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IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

EXCELETECH, INC.,

Appellant,

vs.

S.W. WILLIAMS,

Appellee.
_____/

5TH DCA CASE NO.: 90-01716
FLORIDA SUPREME COURT
CASE NO. 78-123

ANSWER BRIEF OF APPELLEE, S.W. WILLIAMS

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STATEMENT OF THE CASE AND FACTS

The issues certified to this Court by the Fifth District Court of Appeal are (1) whether the trial court is required to examine the judgment creditor before impleading a third party in proceedings supplementary, and (2) whether the judgment creditor must file a sworn motion before impleading a third party in proceedings supplementary.

The issues raised by Exceletech in its brief, but which were not certified by the appellate court, are (1) whether the lower court had a sufficient basis to implead Exceletech, Inc. in the proceedings supplementary in this case, and (2) whether Exceletech, Inc. was afforded due process and received sufficient notice of the allegations against it and of the relief sought by Williams.

On July 18, 1989, Williams obtained a final judgment in excess of $4,000,000.00 against John D. Brown and Beth M. House. John D. Brown controls Exceletech, Inc. He is the president, one of three directors, and holds more than 50% of the company's stock in his name and as attorney-in-fact for his niece and co-judgment debtor, Beth M. House. Brown's long time girlfriend, Marlene Beigel, a resident of Cincinnati, is secretary and treasurer of Exceletech, and a director. J. Ligon Jones is vice president and a director.

Williams deposed Jones on October 25, 1989. Jones testified that unfinished work on an Air Force contract obtained by Exceletech when it was known as Williams Steel Industries, Inc. was worth more than $1,000,000.00 in profit. [App. Ex. A, p. 49]. Jones testified that Brown provided services to Exceletech in connection with the Air Force contract for a fee which was not

payable at a predetermined time, but upon demand by Brown when Exceletech had sufficient cash on hand. [App., pp. 14-15 & 17-22]. Jones similarly testified that the profits from the Air Force contract were not distributed to shareholders on a scheduled basis, but when Brown and Jones determined there was enough cash to make a distribution. [App., pp. 26-28 & 37-40]. Thus, Brown controls Exceletech and its cash flow to him and Exceletech's shareholders.

Williams exhausted his legal remedies in an effort to collect on his judgment against Brown and House. Each of the three writs of execution issued in this case were returned unsatisfied. Williams also served a writ of garnishment on Exceletech, which answered that it did not owe Brown any money because Brown had not demanded any.[1]

On December 9, 1989, the lower court authorized proceedings supplementary as a means for Williams to execute on his judgment, and appointed a Special Master to conduct the proceedings. Williams filed a motion to implead Exceletech [Exceletech's App. pp. 7-9], and a motion for a temporary injunction [App., pp. 70-73], to enjoin Exceletech from transferring any property to Brown until the proceedings supplementary were concluded. Exceletech was served with the motions and process. A hearing was held March 8, 1990 [App., pp. 74-96], on the temporary injunction, which the trial court entered March 12, 1990.

---

[1]The writ was served before Jones' deposition, in which he testified that Exceletech owed Brown money, but that it was not "due" until Brown demanded payment.

A hearing was held on April 5, 1990, on Williams' motion to implead Exceletech, at which time Williams submitted the sworn testimony of Jones to the court and Exceletech in support of impleader. [Exceletech's App. pp. 17-42]. The court impleaded Exceletech on April 12, 1990. [Exceletech's App. pp. 43-45].

A hearing was held July 10, 1990, on Exceletech's motion to quash. [Exceletech's App. pp. 52-66]. Again, Williams argued and submitted Jones' sworn testimony in support of impleader. The court denied Exceletech's motion. [Exceletech's App. pp. 67-68].

On June 28, 1990, Exceletech deposed Williams. Williams' counsel clearly and succinctly stated the precise relief sought against Exceletech, and Exceletech's counsel indicated he completely understood the relief sought.

The Special Master ordered the parties to submit pretrial memoranda. Williams' memorandum, served August 15, 1990, set forth the precise relief sought by Williams against Exceletech, and the legal and factual basis for such relief. [App., pp. 232-57].

Exceletech also submitted interrogatories to Williams. Williams responded by adopting the statements and understanding set forth in his deposition. Exceletech filed a motion to compel, and the lower court entered an Order clearly delineating the scope of the proceedings supplementary relating to Exceletech. [App., pp. 260-61].

The evidentiary hearing before the Special Master was held September 11-13, 1990. Exceletech appeared and presented its defenses. The Special Master issued his Report and Recommendation

on December 28, 1990. The Special Master found that Exceletech should be enjoined from distributing money to Brown or House, and that any such distributions should be made to Williams until his judgment is satisfied. The trial court approved the Report on February 20, 1991.

Exceletech appealed from the Order impleading Exceletech and the Order denying Exceletech's motion to quash or dismiss. On May 16, 1991, the Fifth District Court of Appeal, sitting en banc, affirmed the trial court's orders.

The district court summarily rejected Exceletech's arguments that Exceletech was not afforded due process. [Exceletech's App. p. 79].

The court then held that a trial court need not examine a judgment creditor before impleading a third party in proceedings supplementary. Finally, the court held that Fla. R. Civ. P. 1.250(c) governs impleader in proceedings supplementary, and does not require the judgment creditor to file a sworn motion before impleading a third party. [Exceletech's App. p. 79]. The district court certified that these last two findings conflicted with Robert B. Ehmann, Inc. v. Bergh, 363 So.2d 613 (Fla. 1st DCA 1978).

SUMMARY OF ARGUMENT

The trial court had a sufficient basis to implead Exceletech under Robert B. Ehmann, Inc. v. Bergh, 363 So.2d 613 (Fla. 1st DCA 1978), and progeny. Due process under prior case law required that Williams make a prima facie case, by testimony under oath, that Exceletech had assets of the judgment debtors subject to execution. Williams submitted to the trial court the sworn testimony of J. Ligon Jones, Exceletech's Chief Executive Officer, vice-president, director and shareholder, which showed that Exceletech had assets of Brown and House, the judgment debtors.

Exceletech had sufficient notice of Williams' allegations and the relief sought, that Exceletech had money subject to distribution to Brown and House as shareholders, officers, directors, or creditors. The impleader of Exceletech was based on the sworn testimony of J. Ligon Jones. Exceletech had notice of the basis of Williams' claim, and the relief sought, by the following methods: (1) Williams' motion to implead Exceletech, (2) Williams' motion for temporary injunction, (3) the hearing on the temporary injunction, (4) the hearing on impleader, (5) the hearing on Exceletech's motion to quash, (6) Williams' deposition, (7) Williams' pretrial memorandum, (8) Williams' interrogatory answers, and (9) the Order on Exceletech's motion to compel.

Any failure to provide notice to Exceletech in a specific document is harmless error. The deciding factor is due process. Williams clearly provided notice of his claims and relief sought so that Exceletech had a sufficient opportunity to present its

defenses, which it did. The fact that the notice was provided by one means rather than another is of no consequence. The fact that notice was provided by the sworn testimony of the third party, Exceletech, rather than in a sworn motion of the judgment creditor, Williams, is of no consequence.

There is no requirement under Florida law that the trial court examine the judgment creditor before impleading a third party. There is absolutely no reason or justification for any such requirement.

Fla. R. Civ. P. 1.250(c) governs impleading third parties in proceedings supplementary. Rule 1.250(c) does not require a sworn statement, a prima facie case, or the taking of testimony. The Florida Rules of Civil Procedure require that a motion to implead state with particularity the grounds therefore, Fla. R. Civ. P. 1.100(b), and that a third party claim for relief contain a short and plain statement of the ultimate facts. Fla. R. Civ. P. 1.110(b).

Florida case law does not require an examination of the judgment creditor nor a prima facie case prior to impleader.

The district court's order should be affirmed, and the decision in Robert B. Ehmann, Inc. v. Bergh, 363 So.2d 613 (Fla. 1st DCA 1978), vacated.

ARGUMENT

I. EXCELETECH WAS PROPERLY IMPLEADED UNDER PRIOR CASE LAW

In Wieczoreck v. H & H Builders, Inc., 450 So.2d 867 (Fla. 5th DCA 1984), the Fifth District Court of Appeal set forth the procedures required in proceedings supplementary, which are governed by §56.29, Fla. Stat. (1989). The only jurisdictional prerequisites are (1) a returned and unsatisfied writ of execution, and (2) an affidavit averring that the writ is unsatisfied. Id. at 871. Williams filed these documents with the lower court in November 1989, which authorized these proceedings supplementary in its December 9, 1989 Order. [Exceletech's App. p. 6].

The court has the duty and authority to implead third parties whose interest may be affected by the proceedings. Id. Relying solely on Robert B. Ehmann, 363 So.2d 613, the court held that the judgment creditor should establish a prima facie case, by testimony under oath, that the proposed third parties have assets subject to his claim. Id. The trial court found that Williams set forth such a prima facie case as to Exceletech when it ordered Exceletech impleaded on April 12, 1990. [Exceletech's App. pp. 43-45].

The order impleading Exceletech did not imply liability on its part, but provided it with due process to raise its defenses and protect its interests. Wieczoreck, 450 So.2d at 871. The due process to which Exceletech was entitled is (1) a hearing (held September 11-13, 1990), (2) before an impartial decision-maker (the special master, Ronald L. Sims, Esquire), (3) after fair notice of the charges and allegations (an issue affirmed by the district

court), (4) with an opportunity to be heard (Exceletech had the opportunity to present its evidence and legal arguments and in fact did so). Id. Exceletech was afforded sufficient due process.

II. THE TRIAL COURT HAD A SUFFICIENT BASIS TO IMPLEAD EXCELETECH

Exceletech argues that the trial court did not have a sufficient basis to implead Exceletech.

A. THE COURT IMPLEADED EXCELETECH BASED UPON EXCELETECH'S OWN SWORN TESTIMONY

Prior to impleading Exceletech, Williams obtained the best possible evidence showing that Exceletech had property of the judgment debtors. Williams deposed J. Ligon Jones, Exceletech's Chief Executive Officer, vice-president, director and shareholder. Jones stated under oath that Exceletech held monies for the judgment debtors Brown and House which were not subject to attachment or garnishment. Jones testified that:

1. Exceletech was accruing monies for John D. Brown & Company for services rendered to Exceletech by Brown, the judgment debtor [App., p.14 line 14-p.16 line 12; p.18 line 17-p.19 line 8; p.19 line 25-p.20 line 12; p.27 line 22-p.28 line 1].

2. The monies were not paid until demanded by Brown [App., p.19 line 25-p.20 line 12; p.21 line 25-p.22 line 7].

3. Exceletech did not pay distributions to shareholders, including the judgment debtors, Brown and House, unless demanded and if sufficient cash was on hand [App., p.37 line 17-p.39 line 12; p.39 line 12-p.41 line 7].

Jones' testimony under oath was submitted to the lower court for its consideration. The lower court considered Jones' testimony when it impleaded Exceletech. [Exceletech's App. p.33 line 16-p.34 line 2: p.37 line 24-p.39 line 6]. Thus, Exceletech was impleaded based upon the sworn testimony of its own Chief Executive Officer, vice-president, director and shareholder.

Neither §56.29 nor any of the cases cited by Exceletech require more. See, Ruddy v. Ashton, 554 So.2d 557, 558 (Fla. 5th DCA 1989) (judgment creditor should establish prima facie case, by testimony under oath, that proposed third party defendant has assets subject to creditors claim); Wieczoreck v. H & H Builders, Inc., 450 So.2d 867, 871 (Fla. 5th DCA 1984) (same); Conway Meats, Inc. v. Orange Avenue Partnership, 440 So.2d 674, 676 (Fla. 1st DCA 1983) (same); Robert B. Ehmann, Inc. v. Bergh, 363 So.2d 613, 615 (Fla. 1st DCA 1978) (same).

B. AN EXAMINATION OF THE JUDGMENT CREDITOR IS NOT A PREREQUISITE TO IMPLEADER

Exceletech argues that the lower court did not examine Williams, the judgment creditor, and thus the entire process is flawed. Exceletech supports this argument by stating that §56.29(2) requires the court to examine the judgment creditor prior to impleading a third party. [Initial Brief, p. 8]. §56.29(2) states that "[o]n plaintiff's motion the court shall require the defendant in execution" to appear for examination, not the judgment creditor. (Emphasis added). §56.29(2) does not require the court to examine the debtor, it authorizes an examination only on the

creditor's motion. Williams moved to examine Brown, the judgment debtor, and the court ordered Brown to appear. Brown failed to appear and the lower court held Brown in civil and indirect criminal contempt.[2]

It would be absurd to require a judgment creditor to have to rely solely on his own sworn testimony, rather than the sworn testimony of the judgment debtor or the party to be impleaded, before moving to implead a third party. How is the judgment creditor to discover who, if anyone, holds assets of judgment debtors? According to Exceletech, the creditor must depose the debtor or the third party, and then submit himself to examination by the court so that he may regurgitate what he learned from others. Williams is unable to discover or divine any basis or rationale for the alleged "requirement" that the court examine the creditor before impleading a third party. §56.29(2) does not require an examination of the judgment debtor unless requested by the judgment creditor.

Williams presented a prima facie case to the trial court, by testimony under oath, that Exceletech had assets of the judgment debtors subject to execution. The trial court properly impleaded Exceletech.

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[2]The Fifth District Court of Appeal affirmed the orders holding Brown in contempt, and also dismissed Brown's pending appeals.

III. EXCELETECH HAD SUFFICIENT NOTICE OF THE ALLEGATIONS

Exceletech argues that it did not have notice of the allegations against it. Each of the following documents or hearings provided Exceletech with sufficient notice of the relief sought by Williams to satisfy all due process concerns.

A. MOTION AND HEARING FOR TEMPORARY INJUNCTION

Williams' motion to implead Exceletech alleged that Exceletech had property of Brown and House. [Exceletech's App. pp. 7-8]. Williams also moved for a temporary injunction prohibiting Exceletech from transferring any property to Brown or House, directly or indirectly, pending the outcome of these proceedings supplementary. The lower court entered the injunction and the district court affirmed. Order dated July 31, 1990, in Exceletech, Inc. v. Williams, Case No. 90-552 (Fla. 5th DCA). At the hearing on the temporary injunction, Williams argued that the purpose of the impleader and the injunction was to prevent Exceletech from distributing any money or property to Brown, its president, director, shareholder and consultant, and House, a shareholder. [App., pp. 83-85]. Thus, Exceletech had notice of the relief sought by Williams.

B. MOTION AND HEARING TO IMPLEAD EXCELETECH

The trial court held a hearing on Williams' motion to implead Exceletech on April 5, 1990. Again, Williams argued, based upon the record and the sworn testimony, that Exceletech held money of

Brown and House in the form of shareholder distributions and accrued but unpaid fees. [Exceletech App. pp. 33-34, 37-39]. Based upon that testimony, the trial court impleaded Exceletech. Exceletech thus had explicit notice of the precise property which Williams alleged was in Exceletech's possession.

C. MOTION AND HEARING TO QUASH IMPLEADER

Exceletech then moved to quash the Order impleading it. The motion was heard on July 10, 1990, by the trial court. Again, Williams referred to and relied on Jones' deposition to show that Exceletech held money belonging to Brown and House. Again, Exceletech had notice of the precise property sought by Williams. The trial court denied Exceletech's motion to quash. [Exceletech's App. p. 67].

D. DEPOSITION OF WILLIAMS BY EXCELETECH

Exceletech was also given notice of the property and relief sought by Williams during the deposition of Williams held June 28, 1990. During the deposition, which was noticed by counsel for Exceletech, the following exchange occurred:

> MR. STUMP: Mr. Connor, it's my understanding that the scope of the impleader action filed on behalf of Mr. Williams against Exceletech, Inc. is limited to the future stockholder distributions which may be made by Exceletech, Inc. to John D. Brown and Beth M. House, individually. And it is the intent of the impleader action to obtain an order directing that any future stock -- excuse me, any future cash distributions based on share ownership in Exceletech be first used to satisfy the judgment obtained by Mr. Williams to the extent that

those payments are to be made to Brown and House individually?

MR. CONNOR: That is correct. I should also say any director's fees or salaries or anything like that would be included in that. It's my understanding he is not receiving any at this time.

MR. STUMP: So the reason I've gone into a lot of questions concerning existing partnerships and other matters is my concern there is an effort to pursue previous payments which have been made to individual shareholders prior to the injunction or payments made to John D. Brown & Company for compensation as management fees or other matters, it's my understanding that will not be an issue at this hearing in August?

MR. CONNOR: We believe we are entitled to that money and is fraudulent on the part of Mr. Brown and Ms. House, however, we are not trying to get Exceletech to make the payments to us or get the money back and pay to us. We are trying to get the money, but not from Exceletech.

MR. STUMP: Based on the representation and agreement that the scope of the hearing in August, as it relates to Exceletech, will only be to future payments to stockholders Brown and House, that is going to limit the scope of my deposition. I'd like it reflected in the record my deposition will be limited in nature simply because the issues have been more closely defined.

[App., pp. 110-12].

Q. I can consider this a stipulation of agreement that the focus of the hearing in August, if an agreement is not reached before then will be -- now let me take that back. The focus and scope of any hearing in August will be future cash payments to stockholders and that this is not an intention to go back and try to set aside any payments to John Brown & Company or any stockholders prior to the entry of the injunction. And with that understanding, the scope of my deposition has been limited.

I would go into a much more detailed examination concerning John D. Brown & Company and prior affiliations with Williams Steel and prior payments to that company for management fees. I would go into the other partnerships because I believe it would be directly relevant to those issues.

With my understanding of the limitation of the scope of the issues to be raised in August, I don't have any further questions. If I'm wrong, tell me.

MR. CONNOR: I agree....

MR. STUMP: In that case I don't have any other questions.

[App., pp. 136-37].

These statements clearly provided Exceletech with all the notice to which it is entitled.

E. WILLIAMS' PRETRIAL MEMORANDUM

The proceedings supplementary were referred to a Special Master. The Special master ordered the parties to submit pretrial memoranda. On August 15, 1990, Williams submitted his pretrial memorandum [App., pp. 232-257], which again explicitly set forth the relief sought against Exceletech, and the legal and factual basis for such relief. Again, Exceletech had sufficient notice of the relief sought by Williams.

F. EXCELETECH'S INTERROGATORIES TO WILLIAMS

Exceletech also submitted interrogatories to Williams. Williams answered the interrogatories by referring to the statements of counsel during the deposition of Williams. [App., pp. 258-59]. Again, the relief sought by Williams should have been clear to Exceletech by this time.

G. ORDER ON MOTION TO COMPEL

Exceletech, not satisfied with all of the above methods of notice, moved to compel better interrogatory answers from Williams. Again, counsel for Williams argued that Exceletech held money belonging to Brown or House. On September 5, 1990, the trial court entered an Order granting the motion to compel. The Order states:

> ...the motion is GRANTED. The scope of the hearing set for September 11-13, 1990, before the Special Master, Ronald L. Sims, Esquire, as to Exceletech, Inc., shall be limited to an effort to prohibit any future cash distributions, or other future payments or future transfers of property, from Exceletech, Inc. to John D. Brown or Beth M. House, directly or indirectly, and to request that such future cash distributions, or other future payments or future transfers of property, from Exceletech, Inc. to John D. Brown or Beth M House, directly or indirectly, be applied toward satisfaction of Williams' judgment.

[App. Ex. G, pp. 260-61]. Clearly, Exceletech had notice of the relief sought by Williams.

IV. ANY ERROR IS HARMLESS

Exceletech ignores each of the methods of notice described above, and argues that if the precise relief or property sought is not set forth in the motion to implead or the Order impleading Exceletech, then the whole process is flawed. This is an attempt to raise form over substance.

§56.29 does not set forth the procedure for impleading a third party in proceedings supplementary. Courts have held that the bottom line is due process. See, e.g., Wieczoreck, 450 So.2d at 871. The primary consideration is whether the third party has sufficient notice to prepare and present its defense. In this

case, Williams' motion to implead Exceletech was filed February 20, 1990. The proceedings supplementary hearing was not held until September 11, 1990. Exceletech had almost seven months to prepare its defense. During those seven months, Williams provided explicit notice of the relief sought no less than nine times. Any failure to make the motion to implead or the Order impleading Exceletech more explicit, in light of the additional notice provided by various methods, is harmless. Exceletech knew what Williams was seeking, Exceletech prepared its defense, and Exceletech presented its defense. Exceletech was not harmed nor prejudiced. This appeal should be denied, and the lower court's Order affirmed.

This case is analogous to Wieczoreck. In Wieczoreck, the lower court did not implead the third party, Wieczoreck, until the court entered the final judgment. Wieczoreck argued that due process required the court to implead him before a final judgment was entered. The Fifth District Court of Appeal held that Wieczoreck was not denied due process:

> Although it may have been better procedure for the trial court to have entered an order first impleading the appellant and then an order setting aside the conveyance, we cannot say that the procedure utilized in the case at bar did not comport with procedural due process of law.

Wieczoreck, 450 So.2d at 872. The procedure comported with due process because Wieczoreck received (1) a hearing, (2) before an impartial decision-maker, (3) after fair notice of the allegations, (4) and an opportunity to present his defenses. Id.

This case is no different. It may have been better for Williams and the court, in the motion and Order regarding

impleader, to set forth with more specificity the money held by Exceletech for Brown and House. However, the procedure utilized did not violate due process. Exceletech received (1) a hearing, (2) before an impartial decision-maker, (3) after fair notice of the allegations, (4) and an opportunity to present its defenses. Exceletech's only complaint is that the notice was not in a form to its liking. This appeal should be denied and the lower court's Order affirmed.

On the other hand, this case is not analogous to Conway Meats, Inc. v. Orange Avenue Partnership, 440 So.2d 674 (Fla. 1st DCA 1983), or Ruddy v. Ashton, 554 So.2d 557 (Fla. 5th DCA 1989). In Conway Meats, the only facts alleged by the judgment creditor were that the debtor and the third party had the same officers and shareholders. Conway Meats, 440 So.2d at 676-77. The creditor did not substantiate any other allegations with evidence. Id. at 677. In Ruddy, the creditor submitted no evidence whatsoever in support of its motion to implead. Ruddy, 554 So.2d at 558. In this case, Williams substantiated his allegations with the sworn testimony of Exceletech itself.

V. FLORIDA LAW DOES NOT REQUIRE THE JUDGMENT CREDITOR TO SUBMIT TO AN EXAMINATION BY THE COURT OR TO SUBMIT EVIDENCE BEFORE IMPLEADING A THIRD PARTY IN PROCEEDINGS SUPPLEMENTARY

The two issues certified by the Fifth District Court of Appeal are whether, prior to impleading a third party into proceedings supplementary, (1) the trial court must examine the judgment creditor and (2) the judgment creditor must submit evidence or a

sworn statement to the court. Neither Florida statutes, rules, nor case law mandate either of these matters. Thus, the district court's Order should be affirmed by this Court.

A. FLORIDA STATUTES

The only statute which applies in this situation is §56.29, Fla. Stat. (1989). §56.29 does not address the issue of who may be impleaded or how. See also, Exceletech, Inc. v. Williams, Case No. 90-1716 (Fla. 5th DCA May 16, 1991) [Exceletech's App. p. 78]; Exceletech's Initial Brief, p. 7. Williams is not aware of, and Exceletech has not argued, any other statute which could impose these two requirements.

B. FLORIDA RULES OF CIVIL PROCEDURE

Only three procedural rules could apply in this situation. Fla. R. Civ. P. 1.100(b), regarding motions, states that an application to a court for an order shall be by motion and state with particularity the grounds therefor. Nothing in Rule 1.100(b) requires that a movant be examined or support a motion with evidence.

Fla. R. Civ. P. 1.110(b), regarding claims for relief, requires a short and plain statement of the ultimate facts. Again, nothing in Rule 1.110(b) requires that a movant be examined or support a motion with evidence.

Fla. R. Civ. P. 1.250(c), regarding adding parties, states that parties may be added "on motion of any party at any stage of

the action and on such terms as are just." Rule 1.250(c) does not require an examination or evidentiary support with every motion to add a party.

C. FLORIDA CASE LAW

A review of Florida case law cited by the parties and the Fifth District Court of Appeal shows that neither an examination of the judgment creditor nor evidentiary support has been or should be required before impleading a third party in proceedings supplementary.

1. Ryan's Furniture Exchange, Inc. v. McNair

One of the earliest cases to address the relationship between proceedings supplementary and third parties was Ryan's Furniture Exchange, Inc. v. McNair, 120 Fla. 109, 162 So. 483 (1935). In Ryan's Furniture Exchange, the judgment creditor obtained a judgment against Ryan Bros., Inc. The trial court ordered the defendant to appear for examination by a Commissioner. The Commissioner held his hearings, although Ryan Bros., Inc. never appeared. Ryan's Furniture Exchange, Inc. was never notified about the hearings nor made a party thereto. Id. at ___, 162 So. at 485.

The Commissioner issued a report finding that Ryan's Furniture Exchange, Inc. was a mere continuation of Ryan Bros., Inc., and that the assets of the former were subject to McNair's judgment. The trial court confirmed the report and the sheriff seized the assets of Ryan's Furniture Exchange, Inc., who appealed. Id.

The Florida Supreme Court reasoned that "[f]air notice and a reasonable opportunity to be heard shall be given interested parties before a judgment or decree is rendered." Id. at ___, 162 So. at 487 (emphasis added). Ryan's Furniture Exchange required due process before a judgment is entered, not before a party is impleaded. The Court expounded on this by stating repeatedly that the third parties must be made parties to the proceedings and then accorded due process, not that third parties must be accorded due process and then made parties. Exceletech would have this Court put the cart before the horse.

2. State ex rel. Phoenix Tax Title Corp. v. Viney

In State ex rel. Phoenix Tax Title Corp. v. Viney, 120 Fla. 657, 163 So. 57 (1935), the judgment creditor sought to implead third parties. The trial court entered an order to show cause stating that the third parties were to pay plaintiff's judgment or show cause why they should not pay. Id. at ___, 163 So. at 59.

The Supreme Court quashed the rule to show cause on the basis of Ryan's Furniture Exchange, Inc. v. McNair, 120 Fla. 109, 162 So. 483, because the trial court could not adjudicate the third parties' liability until they were made parties. Id. at ___, 163 So. at 61. The Court held that the order to show cause was to be interpreted as presenting

> prima facie findings against the respondents which they are required to answer and upon the allegations of which issues may be made up for jury trial, if jury be demanded by either party...

rather than as an adjudication of liability. Id. The Court in Viney found that plaintiff had presented a prima facie case, but it did not require plaintiff to present a prima facie case. In fact, the Court held that it was without jurisdiction to adjudicate the sufficiency of the findings in the order. Id.

Again, the Court's holding was that a third party must be impleaded into proceedings supplementary and then provided due process before a judgment could be entered against the third party. The Court did not find that the third parties were entitled to due process before being impleaded.

3. Richard v. McNair

The Florida Supreme Court addressed the same issue for the third time in one year in Richard v. McNair, 121 Fla. 733, 164 So. 836 (1935), a case arising out of the same circumstances as Ryan's Furniture Exchange v. McNair, 120 Fla. 109, 162 So. 483. The Court stated that under the proceedings supplementary statute,

> the judges have the power, and it is their duty, to bring in and implead third parties wherever it appears relief against them may be warranted. The constitutional guaranty of due process requires that the rights of third persons claiming adversely both to the plaintiff and defendant in execution should not be finally adjudicated unless such persons have been first fully impleaded and brought into the proceedings as actual parties and given an opportunity to present their claims as parties....

Richard v. McNair, 121 Fla. at ___, 164 So. at 840. Again, the procedure is for third parties to be impleaded and then provided due process, not the other way around. The Court reversed and remanded because Richards was never made a party to the action nor

afforded an opportunity to be heard, yet the trial court purported to adjudicate his rights. Id.

After finding that the trial court did not have the authority to adjudicate Richard's rights, the Court examined §4545, C.G.L., the precursor to §56.29(6)(b), Fla. Stat. (1989), concerning fraudulent transfers. That law provided, as does §56.29(6)(b), that the court could void a fraudulent transfer and order the sheriff to seize the property to satisfy the execution. Third persons would then have to file a claim and litigate their interests in the seized property. See also, §§56.16-56.20, Fla. Stat. (1989).

Because the order entered under §4545 provided for the sheriff to seize property prior to adjudicating the rights of third parties, the Court in Richard held that

> [c]learly this section contemplates that the order shall be made on a prima facie showing, but it does not contemplate that it shall operate, as was attempted in this case, to finally adjudicate the rights of any person who has not been afforded an opportunity to be heard....

Id. at ___, 164 So. at 841. The Court concluded that in order to proceed under §4545, a judgment creditor must present a prima facie case that the transfer was fraudulent, and implead "every person whose rights may be affected thereby" so that they may be heard. Id. The Court did not require a prima facie case in order to implead third parties, but only to seize property which was fraudulently transferred under §4545, now §56.29(6)(b). Williams did not proceed in this case against Exceletech under §56.29(6)(b).

4. Advertects, Inc. v. Sawyer Industries, Inc.

Twenty years later, the Florida Supreme Court addressed this issue in Advertects, Inc. v. Sawyer Industries, Inc., 84 So.2d 21 (Fla. 1955). Advertects obtained a judgment against Sawyer Industries, which did not have assets to satisfy the judgment. Advertects thus sought to hold Sawyer's shareholders liable for the judgment against the corporation.

Advertects sought to pierce the corporate veil, which requires a showing that the corporation was used to defraud creditors. Id. at 23. However, Advertects could neither plead nor prove fraud, only that there were two shareholders who controlled Sawyer Industries. Id. Advertects' motion to implead was obviously deficient, regardless of the evidence in support. Controlling a corporation is not wrongful or fraudulent. Id. The Court held that before impleading a corporation's shareholders, the creditor must show that the corporation is the alter ego of the shareholders and was used to defraud creditors. Otherwise, every judgment against a corporation could be exploited to harass shareholders. Id. at 24.

Like Richard, Advertects involved allegations of fraud, which may, in the court's discretion, be subject to more stringent terms under Rule 1.250(c). See, infra, p. 27.

The situation in this case is not analogous to Advertects. In this case, Williams alleged, and submitted sworn testimony showing, that Exceletech had assets of the judgment debtors. Williams was not attempting to pierce the corporate veil nor execute on property

prior to adjudicating the rights of third parties. Thus, there is no reason to impose more stringent requirements on Williams before impleading Exceletech.

5. Tomayko v. Thomas

In Tomayko v. Thomas, 143 So.2d 227 (Fla. 3d DCA 1962), the trial court ordered the third party, who was not made a party to the action, to pay to the creditor certain assets allegedly belonging to the judgment debtor. Id. at 229. The order, however, "was not entered pursuant to proceedings supplementary to execution." Id. The court reversed the order on the grounds that the third party was not made a party to the action and was not provided an opportunity to be heard. Id. at 230. The case did not concern the issue of whether a prima facie showing was required. Tomayko, nevertheless, was one of the two cases relied on by the court in Robert B. Ehmann, 363 So.2d 613.

6. Robert B. Ehmann, Inc. v. Bergh

After considering the cases analyzed above, the decision in Robert B. Ehmann, Inc. v. Bergh, 363 So.2d 613, 615 (Fla. 1st DCA 1978), with all due respect, defies description. Bergh, the judgment creditor, obtained a judgment against a corporation, Robert B. Ehmann, Inc. ("Ehmann, Inc."). The judgment remained unsatisfied, so Bergh moved to institute proceedings supplementary and implead third parties on the grounds that Robert B. Ehmann, individually, owned all of the stock of Ehmann, Inc., and that

Ehmann had used the corporation to defraud creditors. The trial court granted the motion, and the First District Court of Appeal reversed.

For the first time ever, a court held that the trial court should examine the judgment creditor:

> The trial court should conduct an examination of the judgment creditor or appoint a special master to do this for it. Section 56.29(2), Florida Statutes.

Id. at 614. §56.29(2) states that the court shall require the defendant in execution to appear for examination on plaintiff's motion. The statute does not require that the defendant be examined unless the plaintiff so moves. Nowhere does the statute address an examination of the judgment creditor.

The court then held that the order was erroneous because the trial court did not issue an order to show cause to the third parties, nor were the third parties given an opportunity to respond in writing or to have a hearing prior to being impleaded. Id. at 614 & 615. The only authority cited by the court was Tomayko v. Thomas, 143 So.2d 227, and State ex rel. Phoenix Tax Title Corp. v. Viney, 120 Fla. 657, 163 So. 57. Robert B. Ehmann, Inc., 363 So.2d at 615.

Without any citations to precedent or other authority, the court then held that "fair play" requires judgment creditors to make a prima facie case before impleading third parties. Id. Obviously, the court in Robert B. Ehmann confused a motion to institute proceedings supplementary and for impleader with the final hearing and order adjudicating the rights of third parties

after impleader and an opportunity to be heard. There was no authority for the court to find that a judgment creditor must be examined and make a prima facie case for impleader. There was no authority to require that the third party be given notice and an opportunity to be heard before being impleaded. Florida law authorized the trial court to implead third parties, and then provides them with due process in the form of an opportunity to be heard.

The court also found that Rules 1.100(b) and 1.250(c) do not apply to proceedings supplementary because the third parties were not parties to the underlying action and often would not know about it. Id. at 615. A third party's knowledge of the underlying action has no bearing on proceedings supplementary. Proceedings supplementary are independent proceedings ancillary to the underlying action. See, e.g., Grafman v. Grafman, 488 So.2d 115, 117 (Fla. 3rd DCA 1986). A third party's knowledge of the underlying cause of action, of discovery conducted regarding liability, and of procedural posturing prior to trial is not relevant whatsoever to the sole issue in proceedings supplementary; whether the third party has property of the judgment debtor.

Ehmann, if it is followed literally as Exceletech desires, would require trial courts to examine judgment creditors, who often have no knowledge whatsoever about the judgment debtor's assets. This alone could render §56.29 a nullity. Alternatively, the creditor could regurgitate to the court what its attorneys learned during discovery in aid of execution. Williams will not address

the potential hearsay and other evidentiary problems this may cause. Perhaps Exceletech could enlighten the Court. Based on Robert B. Ehmann, Exceletech would require a full blown evidentiary hearing, with an opportunity to be heard and to respond in writing, prior to impleading a third party.

There is absolutely no reason for imposing such requirements in post-judgment proceedings and not in pre-judgment proceedings. With all due respect, the court in Robert B. Ehmann erroneously applied pre-judgment due process protection to pre-impleader facts. The Fifth District Court of Appeal should be commended for correcting this misinterpretation, not castigated for blindly following an unprecedented and unfortunate departure from Florida law. The doctrine of stare decisis is not inflexible. Courts need not follow precedent which is badly reasoned. See, e.g., Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 2609, ___ L. Ed.2d ___ (1991).

Naturally, there may be exceptions to every rule, although this case does not present such a situation. For example, in Richard v. McNair, 121 Fla. 733, 164 So. 836, the court held that a creditor should present a prima facie showing under a statute which allows the sheriff to seize property before the rights of third persons may be adjudicated. Fla. R. Civ. P. 1.250(c) provides that parties may be added at any time "on such terms as are just." This rule allows courts to fashion terms on a case-by-case basis where impleader should be granted only in more limited

circumstances. However, neither this rule nor any other authority imposes blanket terms applicable across the board as claimed by Exceletech.

CONCLUSION

The trial court had a sufficient evidentiary basis, under prior case law, showing that Exceletech had property of the judgment debtors when the court impleaded Exceletech.

Exceletech had sufficient notice of Williams' allegations and the relief sought by at least nine different methods. Thus, Exceletech was not denied due process. Any failure to provide notice in an additional manner is harmless error.

Neither Florida statutes, rules, nor case law requires the trial court to examine the judgment creditor prior to adding a party in proceedings supplementary.

Florida law does not require a judgment creditor to present evidence or a prima facie case prior to impleading a third party in proceedings supplementary.

The decision in Robert B. Ehmann misinterpreted Florida law, and should no longer be followed.

Dated: August 2, 1991

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 2nd day of August, 1991, to **JOHN D. BROWN**, Brown & Kerr, 492 Pedretti Ave., Cincinnati, Ohio 46238; **MICHAEL R. CAREY, ESQUIRE**, P.O. Box 499, Tampa, FL 33601-0499; **JOHN R. STUMP, ESQUIRE**, 200 South Orange Avenue, No. 1424, Orlando, FL, 32801; **CARL W. HARTLEY, ESQUIRE**, P. O. Box 2168, Orlando, FL 32802; and **ERIC W. LUDWIG, ESQUIRE**, 111 North Orange Avenue, Suite 1019, Orlando, FL 32801.

RICHARD D. CONNOR, JR.

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