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IN THE SUPREME COURT OF FLORIDA

LAWRENCE FERNANDEZ, JR.,

Petitioner,

vs.

SUSAN E. FERNANDEZ, GEORGE MURPHY, MICHAEL A. MURPHY, DAVID MURPHY, ANN NASH, LAURIE SOMESON, JANE BOURKARD, ESTATE OF SUSAN E. FERNANDEZ, deceased, and E. RICHARD BOURKARD, JR., Personal Representative of the ESTATE OF SUSAN E. FERNANDEZ,

Respondents.

CASE NO. 83,392

DISTRICT COURT OF APPEAL, 2ND DISTRICT NO. 93-00802

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY NOTE

For purposes of this brief, the parties will be referred to in the following fashion:

a. Petitioner, Lawrence Fernandez, Jr., husband in the Circuit Court dissolution action, will be referred to as "Petitioner" and/or "Husband."

b. Respondents, the heirs, estate of and personal representative of the estate of Susan E. Fernandez, will be collectively referred to as "Respondents" and/or "the heirs of Susan E. Fernandez."

c. Susan E. Fernandez, the deceased wife of Lawrence Fernandez, Jr., will be referred to as "Susan E. Fernandez" and/or "Wife."

STATEMENT OF THE CASE

Susan E. Fernandez filed a Petition for Dissolution of Marriage on November 26, 1991 (R, 1-4). Petitioner filed his Answer and Counter-Petition for Dissolution on December 27, 1991 (R, 9-18). On January 21, 1992, Susan E. Fernandez filed a Motion to Bifurcate and a Notice of Hearing (R, 27-29). The Motion and Notice of Hearing were hand delivered on Petitioner's attorney and gave the Petitioner two (2) days notice of the hearing. A hearing was held on January 23, 1992, and on that date the trial court entered an order granting the bifurcation (R, 30, 31) and a Final Judgment of Dissolution of Marriage (R, 32, 33). The Final Judgment of Dissolution recites that neither party appeared at the Final Hearing on January 23, 1991. This first Final Judgment only dissolved the marriage and dealt with no property or financial issues. Two (2) days later the Wife died (R, 206).

The heirs of Susan E. Fernandez became substituted as parties and a second Final Judgment was entered on December 17, 1992, purportedly distributing the marital assets (R, 64-72). On December 28, 1992, the Petitioner filed his Motion for Relief from Judgment Pursuant to Rule 1.540 and Rule 1.530 of Florida Rules of Civil Procedure (R, 73-75). On January 20, 1993, a partial hearing was conducted on the Petitioner's Motion for Relief from Judgment (R, 174-202). On February 10, 1993, the trial court entered its Order Granting Motion for Relief from Judgment (R, 81, 82). From that Order the heirs of Susan E. Fernandez appealed to the Second District Court of Appeal. On January 21, 1994, the Second District

Court entered its opinion and reversed the trial court and remanded with instructions to reinstate the above-mentioned Final Judgments.

Petitioner timely filed a Motion for Rehearing, Certification and Rehearing En Banc with the Second District Court. Said motion was denied. Subsequently, Petitioner filed his Notice to Involve Discretionary Jurisdiction with the Supreme Court of Florida and on June 15, 1994, this Court entered its Order Accepting Jurisdiction and Dispensing with Oral Argument.

STATEMENT OF THE FACTS

At the January 23, 1992 Final Hearing, neither the Husband or Susan E. Fernandez testified or even appeared (R, 179). Susan E. Fernandez died two (2) days later. (R, 206) The father of Susan E. Fernandez testified as to the Wife's residency at the January 23, 1992 hearing. No witness testified that the marriage was irretrievably broken. The Final Judgment of Dissolution of Marriage makes no specific findings of fact concerning the residency of either Susan E. Fernandez or Lawrence Fernandez, Jr. or that the marriage is irretrievably broken (R, 32, 33). The Final Judgment of Dissolution of Marriage purported to dissolve the marriage between Susan E. Fernandez and Petitioner and to reserve jurisdiction over all other matters and issues. The property and financial issues were not litigated at the January 23, 1992 Final Hearing.

The second Final Judgment was entered on December 17, 1992, some ten months after the death of Susan E. Fernandez and attempted to divide the parties' property (R, 64-72). Petitioner filed his Motion for Relief from Judgment Pursuant to Rule 1.540 and Rule 1.530 of Florida Rules of Civil Procedure (R, 73-80). It is the Petitioner's position that since neither party testified as to their actual presence in the state and the intention to make Florida his or her residence at that time or that their marriage was irretrievably broken, Florida Statutes §61.021 and §61.052 were not complied with and the trial court was without jurisdiction. Thus, the Final Judgment of Dissolution and all subsequent orders

were void and the death of Susan E. Fernandez on January 25, 1992 divested the trial court of jurisdiction.

At the January 20, 1993 hearing on the Petitioner's Motion for Relief from Judgment, the trial court received the testimony of Simson Unterberger, Esquire, the present attorney for the Respondents. As is reflected in the Order Continuing Motion for Relief from Judgment (see Appendix A) and the transcript of testimony from that hearing (R, 174-202), the Petitioner did not complete presenting his evidence on his Motion for Relief from Judgment. After the limited testimony that was presented, the trial court felt that the Motion for Relief might be disposed of on a purely legal argument once it was established that neither party testified and that Susan E. Fernandez died two days after the Final Hearing. Thus, the parties were ordered to submit memoranda of law on the residency issue.

On February 10, 1993, the trial court entered an Order Granting Motion for Relief from Judgment (R, 81, 82). The Order was prepared by the trial court itself. In that Order, the trial court found that it was without jurisdiction on this matter and set aside the Final Judgment of Dissolution of Marriage and all subsequent Orders based upon the Final Judgment of Dissolution of Marriage. The heirs of Susan E. Fernandez appealed that ruling to the Second District Court of Appeal and the Second District wrote an opinion reversing the trial court. In that opinion, the Appellate Court noted that its decision conflicted with Gillman v. Gillman, 412 So.2d 412 (Fla. 4th DCA 1982).

SUMMARY OF ARGUMENT

I.

A PARTY SEEKING A DISSOLUTION OF MARRIAGE MUST TESTIFY AS TO HIS OR HER RESIDENCY AND TO THE FACT THAT THE MARRIAGE IS IRRETRIEVABLY BROKEN.

To obtain a dissolution of marriage in Florida, one of the parties must reside in the state 6 months before the filing of the petition. No judgment of dissolution of marriage shall be granted unless the facts prove the marriage is irretrievably broken. In this case, neither the Husband or the Wife appeared at the final hearing and testified as to either of these requirements. From the undisputed facts in this record, the Wife's father, George Murphy, was the only witness as to residency at the final hearing. Such proof is insufficient as a matter of law since there was no proof as to the Wife's intention to remain in Florida. Additionally, there was a complete absence of proof as to the fact that the marriage was irretrievably broken on the date of the final hearing.

II.

EVEN IF THE FINAL JUDGMENT OF DISSOLUTION WAS PROPER, THE TRIAL COURT LOST JURISDICTION OVER THIS MATTER AFTER THE DEATH OF SUSAN E. FERNANDEZ.

The Final Judgment of Dissolution was entered on January 23, 1992. It only purported to dissolve the parties' marriage. No property or financial issues had been litigated at the final hearing. Susan E. Fernandez died two days later on January 25, 1992. The trial court lost jurisdiction over the dissolution case, despite its attempted reservation of jurisdiction in the Final Judgment of Dissolution. A dissolution action dies when one of the

parties dies. Jurisdiction cannot be conferred by stipulation or agreement. The reservation by the trial court would have only been effective if the property and financial issues had been litigated, orally ruled upon, and the ruling reduced to writing after the Wife's death.

III.

THE SECOND DISTRICT COURT OF APPEAL INCORRECTLY REVERSED AND REMANDED WITH INSTRUCTIONS TO REINSTATE THE FINAL JUDGMENT SINCE PETITIONER DID NOT COMPLETE HIS TESTIMONY OR EVIDENCE AT THE HEARING ON HIS MOTION FOR RELIEF FOR JUDGMENT.

On December 28, 1992, the Petitioner filed his Motion for Relief from Judgment. As grounds for relief, the Petitioner alleged that the Court was without jurisdiction due to a failure of proof as to residency and as to the marriage being irretrievably broken. Additionally, the Petitioner alleged that the Wife was incompetent for thirty (30) days prior to her death and that Petitioner had no knowledge of the January 23, 1992 final hearing. The Motion was verified by the Petitioner.

At the January 20, 1993 hearing on the Petitioner's Motion for Relief from Judgment, the Petitioner called Simson Unterberger, Esquire as his first witness. The time allotted for the hearing expired, and the two other witnesses for the Petitioner were not able to be called. The trial court, after receiving the testimony of Simson Unterberger, felt that the matter might be resolved on the residency/jurisdictional issue alone and continued the hearing for a later date and required written memoranda on the jurisdictional issue in the meantime. A copy of that Order

Continuing Motion for Relief from Judgment is attached hereto as Appendix A. Following the receipt of the memoranda, the trial court prepared and entered its own order granting motion for relief from judgment. From that order, the Respondents appealed. The Husband was not provided an opportunity to present testimony or evidence on his remaining points: that the Wife was incompetent on January 23, 1992 and/or that he had no knowledge of the January 23, 1992 final hearing and therefore could not have consented to the bifurcation. If the Second District Court was going to reverse, it should not have reinstated the Final Judgment, but should have remanded so the hearing on the Motion for Relief could have been completed.

ARGUMENT

I.

A PARTY SEEKING A DISSOLUTION OF MARRIAGE MUST TESTIFY AS TO HIS OR HER RESIDENCY AND TO THE FACT THAT THE MARRIAGE IS IRRETRIEVABLY BROKEN.

Susan E. Fernandez did not appear and therefore did not present her live testimony at the January 23, 1992 Final Hearing. Attorney Simson Unterberger testified at the January 20, 1993 hearing that neither the Husband nor the Wife was present at the January 23, 1992 hearing (R, 179). This is consistent with the language of the Final Judgment entered on January 23, 1992 (R, 32, 33). Mr. Unterberger also testified that the only witness was Susan E. Fernandez's father. Mr. Unterberger testified that the Final Hearing lasted only a couple of minutes and that the one witness only testified as to residency (R, 179, 180). It is the Petitioner's position that the party seeking the dissolution must testify at the Final Hearing, both as to residency and as to the fact the marriage is irretrievably broken.

The case of Gillman v. Gillman, 413 So.2d 412 (Fla. 4th DCA 1982) ruled as follows:

> "We hold that Section 61.052(2), Florida Statutes (1971), requires that the individual invoking the jurisdiction of the Court must testify as to his or her actual presence in the state and the intention to make Florida his or her residence at the time, and that such testimony must be corroborated by other testimony or objective evidence." Id. at 414. (Emphasis added)

This language is clear and unequivocal. Gillman has not been reversed by this Court and no other District Court has distinguished or conflicted with Gillman, until the Second District

did so in this case. The party invoking the jurisdiction must testify as to residency. Respondents argue that the testimonial requirement was satisfied by the verified Petition for Dissolution filed by Susan E. Fernandez. This is incorrect. The verified Petition is not subject to cross-examination. A review of the record reveals that the verified Petition was not even received into evidence at the Final Hearing. The residency allegation in the Petition was conclusory and inadequate. If the Gillman Court had intended for "testify" to mean "prove", they would have used the term "prove by objective evidence" in lieu of the word "testify" just as they did with the corroboration of residency requirement.

Respondents also argue that since the Answer of the Husband admitted the Wife's allegations of residency and of the marriage being irretrievably broken, then these facts were established and proven by such admission. This is also incorrect. In Wise v. Wise, 310 So.2d 431 (Fla. 1st DCA 1975), the First District Court of Appeal held that an admission of residency in the pleadings by an adverse party cannot substitute for proof. See also Kutner v. Kutner, 33 So.2d 42 (Fla. 1947) and Hadley v. Hadley, 140 So.2d 326 (Fla. 3rd DCA 1962).

The State of Florida has a substantial interest in every divorce action in the State. In fact, a dissolution case is sometimes referred to as a triangular proceeding in which the husband, the wife, and the state are parties. Danner v. Danner, 206 So.2d 650 (Fla. 2nd DCA 1968) and Harman v. Harman, 128 So.2d

164 (Fla. 3rd DCA 1961). Dissolution in Florida is controlled by statute. These statutes must be strictly adhered to. What policy interest is served by requiring live testimony at the Final Hearing? Not only does live testimony insure the right of cross-examination, it also protects against a divorce being granted when the parties have had a change of heart and reconciled. There are numerous instances where parties have filed for dissolution and after the filing resumed living together. For all we know, these parties may have previously filed an action for dissolution and then reconciled. If the divorce could be proved by the initial pleadings, it would be possible to dissolve marriages that were not truly broken. Live testimony is the rule. It was only the assumption of the attorneys and the trial court that the Husband and the Wife wanted this dissolution on January 23, 1992. The attorneys and the trial court guessed that the marriage was irretrievably broken. There was absolutely no evidence at the January 23, 1992 hearing that the marriage was broken on that date.

Even if there was an exception to the rule of live testimony, the proof in this case as to residency and irretrievably broken was insufficient. Residency must be proven by clear and positive evidence, a standard of proof which is akin to clear and convincing evidence. Beaucamp v. Beaucamp, 508 So.2d 419 (Fla. 2d DCA 1987). The Wife's father apparently testified as to her presence in the state. However, he clearly could offer no competent evidence as to the Wife's intent as to residency. Residency is not only the actual presence in the state, but also an intention to remain. No

other evidence was received by the Court. Again, the Wife's Petition was not received into evidence. The Wife's father clearly offered no evidence as to the marriage being broken and could not offer any competent evidence as to the Wife's state of mind on this issue.

Respondents have previously argued that, by analogy to Rule 1.611(c) and (d), Florida Rules of Civil Procedure, a verified allegation of residency coupled with an admission of residency in a responsive pleading is sufficient to bestow jurisdiction on the court. In support of this argument, Respondents refer to Florida's simplified dissolution procedure. Such analogy is misplaced.

Rule 1.611, Florida Rules of Civil Procedure, requires that before the simplified dissolution process can be used that there be no children and that the parties have made a satisfactory division of their property. A review of Form 1.943-1 reveals that both the Husband and Wife must appear before a deputy clerk and execute a joint petition under oath. Residency must be corroborated by a witness. Then both parties must appear before the judge. Rule 1.943(b), Florida Rules of Civil Procedure. Normally, the parties appear before the judge that day. Thus, in simplified dissolution there are sufficient procedural safeguards to protect the parties and the interest of the State of Florida. It is hard to imagine a dissolution being granted where the parties have had a change of heart or reconciled, since they must both appear before a judge. It is just as hard to imagine a dissolution being granted where the residency requirement is not met if both parties appear before the

judge and are subject to inquiry by the court.

In the case at hand, Susan E. Fernandez and Petitioner could not use the simplified dissolution procedure since they had not divided their assets and liabilities. Even if they could have used such procedure, they did not comply with Rule 1.943(b) in that neither party appeared before the Court. Thus, this Court would not have had jurisdiction even had this been a simplified dissolution case.

Respondents argument by analogy would require this Court to overrule the decisions of Gillman, Wise and Beaucamp, supra. The Respondents have not demonstrated a compelling reason for any change in the underlying law which would justify such a break with precedent. Florida Statutes §61.021 and §61.052 (1991) were the law when Gillman, Wise and Beaucamp were decided. The enactment of a simplified dissolution procedure does not apply to this case since the parties were not proceeding under that rule. Respondents' analogy fails.

Simply put, Florida has a compelling interest in requiring the party seeking a dissolution to appear before the court. In a non-simplified case, that party must testify as to residency and the fact that the marriage is irretrievably broken. Such requirement is not an unreasonable requirement for any litigant.

In its opinion in the instant case, the Second District Court ruled that the verified Petition, coupled with the testimony of Susan E. Fernandez's father, was sufficient to prove residency. The Second District Court failed to address the issue of whether it

was proven that the marriage was irretrievably broken. Florida Statute §61.052 (1991) provides as follows:

> (1) No judgment of dissolution of marriage shall be granted unless one of the following facts appears, which shall be pleaded generally:
>
> (a) The marriage is irretrievably broken...

Subsection (2) of the same statute begins with "Based on the evidence at the hearing". These portions of the statute have not been amended since this Court decided the case of Ryan v. Ryan, 277 So.2d 266 (Fla. 1973) wherein the dissolution stated was ruled constitutional. In Ryan, this Court noted that it is sufficient in the petition to allege the ultimate fact that the marriage is irretrievably broken. However, the trial court must still determine that in each case based upon the facts of each case. Id. at 271. In Stafford v. Stafford, 294 So.2d 25 (Fla. 3rd DCA 1974), the Third District applied Ryan and determined that the parties could not prove "irretrievably broken" by stipulation, but that a full evidentiary hearing should be held. The Fourth District Court following Ryan in the case of Nelms v. Nelms, 283 So.2d 50 (Fla. 4th DCA 1973) and ruled that an admission in the pleadings or stipulation does not prove "irretrievably broken". The trier of fact must determine it from the evidence adduced. In McClelland v. McClelland, 318 So.2d 160 (Fla. 1st DCA 1975), the First District stated that the trial court must learn from the parties as to whether the marriage is irretrievably broken. Clearly, all of these cases contemplate one or both of the parties testifying at the final hearing that the marriage is irretrievably broken.

The only proof was the allegation in the parties' respective petitions. Mr. Unterberger testified that he was relying on the pleadings to prove the issue of irretrievably broken (R, 184-185). Since the Second District Court failed to address this issue in its opinion, we can only assume they considered the proof sufficient. However, the Husband respectfully contends the proof was insufficient. First, the verified Petition was not introduced into evidence. Second, the pleading as to "irretrievably broken" was general and conclusory, as that statute allows. Third, the Wife's Petition was filed on November 26, 1991 and the Final Hearing was two months later. Finally, relying on the pleadings is contrary to the statutory law of dissolution and the case law interpreting it. Statute §61.052 requires the final judgment to be based upon the proof adduced at the final hearing. There simply was no proof. "Irretrievably broken" is clearly a subjective state of mind which cannot be proven by an affidavit, which is all a verified petition is. Even if the proof was adequate to show the marriage was broken on November 26, 1991, it takes a major assumption to determine that it was still broken on January 23, 1992. The statutory law of dissolution of Florida does not allow for such assumption and instead requires evidence at the final hearing.

If the decision of the Second District Court in the instant case is allowed to stand, there will be confusion in the circuit courts of this state as to how to prove residency and "irretrievably broken" in a dissolution case. The law of Florida requires a uniform standard and approach to the handling of

dissolution cases. The statutory law of dissolution requires that residency and "irretrievably broken" be proven at the final hearing.

II.
EVEN IF THE FINAL JUDGMENT OF DISSOLUTION WAS PROPER, THE TRIAL COURT LOST JURISDICTION OVER THIS MATTER AFTER THE DEATH OF SUSAN E. FERNANDEZ.

Even if the Final Judgment of Dissolution entered on January 23, 1992 is proper, the Court lost jurisdiction over this matter after Susan E. Fernandez's death on January 25, 1992. In other words, if the marriage was effectively dissolved, the divorce court lost jurisdiction to decide property and financial issues on the Wife's death.

The only instant where a post-mortem order is valid in a divorce is where the final judgment of dissolution is actually entered while the parties are still alive and the supplement final judgment is entered after death which reflects an actual ruling made prior to death. Then and only then can a court render a nunc pro tunc post-mortem final judgment. Therefore, the trial court's second Final Judgment entered on December 17, 1992 is void. The fact that the parties stipulated to it is irrelevant. Jurisdiction cannot be conferred by agreement. Simpson v. Simpson, 473 So.2d 299 (Fla. 3rd DCA 1985) held that after the wife's death, her property should be the subject of a probate action and the divorce action dismissed. So, even if the Final Judgment of Dissolution is not void, all subsequent orders are. The trial court lacked the authority after the death of Susan E. Fernandez to divide her property or Petitioners. Only a probate court had jurisdiction

over Susan E. Fernandez's property.

In the last paragraph of its opinion, the Second District Court of Appeal cites Becker v. King, 307 So.2d 855 (Fla. 4th DCA), cert. denied, 307 So.2d 76 (Fla. 1975) for the proposition that the trial court had jurisdiction to decide the property and financial issues after the wife died. The Second District has misapplied Becker v. King and in doing so, created a conflict with Jaris v. Tucker, 414 So.2d 1164 (Fla. 3rd DCA) (rehearing En Banc), appeal dismissed 419 So.2d 1198 (Fla. 1982). In Becker, the parties presented two days of testimony at a final hearing. Both sides rested and made final arguments. All of the issues of the dissolution were tried, including the dissolution itself, alimony, child support, and property division. The trial judge signed a partial final judgment dissolving the marriage and determining custody. Approximately a month later, the trial judge made final decisions on the remaining issues and announced these rulings to counsel for the parties and requested a formal written final judgment be prepared for his signature. Before this could be done, the husband died. Subsequently, the property and financial ruling were reduced to a written final judgment. In reviewing these actions by the trial court, the Third District Court noted that in general cases, the death of a party does not deprive a court of jurisdiction to render a judgment. However, a divorce suit is an exception to that general principal. Nonetheless, that exception did not apply in Becker since the property and financial issues were fully litigated, submitted for decision and actually decided

before the husband's death. In the case at hand, the financial and property issues were not litigated at the first final hearing. These issues were not submitted to and decided by Judge Simms before Susan E. Fernandez's death. Instead, the heirs of Susan E. Fernandez became parties to the dissolution action and continued the divorce litigation seeking a distribution of assets based upon the alleged fault of the Husband for events prior to the Wife's death. Surely, such a proceeding is not permissible under Florida law.

Following Becker, the Third District Court decided Jaris v. Tucker, 414 So.2d 1164 (Fla. 3rd DCA) (rehearing en banc), appeal dismissed, 419 So.2d 1198 (Fla. 1982). There, a final hearing was conducted. The husband was in intensive care at that time. The wife testified and presented a stipulation as to property matters. The trial court orally announced its ruling based upon the stipulation, and instructed the husband's counsel to prepare the written final judgment. Four days later the husband died. The wife moved to abate the proceedings and the trial court dismissed the case. The personal representatives of the husband's estate appealed. The Third District cited Becker and reiterated that:

> "It is true that in the ordinary case the death of a party does not deprive a court of the power to enter a post-mortem nunc pro tunc judgment. Becker v. King, 307 So.2d 855, 858 n. 2 (Fla. 4th DCA 1975). However, this general principle does not apply to actions to dissolve a marriage, since the death itself has already terminated the marriage. Sahler v. Sahler, 154 Fla. 206, 17 So.2d 105 (1944); McKendree v. McKendree, 139 So.2d 173 (Fla. 1st DCA 1962); see Leitner v. Willaford, supra; cf. Baggett v. Baggett, 309 So.2d 223 (Fla. 2nd DCA 1975); Becker v. King, supra (where written final judgment dissolving marriage entered prior to death of one party,

court can center nunc pro tunc judgment respecting other matters which it had theretofore orally decided)."

Jaris was originally decided with a contrary result and then after a rehearing en banc, the above decision was reached.

In the instant case, the property and financial issues had not been decided prior to the death of Susan E. Fernandez. The Second District's misapplication of Becker to the present case will create conflict and uncertainty for the trial courts of this state as to when they can proceed with a dissolution after one parties' death. Normally, alimony and child support obligations cease on the death of a former spouse. The division of property should be effected in a probate court based upon probate law, not divorce law. That is exactly what the Third District ruled in Simpson, supra.

III.

THE SECOND DISTRICT COURT OF APPEAL INCORRECTLY REVERSED AND REMANDED WITH INSTRUCTIONS TO REINSTATE THE FINAL JUDGMENT SINCE PETITIONER DID NOT COMPLETE HIS TESTIMONY OR EVIDENCE AT THE HEARING ON HIS MOTION FOR RELIEF FOR JUDGMENT.

On December 28, 1992, the Petitioner filed his Motion for Relief from Judgment. As grounds for relief, the Petitioner alleged that the Court was without jurisdiction due to a failure of proof as to residency and as to the marriage being irretrievably broken. Additionally, the Petitioner alleged that the Wife was incompetent for thirty (30) days prior to her death and that Petitioner had no knowledge of the January 23, 1992 final hearing. The Motion was verified by the Petitioner.

At the January 20, 1993 hearing on the Petitioner's Motion for Relief from Judgment, the Petitioner called Simson Unterberger,

Esquire as his first witness. The time allotted for the hearing expired, and the two other witnesses for the Petitioner were not able to be called. The trial court, after receiving the testimony of Simson Unterberger, felt that the matter might be resolved on the residency/jurisdictional issue alone and continued the hearing for a later date and required written memoranda on the jurisdictional issue in the meantime. A copy of that Order Continuing Motion for Relief from Judgment is attached hereto as Appendix A. Following the receipt of the memoranda, the trial court prepared and entered its own order granting motion for relief from judgment. After reviewing the law and the Gillman case in particular, the trial judge reached the conclusion that the Wife had to testify as to residency and the fact that the marriage was irretrievably broken. Thus, the trial judge correctly decided that both of his Final Judgments were void. The trial judge was apparently so convinced of this that he did not hear any evidence on the Husband's other bases for relief from judgment. Thus, the Husband was not provided an opportunity to present testimony or evidence on his remaining points: that the Wife was incompetent on January 23, 1992 and/or that he had no knowledge of the January 23, 1992 final hearing and therefore could not have consented to the bifurcation. The Final Judgments should not have been reinstated, but instead, the case should have been remanded so the hearing on the Motion for Relief could have been completed.

In his verified Motion for Relief from Judgment, the Husband swore that he had no knowledge of the January 23, 1992 hearing.

Obviously, the Husband could not have consented to the bifurcation if he was unaware of the hearing. Generally, in Florida, an attorney cannot bind his client unless he has the express authority to do so. Jorgensen v. Grand Union Company, 490 So.2d 214 (Fla. 4th DCA 1986) and Lechuga v. Flanigan's Enterprises, Inc., 533 So.2d 856 (Fla. 3rd DCA 1988). The trial court ruled in the Husband's favor on the preliminary issue of residency and therefore did not allow any evidence or testimony on the authority of the Husband's previous attorney to stipulate to the bifurcation and dissolution. Therefore, an unresolved question of fact remains and the Second District Court of Appeals should have remanded for it to be resolved. Bonifay v. Garner, 503 So.2d 389 (Fla. 1st DCA 1987); Jenkins v. Jenkins, 556 So.2d 441 (Fla. 4th DCA 1990); and World Metals, Inc. v. Townley Foundry and Machine Co., Inc., 585 So.2d 1185 (Fla. 5th DCA 1991).

CONCLUSION

Neither party testified at the January 23, 1992 Final Hearing. Thus, there was no competent proof as to residency or that the marriage was irretrievably broken. These matters cannot be established by stipulation. Without such evidence, the trial court lacked jurisdiction and the Final Judgment of Dissolution is void. The opinion of the Second District Court of Appeal creates a conflict among the districts in this State as to how residency can be proven. Even if residency can be proven by a verified Petition and a corroborating witness, a verified Petition is insufficient to prove "irretrievably broken". Regardless of what evidence is

sufficient to prove "irretrievably broken", there was no proof adduced at the January 23, 1992 Final Hearing in this case. On these grounds, this Court should reverse the opinion of the Second District and reinstate the trial court's Order Granting Motion for Relief from Judgment.

Even if residency and "irretrievably broken" were established, after the Wife's death the Circuit Court lost jurisdiction over the case and could not proceed further. The Second District Court of Appeal has misapplied Becker v. King and has failed to apply Jaris v. Tucker resulting in conflict on the issue of when a trial court loses jurisdiction upon the death of a party to a dissolution. This Court should adopt the rule stated in Becker and Jaris and state that property and financial issues cannot be litigated in a dissolution after the death of a party.

Finally, if the decision of the Second District is allowed to stand, the Husband should be given an opportunity to prove the other issues raised in his Motion for Relief from Judgment. This requires a remand for the conclusion of the evidentiary hearing.

Respectfully submitted,

HARRY M. HOBBS, P.A.

By: ______________________
Robert S. Hobbs, Esquire

1\92-517.brf

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Initial Brief on the Merits has been furnished by United States Mail to SIMSON UNTERBERGER, ESQUIRE, One Mack Center, Suite 707, 501 East Kennedy Boulevard, Tampa, Florida 33602-4933 this 9th day of July, 1994.

HARRY M. HOBBS, P.A.

By: ______________________

ROBERT S. HOBBS, ESQUIRE
Attorney for Petitioner
Post Office Box 18225
Tampa, Florida 33679-8225
(813) 879-8333
Florida Bar No. 303641

1\92-517.brf

RECEIVED
JAN 26 1993

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR THE STATE OF FLORIDA, COUNTY OF HILLSBOROUGH
FAMILY LAW DIVISION

IN RE: THE MARRIAGE OF

SUSAN E. FERNANDEZ,

Petitioner/Wife,

CASE NO.: 91-12971

DIVISION: F E

vs.

LAWRENCE FERNANDEZ, JR.,

Respondent/Husband,
_________________________________/

ORDER CONTINUING MOTION FOR RELIEF FROM JUDGMENT

THIS CAUSE coming on to be heard on January 20, 1993 and there appearing before the Court, Harry M. Hobbs, Esquire, Attorney for the Husband, and Lawrence Fernandez, Jr., the Husband, and J. Scott Taylor, Esquire, Attorney for George Murphey, Michael A. Murphey, David Murphey, Ann Nash, Laurie Someson, Jane Bourkard, Estate of Susan E. Fernandez, and E. Richard Boukard, as Personal Representative of the Estate of Susan E. Fernandez, and the Court having heard the testimony of Simson Unterberger, Esquire, and being unable to conclude the hearing in the time allotted, and the attorneys for the parties having stipulated as to the fact that Susan E. Fernandez was not present at the January 22, 1992 hearing and that she did die on January 25, 1992, it is therefore

ORDERED AND ADJUDGED that the hearing on the Husband's Motion for Relief from Judgment shall be continued until a later date. It is further

ORDERED AND ADJUDGED that based upon the stipulation and

certified death certificate of Susan E. Fernandez, the Court finds that Susan E. Fernandez was not present at the hearing held on January 23, 1992, and therefore did not testify live, and that Susan E. Fernandez did die on January 25, 1992. Based upon the foregoing, the attorneys for each parties are directed to file written memorandums of law addressing the legal effect of Susan E. Fernandez's failure to testify in person at the January 23, 1992 hearing and the legal effect of the death of Susan E. Fernandez on January 25, 1992 on all subsequent actions taken by the Court after her death. It is further

ORDERED AND ADJUDGED that said written memorandum shall be submitted by both attorneys on Wednesday, February 3, 1993. The memorandum shall be submitted simultaneously and shall contain copies of any cases cited in said memorandums.

DONE AND ORDERED in Chambers, Tampa, Florida, this 25th day of January, 1993.

/s/ Robert J. Simms

CIRCUIT JUDGE

conformed copies to:

Harry M. Hobbs, Esquire
Scott Taylor, Esquire
Lawrence Fernandez, Jr.
Estate of Susan E. Ferndandez

1\92-517.ord

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FILED
SID J WHITE
JUL 14 1994
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LAWRENCE FERNANDEZ, JR.,

Petitioner,

vs.

SUSAN E. FERNANDEZ, GEORGE MURPHY, MICHAEL A. MURPHY, DAVID MURPHY, ANN NASH, LAURIE SOMESON, JANE BOURKARD, ESTATE OF SUSAN E. FERNANDEZ, deceased, and E. RICHARD BOURKARD, JR., Personal Representative of the ESTATE OF SUSAN E. FERNANDEZ,

Respondents.

CASE NO. 83,392

DISTRICT COURT OF APPEAL, 2ND DISTRICT NO. 93-00802

SUPPLEMENTAL APPENDIX
PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT S. HOBBS, ESQUIRE
Harry M. Hobbs, P.A.
Attorney for Petitioner
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Florida Bar No. 303641

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FILED
FEB 11 1993

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA, STATE OF FLORIDA
FAMILY LAW DIVISION

SUSAN E. FERNANDEZ,
PETITIONER,

CASE NO.: 91-12971

AND

DIVISION: E

LAWRENCE FERNANDEZ, JR.,
RESPONDENT.

/

ORDER GRANTING MOTION FOR RELIEF FROM JUDGMENT

THIS MATTER having come on before this Court on Wednesday, January 20, 1993 and the Former Husband, Lawrence Fernandez, Jr. having personally appeared along with his attorneys, Robert Hobbs and Harry Hobbs, and Simson Unterberger having appeared on behalf of the deceased Former Wife and the Court having heard testimony and argument of counsel and having reviewed the file makes the following findings:

1. That on January 21, 1992 the Former Wife filed a Motion to Bifurcate seeking an immediate hearing.

2. That the Motion to Bifurcate was GRANTED.

3. That on January 23, 1992 a hearing to dissolve the marriage only and to reserve as to all other issues.

4. That attorneys for both parties were present before the Court and the attorneys advised the Court of their client's consent and agreement that the Court could accept the verified Petition for Dissolution of Marriage as proof of both the Wife's residency and that the marriage was irretrievably broken.

5. That a witness appeared, to wit: George Murphy, Former Wife's father, who corroborated residency of the Former Wife.

6. That the Former Wife did not appear and did not offer live

testimony.

7. That counsel for both parties stipulated to the Court granting a Dissolution of Marriage based on the above presentation of evidence and assured the Court that it had jurisdiction.

8. That on December 28, 1992 (less than 1 year since the entry of the Final Judgment) Former Husband filed this Motion for Relief from Judgment alleging among other things that the Court did not have jurisdiction because of the failure of the Former Wife to offer testimony at said hearing. That the Court relied upon the good faith representations of the attorney's as to their client's consent.

9. That the Case of Gillman v. Gillman, 413 So. 2d 412 (1982 - 4th DCA) is the controlling authority in this matter.

Based upon the foregoing Findings of Fact, it is

ORDERED AND ADJUDGED

1. That the Court was without jurisdiction in this matter and the Final Judgment of Dissolution of Marriage is hereby set aside.

2. That all subsequent Orders based upon the Final Judgment of Dissolution of Marriage are therefore null and void and are also set aside.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, on this 10th day of February, 1993.

/s/ Robert J. Simms

ROBERT J. SIMMS, CIRCUIT COURT JUDGE

Copies:
Robert Hobbs, Esq.
Harry Hobbs, Esq.
Simson Unterberger, Esq.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SUSAN E. FERNANDEZ, GEORGE MURPHY, MICHAEL A. MURPHY, DAVID MURPHY, ANN NASH, LAURIE SOMESON, JANE BOURKARD, ESTATE OF SUSAN E. FERNANDEZ, deceased, and E. RICHARD BOURKARD, JR., Personal Representative of the ESTATE OF SUSAN E. FERNANDEZ,

Appellants,

v.

LAWRENCE FERNANDEZ, JR.,

Appellee.

CASE NO. 93-00802

Opinion filed January 21, 1994.

Appeal from the Circuit Court for Hillsborough County; Robert J. Simms, Judge.

Simson Unterberger, Tampa, for Appellants.

Robert S. Hobbs of Harry M. Hobbs, P.A., Tampa, for Appellee.

SCHOONOVER, Judge.

The appellants, Susan E. Fernandez, George Murphy, Michael A. Murphy, David Murphy, Ann Nash, Laurie Someson, Jane Bourkard, Estate of Susan E. Fernandez, deceased, and E. Richard

Bourkard, Jr., Personal Representative of the Estate of Susan E. Fernandez, have challenged an order granting a motion to set aside a final judgment of dissolution of marriage. We find that the trial court erred in setting aside the final judgment dissolving Susan E. Fernandez's marriage to Lawrence Fernandez, Jr., the appellee, and, accordingly, reverse.

On November 20, 1991, Susan E. Fernandez, now deceased, filed a petition seeking a dissolution of marriage to the appellee, Lawrence Fernandez, Jr. The appellee filed an answer and a counter-petition also seeking a dissolution of the marriage. After the action was at issue, Mrs. Fernandez, on January 21, 1992, filed a motion to bifurcate the proceedings. She alleged that she was terminally ill and that her doctors advised her that her life expectancy was countable in weeks. The parties stipulated to the granting of this motion and it, as well as a final judgment of dissolution of marriage, was granted on January 23, 1992. The final judgment dissolved the marriage and reserved jurisdiction over all other issues contained in the parties' pleadings. Susan E. Fernandez passed away on January 25, 1992.

After Mrs. Fernandez's death, the pleadings were amended, parties were added, and a stipulated final judgment which dealt with the parties' property was entered on December 17, 1992.

On December 28, 1992, the appellee filed a motion for relief from judgment pursuant to Florida Rules of Civil Procedure

1.540 and 1.530. In his verified motion, the appellee alleged that since the requirements of section 61.052, Florida Statutes (1991), were not met the court did not have jurisdiction to grant a final judgment on January 23, 1992, and therefore, the court was without jurisdiction to enter the stipulated final judgment dated December 17, 1992. The appellee did not allege or offer any evidence that Mrs. Fernandez was not a resident of Florida at the appropriate times and did not allege he was wrong when he in his sworn answer and counter-petition alleged that the court had jurisdiction.

Mrs. Fernandez's first attorney testified that at the original hearing George Murphy, Mrs. Fernandez's father, testified as a corroborating witness to residency. Although no record of the dissolution proceeding was introduced into evidence, it appears that no other witnesses were called to testify at that hearing. The court granted the husband's motion, and the appellants filed a timely notice of appeal from the trial court's final order.

In order to obtain a dissolution of marriage in Florida, one of the parties to the marriage must reside in the state six months before the filing of a petition for dissolution. § 61.021, Fla. Stat. (1991). Furthermore, evidence establishing a party's residence must be corroborated. § 61.052(2), Fla. Stat. (1991).

Florida's residency requirement is jurisdictional and must be alleged and proved. Jurisdiction cannot be acquired or

exercised by, or pursuant to, the agreement of the parties. Phillips v. Phillips, 1 So. 2d 186 (Fla. 1941). The requirement that evidence of residence must be corroborated also cannot be waived by an admission that the residence requirement has been met. Wise v. Wise, 310 So. 2d 431 (Fla. 1st DCA 1975). When Mrs. Fernandez filed her verified petition she alleged residency. The husband filed a sworn answer and counter-petition admitting his wife was a resident and alleging that he was also. If Mrs. Fernandez's father had not testified concerning her residence, this case would be similar to the case of Speigner v. Speigner, 621 So. 2d 758 (Fla. 1st DCA 1993), and we would hold, as our sister court did in Speigner, that the trial court did not have jurisdiction to dissolve the marriage.

In Speigner both parties alleged residence and admitted that the other was a resident, but at the final hearing neither of them testified that they were residents of Florida. Furthermore, neither party presented the testimony of a third person either live or by affidavit to corroborate that either party had been a resident of Florida for the six months immediately before either the petition or the counter-petition had been filed. The court held that the residence requirement may not be established by an admission by one party of the other's allegation and may not be established by uncorroborated testimony, whether it be of a party or another. In this case, however, in addition to the sworn allegations and admission of both parties, Mrs. Fernandez's father corroborated the residency requirement and that testimony together with the sworn pleadings

established jurisdiction. See Speigner.

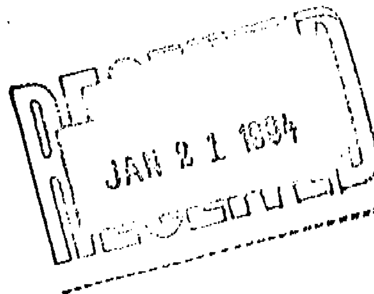
Generally, the one filing an action and seeking a dissolution of the marriage testifies and while doing so testifies as to residency. In such a case that testimony must be corroborated. Lemon v. Lemon, 314 So. 2d 623 (Fla. 2d DCA 1975). No hardship can be worked on the parties by requiring corroboration of a plaintiff's testimony as to bona fide residence. If a plaintiff is a bona fide resident, some of his friends and acquaintances will know about it and be in a position to give corroborating testimony. Phillips. The fact that the parties generally testify, however, does not mean that a party must always testify. As long as there is evidence, e.g. sworn pleadings, that one of the parties is a bona fide resident and that evidence is corroborated, the jurisdictional requirement has been met. §§ 61.021, 61.052(2). See also Speigner; Phillips.

We recognize that by not requiring the party seeking to invoke the court's jurisdiction to testify in all circumstances we are in conflict with Gillman v. Gillman, 413 So. 2d 412 (Fla. 4th DCA 1982). We do not, however, believe that the law requires such testimony in every case.

Since the trial court had jurisdiction to enter the final judgment of dissolution and did so before Mrs. Fernandez died, by reserving jurisdiction to deal with the remaining issues, it had jurisdiction to enter the subsequent final judgment, and the court erred by holding otherwise. Becker v. King, 307 So. 2d 855 (Fla. 4th DCA), cert. denied, 317 So. 2d 76 (Fla. 1975).

We, accordingly, reverse and remand with instructions to reinstate the above-mentioned final judgments.

DANAHY, A.C.J., and PATTERSON, J., Concur.



IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF THE STATE OF FLORIDA

SUSAN E. FERNANDEZ, GEORGE MURPHY, MICHAEL A. MURPHY, DAVID MURPHY, ANN NASH, LAURIE SOMESON, JANE BOURKARD, ESTATE OF SUSAN E. FERNANDEZ, deceased, and E. RICHARD BOURKARD, JR., Personal Representative of the ESTATE OF SUSAN E. FERNANDEZ,

CASE NO.: 93-00802

Appellants

v.

LAWRENCE FERNANDEZ, JR.,

Appellee/Husband.

_______________________________________/

MOTION FOR REHEARING, MOTION FOR CERTIFICATION, AND MOTION FOR REHEARING EN BANC

COMES NOW, Appellee/Husband, Lawrence Fernandez, Jr., by and through his undersigned attorney pursuant to Florida Rules of Appellate Procedure, Rules 9.330 and 9.331 and files this Motion for Rehearing, Motion for Certification, and Motion for Rehearing En Banc, and in support thereof would state the following:

1. This Court misapprehended the effect and application of Becker v King, 307 So. 2d 855 (Fla. 4th DCA), cert. denied, 317 So. 2d 76 (Fla. 1975). In Becker, the issues ruled upon and decided in the post-mortem Final Judgment had been tried, considered and orally ruled upon prior to the husband's death.

2. This Court overlooked, and/or failed to consider the case of Jarvis v Tucker, 414 So. 2d 1164 (Fla. 3rd DCA 1982) dism. 419 So. 2d 1198 (Fla. 1982) and its explanation of Becker v King at page 1166.

3. The Appellee/Husband respectfully requests that the following questions be certified to the Supreme Court of Florida as questions of great public interest and/or exceptional importance.

Questions No.1: WHETHER OR NOT THE INDIVIDUAL INVOKING THE JURISDICTION OF THE COURT IN A DISSOLUTION ACTION MUST TESTIFY AS TO HIS OR HER ACTUAL PRESENCE IN THE STATE AND THE INTENTION TO MAKE FLORIDA HIS OR HER RESIDENCE AT THE TIME.

Question No. 2: WHETHER A DIVORCE COURT MAY RESERVE JURISDICTION TO DECIDE PROPERTY ISSUES NOT PREVIOUSLY LITIGATED AND/OR RULED UPON AFTER THE DEATH OF A PARTY IN A BIFURCATED DISSOLUTION.

4. The Appellee/Husband respectfully requests that this Court grant an En Banc Rehearing. In support thereof, I the undersigned attorney, express a belief based upon research and studied professional judgment, that the panel decision is of exceptional importance.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Simson Unterberger, Esquire, Suite 707, One Mack Center, 501 East Kennedy Blvd., Tampa, Florida 33602 this 31st day of January, 1994.

HARRY M. HOBBS, P.A.

By: ______________________
Robert S. Hobbs, Esquire
Post Office Box 18225
Tampa, Florida 33679-8225
(813) 879-8333
Attorneys for Appellee/Husband

92-517

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

MARCH 2, 1994

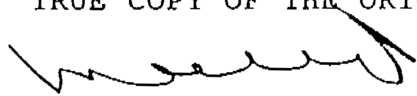
SUSAN E. FERNANDEZ, et al., Appellant(s), v. LAWRENCE FERNANDEZ, JR., Appellee(s).	Case No. 93-00802

BY ORDER OF THE COURT:

Counsel for the appellee, Lawrence Fernandez, Jr., having filed a motion for rehearing, certification and rehearing en banc in the above-styled case, upon consideration, it is

ORDERED that the motion is hereby denied.

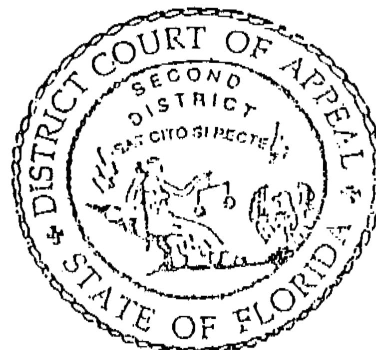
I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.



WILLIAM A. HADDAD, CLERK

c: Simson Unterberger, Esq.
Robert S. Hobbs, Esq.
Richard Ake

/JM



IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF THE STATE OF FLORIDA

SUSAN E. FERNANDEZ, GEORGE MURPHY, MICHAEL A. MURPHY, DAVID MURPHY, ANN NASH, LAURIE SOMESON, JANE BOURKARD, ESTATE OF SUSAN E. FERNANDEZ, deceased, and E. RICHARD BOURKARD, JR., Personal Representative of the ESTATE OF SUSAN E. FERNANDEZ,

CASE NO.: 93-00802

Appellants

v.

LAWRENCE FERNANDEZ, JR.,

Appellee/Husband.

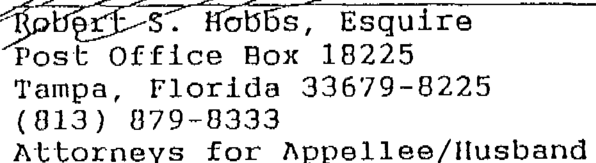
______________________________/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that LAWRENCE FERNANDEZ, JR., Appellee/Husband, invokes discretionary jurisdiction of the supreme court to review the decision of this court rendered March 2, 1994. The decision expressly and directly conflicts with a decision of another district court of appeal.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Simson Unterberger, Esquire, Suite 707, One Mack Center, 501 East Kennedy Blvd., Tampa, Florida 33602; William A. Haddad, Clerk of Court, Second District Court of Appeal, P.O. Box 327, Lakeland, Florida 33802-0327, and Richard L. Ake, Clerk of Circuit Court, Hillsborough County, 419 Pierce Street, Tampa, Florida 33602 this 11th day of March, 1994.

HARRY M. HOBBS, P.A.



By: ______________________

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Post Office Box 18225
Tampa, Florida 33679-8225
(813) 879-8333
Attorneys for Appellee/Husband

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92-513

Supreme Court of Florida

WEDNESDAY, JUNE 15, 1994

LAWRENCE FERNANDEZ, JR.,	**	
	**	
Petitioner,	**	ORDER ACCEPTING JURISDICTION AND DISPENSING WITH ORAL ARGUMENT
v.	**	
	**	
SUSAN E. FERNANDEZ ET AL.,	**	CASE NO. 83,392
	**	DISTRICT COURT OF APPEAL, 2ND DISTRICT NO. 93-00802
Respondents.	**	
	**	
	**	

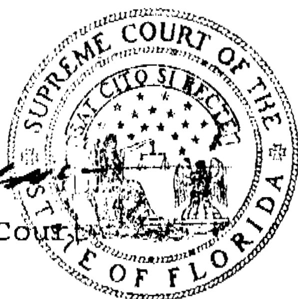
The Court has accepted jurisdiction and dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Petitioner's brief on the merits shall be served on or before July 11, 1994; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs. Please send to the Court, either in Word Perfect format or ASCII text format, a 3-1/2 inch diskette of the briefs filed in this case. This procedure is voluntary.

The Clerk of the District Court of Appeal, Second District, shall file the original record on or before August 15, 1994.

GRIMES, C.J., OVERTON, SHAW and KOGAN, JJ., concur
HARDING, J. and MCDONALD, Senior Justice, dissent

A True Copy
TEST:



Sid J. White
Clerk, Supreme Court

H
cc: Hon. William A. Haddad, Clerk
Mr. Harry M. Hobbs
Mr. Simson Uterberger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Supplemental Appendix to Petitioner's Initial Brief on the Merits has been furnished by United States Mail to SIMSON UNTERBERGER, ESQUIRE, One Mack Center, Suite 707, 501 East Kennedy Boulevard, Tampa, Florida 33602-4933 this 12th day of July, 1994.

HARRY M. HOBBS, P.A.

By: ______________________________

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Post Office Box 18225
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