3-5-91

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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
FEB 11 1991
CLERK, SUPREME COURT
By
Deputy Clerk

CASE NO: 77358

FIRST DCA CASE NO: 90-03387

KENNETH R. McGURN, as Trustee
of the SIMONTON RANCH TRUST,

Petitioner,

v.

STEPHEN A. SCOTT,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

PROCEEDINGS FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

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INTRODUCTION

References to the Appendix in this Brief will be followed by the page designations assigned therein, comprised of the letter "A" followed by a number. For the Court's convenience, copies of all reported decisions cited in this Brief are contained in the Appendix.

STATEMENT OF THE CASE AND FACTS

A. NATURE OF THE ISSUE PRESENTED.

The First District Court of Appeal dismissed Petitioner's Appeal below, based upon its holding that the Final Judgment entered by the Circuit Court of Alachua County following the non-jury trial of this case was in fact a non-final order, and thus not properly appealable (A-47). The First District's holding was based upon the fact that the trial Court had reserved jurisdiction to award Pre-Judgment interest at a later time " ... upon proper motion by the parties." In its per curiam opinion, McGurn v. Scott, 16 F.L.W. D291 (January 23, 1991); ___ So.2d ____ (Fla. 1st DCA 1991), the First District expressed its reasoning as follows:

> An order may be final despite the trial Court's reservation of jurisdiction to consider the questions of costs, and attorney's fees. Where pre-judgment interest is an issue in the cause, however, an order must dispose of the question before it meets the requisite test of finality. Accordingly, we find that the order here presented for review is not final and we have no jurisdiction to review it and we dismiss the appeal.

(Citations Omitted).

The First District further specifically acknowledged, however, in its opinion, that the decision reached below was in conflict with a decision of the Third District Court of Appeal involving the question of law. Referring to the decision to dismiss set forth above, the Court stated:

> In so doing, we note apparent conflict between our decision and the result in City of Miami v. Bailey & Dawes, 453 So.2d 187 (Fla. 3d DCA 1984).

In these proceedings, Petitioner now requests that this Court exercise its discretionary jurisdiction to review the First District's decision below. Petitioner respectfully submits that this Court should settle the law on this significant procedural issue.

B. **PROCEDURAL HISTORY AND COURSE OF PROCEEDINGS.**

Following a non-jury trial, the Honorable Stephan P. Mickle, Circuit Judge, entered a Final Judgment in favor of the Plaintiff, Steven A. Scott, Respondent herein, (A-1). The Final Judgment was regular in form, appearing in all respects to in fact be a final order resolving both the Plaintiff's claims and the counterclaim of the Petitioner, who was the Defendant below. The judgment provided for a specific award of monetary damages to the Plaintiff, and the issuance of execution process thereon. However, in the third paragraph of the final judgment, the trial court provided as follows:

> 3. The Court reserves jurisdiction to award appropriate costs, pre-judgment interest and attorney's fees, upon proper motion by the parties.

Petitioner filed a timely Motion for Rehearing (A-3), which was denied by the Trial Court on October 16, 1990 (A-20). Thereafter, on November 14, 1990, Petitioner filed a timely Notice of Appeal of the Final Judgment, which instituted the proceedings below before the First District Court of Appeal (A-22).

Respondent Scott served a Motion to Permit Lower Tribunal To Consider Plaintiff's Motion For Award of Interest and Verified

Plaintiff's Motion for Costs (A-23), on November 29, 1990, in the appellate proceedings, requesting essentially that the District Court relinquish jurisdiction to the Circuit Court for a ruling upon Scott's Motion for pre-judgment interest and costs. Petitioner served a response to the motion in the District Court on December 7, 1990 (A-26).

Thereafter, on December 26, 1990, the District Court sua sponte issued an Order directing Petitioner to show cause why the Appeal should not be dismissed, and deferring disposition of Scott's motion (A-31). The District Court's Order referred the parties to the earlier decision of the First District in Chipola Nurseries, Inc. v. Division of Administration, 335 So.2d 617 (Fla. 1st DCA 1976).

Petitioner served a response to the District Court's Order, as required, on January 4, 1991 (A-32). In that response, the Petitioner pointed out, inter alia, that the Chipola Nurseries decision, although clearly indicating that an order reserving jurisdiction to award pre-judgment interest might not have been appealable when entered, nevertheless did not decide that issue. Rather, Chipola Nurseries resolved the issue of whether a trial court had lost jurisdiction to entertain proceedings several months after the entry of a purported "final judgment" due to the failure of the moving party to seek relief within the time frame contemplated by Rule 1.530, Fla.R.Civ.P. Petitioner's response also pointed out that if Chipola Nurseries stood for the proposition that a final judgment reserving jurisdiction to

consider pre-judgment interest at a later time was not a final, appealable order, that case would be in conflict with the decision of the Third District in City of Miami v. Bailey & Dawes, 453 So.2d 187 (Fla. 3d DCA 1984).

On January 23, 1991, the First District rendered its per curiam opinion below, dismissing Petitioner's appeal upon the authority of the Chipola Nurseries case, but acknowledging that its ruling was in direct conflict with the Third District's opinion in City of Miami. Petitioner then, on February 1, 1991, filed a notice to invoke this Court's discretionary jurisdiction to review the First District's Order.

SUMMARY OF THE ARGUMENT

1. The Supreme Court has jurisdiction to review the decision of the First District in McGurn v. Scott, 16 F.L.W. D291 (January 23, 1991), ____ So.2d _____ (Fla. 1st DCA 1991), which dismissed Petitioner's appeal below for lack of jurisdiction, because the trial court had reserved jurisdiction to determine pre-judgment interest by post-judgment proceeding. The First District has expressly acknowledged that its decision is in direct conflict with the decision of the Third District in City of Miami v. Bailey & Dawes, 453 So.2d 187 (Fla. 3d DCA 1984).

2. The Supreme Court should exercise its discretionary jurisdiction to review McGurn v. Scott, the decision below, because the decision is of great importance to attorneys, litigants and courts throughout the State of Florida as well as to the parties. Because of the conflict in decisions between the First District and

the Third District appellate courts, and the absence of authority on this procedural issue in the remaining three districts, there presently exists and will continue to exist great uncertainty as to the appealability of numerous "final" orders entered by trial courts, and as to the appropriate time at which to take an appeal from final orders which reserve the calculation and award of pre-judgment interest for post-judgment proceedings.

ARGUMENT

THE SUPREME COURT SHOULD EXERCISE DISCRETIONARY JURISDICTION AND RESOLVE THE CONFLICT BETWEEN THE FIRST DISTRICT AND THIRD DISTRICT COURTS OF APPEAL AS TO WHETHER A FINAL JUDGMENT WHICH RESERVES JURISDICTION TO AWARD PREJUDGMENT INTEREST IS AN APPEALABLE ORDER.

A. THE SUPREME COURT HAS JURISDICTION TO REVIEW THE FIRST DISTRICT'S ORDER OF DISMISSAL ENTERED IN THIS CASE.

There is no question in this case that this Court has jurisdiction, pursuant to Art. V, §3(b)(3), Fla. Const. and Fla.R.App.P., 9.030(a)(2)(A)(iv), to review the First District's Order dismissing Petitioner's appeal. The referenced provision of the Florida Constitution authorizes review by the Supreme Court to review a decision of a District Court of Appeal "... that expressly and directly conflicts with a decision of another District Court of Appeal ... on the same question of law." The First District has expressly acknowledged the existence of such a conflict, and correctly so.

The First District, in the decision below, has determined that a Final Judgment, although 1) completely regular on its face, and 2) appearing to finally dispose of all claims and counterclaims

in a civil action, and 3) providing for the issuance of execution process, is nevertheless not a final, appealable order because the trial court reserved jurisdiction to award pre-judgment interest in a post-judgment proceeding. Relying on Chipola Nursuries Inc. v. Division of Administration, 335 So.2d 617 (Fla. 1st DCA 1976), the Court reasoned as follows, McGurn v. Scott, supra.:

> An order may be final despite the trial court's reservation of jurisdiction to consider the questions of costs, Roberts v. Askew, 260 So.2d 492 (Fla. 1972), and attorney's fees, Morand v. Stoneburner, 516 So.2d 270 (Fla. 5th DCA 1987). Where pre-judgment interest is an issue in the cause, however, an order must dispose of the question before it meets the requisite test of finality. Chipola Nurseries v. Division of Administration, State, Department of Transportation, 335 So.2d 617 (Fla. 1st DCA 1976). Accordingly, we find that the order here presented for review is not final and we have no jurisdiction to review it and we dismiss the appeal.

The existence of an opinion in direct conflict with the result reached by the First District below was brought to that Court's attention in response to the earlier Order requesting Petitioner to show cause why the appeal should not be dismissed. The Court below was advised that in City of Miami v. Bailey & Dawes, 453 So.2d 187 (Fla. 3d DCA 1984), the Third District had specifically entertained and disposed of a final order awarding damages following a jury trial, together with an order awarding pre-judgment interest resulting from post-judgment proceedings on that issue, which had been conducted pursuant to a stipulated reservation of jurisdiction by the trial court. In reviewing the consolidated appeals, the Third District found no procedural

infirmity in the appeal of the final judgment for money damages, in which the trial court had reserved jurisdiction to award Pre-Judgment interest by a later proceeding, and further found the lower court's order which assessed pre-judgment interest to be "... both procedurally and substantively correct." Id.

The opinion below reveals that the court carefully considered the City of Miami decision of the Third District in reaching its decision. After consideration, the court came to the conclusion that if it dismissed the appeal below, the decision would be in conflict with City of Miami, and in fact so stated, McGurn v. Scott, supra.:

> In so doing, [dismissing the appeal below], we note apparent conflict between our decision and the result in City of Miami v. Bailey & Dawes, 453 So.2d 187 (Fla. 3d DCA 1984).

Petitioner respectfully submits that the First District's carefully considered observation is clearly correct.

B. THE COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION AND RESOLVE THE CONFLICT BECAUSE THE ISSUE IS ONE OF GREAT IMPORTANCE TO LITIGANTS, ATTORNEYS AND TRIAL COURTS, AS WELL AS TO THE PARTIES INVOLVED IN THIS ACTION.

The issue which the Petitioner asks this Court to resolve is obviously one of importance to the parties to this case, and particularly to the Petitioner. Obviously, the Petitioner wishes to carry forward without delay in prosecution of the appeal below, and cannot do so at this point. Without quarreling with the merits of the First District's decision, it is certainly arguable that resolving questions relating to the entitlement and amount of pre-judgment interest to which a party may be entitled is essentially

a "ministerial duty" of the trial court. See, Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212, 215 (Fla. 1985). Moreover, in this case, and in all probability in most cases, the ultimate issue on appeal relates to liability for monetary damages, an issue involving considerations separate and apart from the pre-judgment interest issue. It is certainly the Petitioner's interest and desire to prosecute the appeal on issues pertinent to the trial court's finding of liability as rapidly as possible, so as to bring the entire litigation to a conclusion as soon as possible.

The issue before this Court, however, is also one of great importance to litigants, attorneys and trial courts throughout the State of Florida. The present state of the law affords guidance as to the proper procedure for perfecting an appeal in the circuits under the jurisdiction of the First District, and those under the jurisdiction of the Third District. However, in those circuits within the jurisdiction of the three District Courts of Appeal which have not spoken to this issue at all, if a final judgment reserves jurisdiction to consider pre-judgment interest, parties and counsel are subject to uncertainty as to when and from what order a plenary appeal may be taken. The problem created will also occur frequently. The reservation of jurisdiction to compute pre-judgment interest by a post-judgment proceeding is fairly commonplace, because in many cases the award is automatic, and is not a function of the trier-of-fact, but merely a "mathematical computation" to be later performed by the Clerk of the Court or the Trial Judge. Id.

Since prudent lawyers will not, and should not, make a risky decision which could divest a client of the right to plenary appeal, it seems certain that the "multiple" appeal approach sanctioned by the Third District in City of Miami will be followed in practice everywhere other than the First District's jurisdictional region. If this Court decides that at some point the First District's approach and ruling is indeed correct, a delay by this Court in resolving the issue presented here will result in an untold number of bifurcated appeals, with a resulting burden and expense upon both litigants, counsel and the court system which can be avoided. The issue is now presented to this Court in a very clear and straightforward manner, and the law can be settled quickly and efficiently.

Accordingly, it would be in the interests of justice, as well as efficiency and judicial economy for this Court to exercise its discretionary jurisdiction and settle the law on the involved issue. Such a resolution would benefit not only the parties to this cause, but litigants, trial counsel and the courts throughout the State of Florida.

CONCLUSION

The decision of the First District below directly conflicts with the Third District's decision in City of Miami v. Bailey & Dawes, supra., and accordingly, this Court has jurisdiction to review that decision. Because it is an issue of law of substantial importance both to litigants, attorneys and the courts of the State

of Florida, as well as the parties to this litigation, this Court should exercise its discretionary jurisdiction and settle the law on the issue of whether a final judgment which reserves jurisdiction to aware pre-judgment interest is an appealable order.

Respectfully Submitted,

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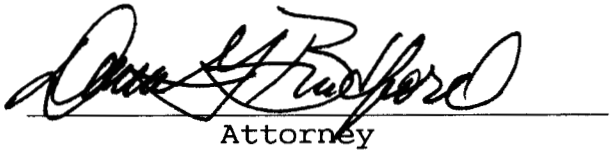
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to: JACK M. ROSS, ESQUIRE, Post Office Box 1168, Gainesville, Florida 32601, by United States Mail, this 8th day of February, 1991.



Attorney