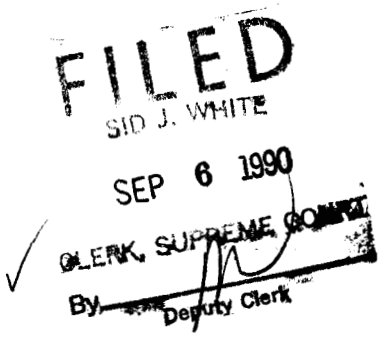
IN THE SUPREME COURT OF FLORIDA



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,

vs. Case No. 76,427

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

Respondents/Plaintiffs.

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case and Facts contains several inaccuracies and, pursuant to Rule 9.210(c), Fla. R. App. P.,the Respondent, Barnett Banks Trust Company, N.A. ("Barnett") brings those areas of disagreement to the Court's attention.

Petitioners accurately state that Respondent's Motion for Summary Judgment was served 20 days prior to the date of trial and that the Notice of Hearing thereon was filed 10 days before trial, scheduling the hearing prior to the start of trial. (Opinion at 4). Significantly, at the hearing Titusville objected not that the notice was unreasonable, but on the basis that Rule 1.510(c), Fla.R.Civ.P., required that the Notice of Hearing and the Motion for Summary Judgment must both be served 20 days prior to the date of the hearing. The trial court accepted Petitioners' argument and would not consider Barnett's Motion. (Opinion at 5) On appeal by the respondent to the First District Court of Appeal, the district court reversed a judgment in favor of petitioners and held that the trial court erred in refusing to hear the respondent's Motion for Summary Judgment. More significantly, the district court agreed with respondent that the trial court had erroneously allowed the petitioners to present parol evidence to vary clear and unambiguous documents. (Opinion at 7-8).

Petitioners' claim (Brief at page 2) that the district court expressly disagreed with Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984), is misleading. What the district court held was:

> In Wakefield, it is unclear whether the Motion for Summary Judgment was timely filed within the twenty day period. We distinguish Wakefield on that basis. We also conclude that the Wakefield court erroneously interpreted Rule 1.510(c).

Opinion at 6. (emphasis supplied)

Petitioners here claim that Wakefield reversed a summary judgment because the Notice of Hearing on the Motion for Summary Judgment was not filed 20 days prior to the hearing. This is the same reading of Wakefield petitioners advanced in the trial court which was rejected by the district court in the present case. It was on the basis of the ambiguity of Wakefield's holding that the first district distinguished the present case. Petitioners' interpretation of Wakefield, as an assertion of "fact," is simply argument and does not belong in the Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The sole holding of the First District Court of Appeal below was that Wakefield was unclear and the court distinguished it from the instant case on that basis alone. This, therefore, is the sole holding presented for this court's determination of whether an express and direct conflict of decisions exists. The fact that the district court went on to conclude that, if petitioners' interpretation of Wakefield was correct, it believed Wakefield erroneously interpreted Rule 1.510(c), is irrelevant to the jurisdictional issue.

Petitioners seek to have this court believe that Wakefield's

ambiguous holding presents a direct and express conflict of decisions. Petitioners have articulated the issue as whether Rule 1.510(c), Fla.R.Civ.P., requires that the Notice of Hearing on a Motion for Summary Judgment be served at least twenty days before the hearing. According to petitioners, "The fourth district in Wakefield said yes. The first district in the instant case said no." (Brief at 3.) This is inaccurate.

For this Court's conflict analysis, the accurate question concerning whether Rule 1.510(c) controls when a notice of hearing on a motion for summary judgment must be served is: "The first district in the instant case said no. Who knows what the fourth district in Wakefield said." Given this uncertainty, it is manifest that there is no express and direct conflict and this court should decline petitioners' invitation to read into the Wakefield decision a conflict. Inferences drawn from, or ambiguity in, an opinion can not create an express and direct conflict.

ARGUMENT

I. THERE IS NO CONFLICT

Petitioners' argument is based upon several erroneous premises. Petitioners claim that Rule 1.510(c) requires that both a Motion for Summary Judgment and a Notice of Hearing thereon are governed by Rule 1.510(c) and that Wakefield so holds.

Respondent suggests that this is inaccurate as a textual analysis of the rule demonstrates. Rule 1.510, entitled "Summary Judgment," is divided into subparts dealing with specific rules of law and procedure applicable to summary judgments. Subsection (c)

is entitled "Motion and Proceedings Thereon," and provides:

> The Motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for the hearing. (emphasis supplied).

By its plain terms, the rule requires only that the motion for summary judgment be served at least 20 days from a hearing thereon. There is absolutely no mention of the Notice of Hearing contained within the rule nor is there any discussion of when such a notice must be served. The rule requires only that the motion be served twenty days before any hearing thereon.[1]

The rule does not purport to govern how far after the motion is served, and how far in advance of a hearing thereon, the notice of hearing must be served. Those questions are governed solely by Rule 1.090, entitled "Time." Subsection (d) of that rule explicitly covers the time "for motions" and provides that:

> A copy of any written motion which may not be

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[1] There is a notice requirement contained within Rule 1.510 and it encompasses two different issues. First, by its plain terms the rule requires that the motion itself be served twenty days prior to any hearing thereon in order to prevent surprise to opposing counsel and to allow opposing counsel at least twenty days within which to prepare a response to the motion for summary judgment. See Cook v. Navy Point, Inc., 88 So.2d 532 (Fla. 1956). In other words, when opposing counsel is served with a motion for summary judgment, it knows that, at a minimum, twenty days must transpire prior to having a hearing on this motion. This allows counsel the opportunity to prepare affidavits and the other documents contemplated by the rule in order to oppose a Motion for Summary Judgment. Second, Rule 1.510(c) requires that the motion itself must state with particularity the grounds upon which it is based and the substantial matters of law to be argued in order to give opposing counsel explicit notice of the specific basis for the motion.

> heard ex parte and a copy of the notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing. (emphasis supplied)

By its terms, Rule 1.090(d) covers any motion which may not be heard ex parte; this obviously includes a Motion for Summary Judgment. There can be no argument that timeliness of a notice of hearing on a motion for summary judgment is controlled solely by Rule 1.090(d), which requires reasonable notice under the circumstances.

As pointed out by the district court below, the petitioners herein did not claim that the ten days notice given was unreasonable; it only claimed that it did not have to present argument on the motion and the trial court did not have to even consider the motion simply because the notice of hearing had not been served with the motion (Opinion at 6).

The view that Rule 1.510(c) only concerns the timely serving of a motion for summary judgment has been accepted by all district courts in this state, including the fourth district, who have addressed the issue. See Norton v. Gibson, 532 So.2d 1325 (Fla. 1st DCA 1988)(reversible error to grant summary judgment pursuant to a motion which has not been served in accordance with the twenty-day time requirement of Rule 1.510(c)); Brock v. G. D. Searle & Co., 530 So.2d 428 (Fla. 1st DCA 1988); Fruhmorgaen v. Watson, 490 So.2d 1032 (Fla. 2d DCA 1986); (notice requirements of Rule 1.510(c) require that a motion for summary judgment be served at least twenty days before the hearing); Gold v. El Camino

Mortgage Corporation, 491 So.2d 322 (Fla. 3d DCA 1986) (appellee's failure to serve appellants with a motion for summary judgment in advance of the trial court's consideration as required by Rule 1.510(c)). Greer v. Workman, 203 So.2d 665 (Fla. 4th DCA 1967); Fernandez v. Moreno, 176 So.2d 587 (Fla. 3rd DCA 1965); John K. Brennan Company v. Central Bank & Trust Company, 164 So.2d 525 (Fla. 2d DCA 1964). [2]

Most significant is the decision of the fourth district in Greer v. Workman, 203 So.2d 665 (Fla. 4th DCA 1967). The Greer decision is critical for this court's conflict analysis as it is upon Greer that Wakefield, the decision petitioners allege is in conflict, was based. It is clear from a mere reading of Greer that at issue was a "non-noticed, unserved motion" for summary judgment. Id. at 668. The court found error in the grant of summary judgment based upon this unserved motion and held that Rule 1.36(b), Florida Rules of Civil Procedure [the precursor to present Rule 1.510(c)], required ten days written notice of the application for judgment. Id.

It is absolutely clear, therefore, that the issue in Greer had nothing whatsoever to do with a notice of hearing but rather had

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[2] Petitioners claim (Brief at page 3, n.2) that other decisions have interpreted the rule as did the court in Wakefield is simply wrong as a mere reading of the decisions cited by petitioners will demonstrate. See Fernandez v. Moreno, 176 So.2d 587 (Fla. 3d DCA 1965); John K. Brennan Company v. Central Bank & Trust company, 164 So.2d 525 (Fla. 2d DCA 1964). Both cases deal with the failure to serve motions for summary judgment within the time required by the rule. The district court below also recognized the fallacy in petitioners' reliance upon these two cases. (Opinion at 7).

to do with the timely serving of the motion itself.

This holding from Greer is dispositive for the jurisdicitional issue because the Wakefield decision, the sole basis for petitioners' claim of conflict, cites only to Greer v. Workman as authority for its holding. Once Greer is analyzed, it becomes patent why the Wakefield decision is ambiguous and explains why the First District Court of Appeal in the instant case held (Opinion at 6), that it was "unclear whether the motion for summary judgment was timely filed within the twenty-day period" in Wakefield. More significantly, the first district's holding on this point was: "we distinguish Wakefield on that basis." Id.[3]

On the denial of Petitioners' Motion for Rehearing or Certification, Judge Ervin took great pains to explain to Petitioners that there was no conflict between the instant decision and Wakefield : "It was this court's decision that Wakefield is

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[3]Petitioners (Brief at 7) advance a specious argument concerning the fact that the district court below "assumed facts that are not within the four corners of the fourth district's opinion [in Wakefield]." This irrelevant remark seems to infer that because this court in undertaking a conflict of decisions analysis will only read from the four corners of the decisions allegedly in conflict, that somehow the first district "improperly" analyzed Wakefield.

In order to analyze petitioners' claim concerning Wakefield, the district court below properly read Greer, cited as authority by Wakefield, and realized that Wakefield was ambiguous because of its citation to Greer and the superficially contrary language employed by the court in Wakefield.

The sole question for this court is whether the first district's holding on this point of law, that Wakefield is unclear, conflicts with any other decision from any other district court of appeal.

factually distinguishable, because it is unclear in that case whether the motion for summary judgment was timely filed."(emphasis supplied)

Once the decision in Greer v. Workman, supra and Wakefield v. Hunter, supra are analyzed, it is obvious that there are only two interpretations possible: (1) Wakefield, by relying on Greer, stands for the proposition that Rule 1.510(c) requires only that the motion for summary judgment itself be served at least twenty days prior to any hearing thereon, as has been held by all other district courts to address the issue; or (2) there is an intra-district conflict within the fourth district. By constitutional directive, this court does not have jurisdiction to resolve an intradistrict conflict.

II. EVEN IF THIS COURT FINDS CONFLICT, REVIEW SHOULD BE DENIED.

The petitioners, by misstating the holding from the first district sub judice, claim conflict based upon the fact that the court below, after having distinguished the Wakefield decision as being ambiguous, stated "we also conclude that the Wakefield court erroneously interpreted Rule 1.510(c)." (Opinion at 6).

Even if we assume that Wakefield is not ambiguous and stands for the proposition advanced by petitioners, there are three reasons why this court should refuse to accept this case for review. First, as stated above, any conflict which arguably exists is solely between Wakefield and Greer, both decisions from the fourth district, and this alleged conflict exists only if

petitioners' strained interpretation of Wakefield is accepted. This Court does not have jurisdiction to settle an intradistrict conflict. It is up to the fourth district in an appropriate case to determine if petitioners' reading of Wakefield has any merit. If the fourth district in such a case accepts Petitioners' interpretation, conflict will unequivocally exist and this Court can and should address the issue at that time.

Second, the Wakefield decision has not been cited, much less relied upon, by a single court since it was decided. Since this Court's conflict jurisdiction exists in order to maintain uniformity of decisions, and eliminate disparate pronouncements among the district courts on the same issue of law, that purpose will not be furthered by addressing a case which no court is following.

Third, exercising jurisdiction to resolve the conflict should make no difference to the final result reached in this case. As the first district correctly held on the dispositive issues presented, respondent was entitled to a judgment as a matter of law based upon two unambiguous documents, a guaranty and a letter of credit. The district court recognized that the documents were unambiguous and that the guaranty did not allow for the right of set off argued for by petitioners at trial; thus, the trial court erred in allowing petitioners to vary the terms of those documents

by parol evidence.[4] (Opinion at 8). Even if this Court accepts petitioners' interpretation of Wakefield, and holds that the trial court properly refused to even consider respondent's motion for summary judgment, the substantive result reached would be unchanged, as the district court's ruling on the determinative issue was imminently correct.

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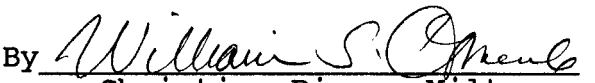
By 

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[4] Respondent feels compelled to respond to the fatuous argument made by petitioners (Brief at 9) that Barnett, being forced to go to trial after the trial court refused to even consider its Motion for Summary Judgment, somehow "waived" its right to complain that the trial court allowed the introduction of parol evidence to vary the terms of the unambiguous documents sued upon. Under petitioners' theory, once the trial court refused to render judgment on the documents and allowed petitioners to present parol evidence on "intent," Barnett would have been free to sit back and not offer its own evidence or else Barnett could have simply rested on the fact that the documents were unambiguous, the same claim the trial court refused to hear! Such a theory has no support in common sense or the law.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Waddell A. Wallace III, Esquire, Smith & Hulsey, 1800 Florida National Bank Tower, 225 Water Street, Post Office Box 53315, Jacksonville, Florida 32201-3315, this 4th day of September, 1990.

William S. Graham
Attorney