. The district court reversed, holding "although the motion had been filed for many months, it had not been served in accordance with Rule 1.36, Florida Rules of Civil Procedure, 30 F.S.A., 'at least 10 days [now 20] before the time fixed for the hearing.'" The phrase "before the time fixed for the hearing," clearly contemplates that a notice of hearing must also be served at least 20 days before the hearing. Without such notice, the time for a hearing could not be "fixed." See also Greer v. Workman, 203 So.2d 665 (Fla. 4th DCA 1967), and John K. Brennan Company v. Central Bank & Trust Company, 164 So.2d 525 (Fla. 2d DCA 1964) (In addressing motions for summary judgment which were neither served nor noticed for hearing within the time required, both decisions clearly subjected the notice of hearing to the 10 [now 20]-day limit.).

The conflict here is "direct" and "express" because it can be ascertained from the four corners of each opinion. This Court has consistently held that, "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). See also Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986). In cautioning future litigants to address only the relevant issues in a jurisdictional brief, this Court in Reaves further explained:

> This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions.
>
> Reaves at 830, n. 3.

In attempting to distinguish Wakefield, it is apparent that the First District assumed facts that are not within the four corners of the Fourth District's opinion. Although the Wakefield opinion did not set forth an exhaustive recitation of facts, the few facts that were set forth are controlling: the notice of hearing on the motion for summary judgment was served less than 20 days before the date fixed for the hearing. (A. 13). Likewise, Barnett served its notice of hearing less than 20 days before the date fixed for the hearing. (A. 4). Therefore, the controlling facts of each case are indistinguishable.

In Hardee v. State, 534 So.2d 706, 708 (Fla. 1988), this Court strictly confined its conflict analysis to the four corners of the decisions in question, although the record in one of the cases under review revealed facts which could have allowed the cases to be harmonized. The jurisdictional issue in Hardee was whether there was a conflict between the Fourth District and First District on the issue of whether a person who steals an unloaded gun from a burglarized dwelling could be convicted of armed burglary. The Fourth District's decision under review held that a person could be convicted for that crime regardless of whether the gun was loaded. Prior First District cases had held that a person could not be convicted of armed burglary unless he at least had access to bullets. In determining that conflict existed, this Court said:

> However, in the instant case, without mention of any other facts*, the district court held that the theft of an unloaded gun by a burglar constituted armed burglary.
>
> Id. at 708 (emphasis added).

In its footnote, the Court noted that the record of the case under review reflected that a plastic case containing bullets kept next to the gun was also stolen with the gun. Nonetheless, this Court stated:

> Thus, on these facts the cases could probably be harmonized. However, for purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion.
>
> Id., citing White Construction Company v. Dupont, 455 So.2d 1026 (Fla. 1984).

The Fourth District in Wakefield mentioned no facts other than that the notice of hearing on the motion for summary judgment was served less than 20 days before the date set for the hearing. This Court would have to look behind the Wakefield opinion into the record to determine whether, as the First District wrongly speculated, the motion for summary judgment was also served less than 20 days before the date of the hearing. Hardee dictates, however, that this Court confine its review solely to the facts that appear on the face of the opinions. On these facts, there is no doubt but that the panel decision on review conflicts with Wakefield.

This Court should exercise its discretion to decide this case for several good reasons.[3] There is now a lack of uniformity in the courts of this state as to the notice requirements under Rule 1.510(c). Until the conflict is resolved, there remains a risk of inconsistent adjudications with resulting uncertainty and impairment of judicial economy.

Moreover, if "reasonable notice" of a summary judgment hearing were all that is required, the adequacy of notice would

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3 The adequacy of the notice of hearing on Barnett's motion for summary judgment remains a material issue in this litigation because Barnett, by itself introducing at trial substantial parol evidence concerning the meaning and interpretation of the documents at issue, and not objecting to the introduction of appellees' parol evidence, cannot complain of or object to the trial court's reliance on parol evidence at trial. See Ross v. Florida Sun Life Insurance Co., 124 So.2d 892 (Fla. 2d DCA 1960). Therefore, if this Court follows Wakefield's interpretation of Rule 1.510(c), the remaining issue not addressed in the First District's opinion below (A. 2)--whether there was sufficient evidence at trial to support the trial court's declaratory judgment--will not be controlled by the principles of law set forth in the First District's opinion.

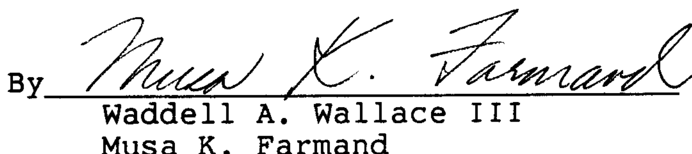
become an additional issue for courts to consider, thereby increasing the required judicial labor and injecting more uncertainty and unpredictability in rules of procedure that must safeguard the constitutional right to trial.

Further, as the Court held in Holl v. Talcott, 191 So.2d 40, 48 (Fla. 1966), courts should be extremely cautious in summary judgment proceedings since the granting of the motion "is necessarily in derogation of the constitutionally protected right to trial."

CONCLUSION

Wherefore, petitioners, Titusville, respectfully request this Court to accept jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and decide this case on its merits.

SMITH & HULSEY

By 
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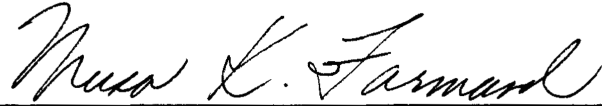
Certificate of Service

I certify that a copy of the foregoing has been furnished by hand delivery to Christine Rieger Milton, Esq., 3300 Barnett Center, 50 North Laura Street, Jacksonville, Florida 32202, this 13th day of August, 1990.



Attorney