IN THE SUPREME COURT OF FLORIDA

DOCKET NO. 85,990
(DCA No. 93-3025)

LUCILLE NASH,

Petitioner,

vs.

WELLS FARGO GUARD SERVICES, INC. OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

On Notice to Invoke Discretionary Jurisdiction
From The District Court of Appeal of Florida,
Third District

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By: STEVEN E. STARK
Florida Bar No. 516864

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TABLE OF AUTHORITIES

Other Authorities:

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STATEMENT OF CASE AND FACTS

Nash's Statement of Case and Facts is improper and reflects facts beyond the four corners of the decision of the First District Court of Appeal, which are the only facts relevant to this Court's determination of whether or not to exercise its discretionary conflict jurisdiction. Thus, her references to matters within the appendix, with the exception of the decision itself, are improper and should not be considered by this Court. Under the circumstances, notwithstanding Respondent's opposition to some of the positions taken, they will not respond to these allegations. Respondents will not restate the facts of this case, but rather will rely upon and refer to the decision of the First District Court of Appeal, which is attached hereto in Respondent's Appendix. [1]

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[1] Thus, Petitioner's representations regarding the Complaint, Answer, Pre-Trial Order, trial proceedings, jury instructions are irrelevant to the issues before this Court.

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeal, which reversed the verdict rendered in favor of the Plaintiff and remanded the action for a new trial, does not directly or expressly conflict with the decision of this Court or any other district court of appeal on the same question of law. Rather, it cites to and correctly follows this Court's decision in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1983). The District Court neither cited any of the cases that Nash asserts are in conflict nor did it express a rule of law different than any other decision that she cited. Thus, there is no "direct and express" conflict upon which this Court can exercise its discretion to accept jurisdiction herein. Indeed, even were this Court to have such discretion, this issue, which Petitioner never raised in the trial court, was fully and adequately addressed by the court below.

With respect to the second grounds for this Court's conflict jurisdiction, there is also no conflict between the decision of the First District and the other decision cited. The First District reversed and remanded the action for a new trial incorporating a proper verdict form. It is up to the appellate court, which is the court of last resort absent a valid jurisdictional basis in this Court, to review and determine what relief is appropriate under given circumstances. After analyzing the issues and errors alleged (there were additional errors alleged beyond the Fabre issue) the First District determined

that a new trial was required. It expressed no rule of law contrary to Third District decisions. Further, Petitioner never raised this issue in her brief or in her motion for rehearing. Under the circumstances, this Court should not exercise jurisdiction herein.

ARGUMENT

I. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL OR THIS COURT ON THE SAME QUESTION OF LAW AND THIS COURT SHOULD REFUSE TO EXERCISE JURISDICTION HEREIN.

Other than a brief assertion of the applicable constitutional and rule provisions, Petitioner provides this Court with no valid basis upon which this Court's jurisdiction would arise under its discretionary conflict review powers. In order for this Court to have "direct conflict" it must be based upon facts contained "within the four corners of the decisions allegedly in conflict." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Further, although the district court decision does not have to specifically identify a conflict with other appellate decisions in order to be "express", it must at a minimum discuss and apply legal principles that are in conflict with other decisions for there to be a sufficient basis for review. See Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981).

Applying these concepts to the Petitioner's jurisdictional brief and in light of the decision below, she has not only failed to show a sufficient basis for this Court's jurisdiction, but indeed has requested this Court to exercise jurisdiction based upon outmoded concepts of the "record proper" by asking this Court to review, through improper inclusion to her appendix, the purported "record" in the case and the "issues" presented, even though those issues were never presented by the parties in their

briefs and was not reflected in the decision of the district court of appeal.

The four corner of the district court decision, which expresses the only facts and conclusions relevant to the jurisdictional issue before this Court, does not make any direct and express finding regarding the issue that is allegedly in conflict with the multitude of decisions that Nash cites. Under the circumstances, rather than addressing the merit of this matter, which were addressed completely in the briefs and on the motions for rehearing below, Respondents merely suggest that under this Court's limited jurisdictional powers and pursuant to the requirements for jurisdictional briefs, Petitioner's brief does not raise a sufficient jurisdictional question.[2] Fla.R.App.P. 9.030(2)(A)(iv); Fla.R.Civ.P. 9.120(d).

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[2] Indeed, Petitioner's entire appendix and jurisdictional statement of facts and argument should be stricken by this Court. Nevertheless, rather than striking the brief, it would simply be appropriate for this Court to decline to exercise its jurisdiction.

II. THE DISTRICT COURT'S DECISION DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE ISSUE OF THE GRANTING OF A NEW TRIAL.

A second alleged basis for this Court's conflict jurisdiction is that the decision of the First District Court of Appeal conflicts with decisions of the Third District Court of Appeal in American Aerial Lift v. Perez, 629 So. 2d 169 (Fla. 3d DCA 1993); Schindler Corp. v. Ross, 625 So. 2d 94, 96 (Fla. 3d DCA 1993); and Schindler Elevator Corp. v. Viera, 644 So. 2d 563, 564 (Fla. 3d DCA 1994). These cases deal with the issue of the scope of retrial where the sole issue for reversal is the concepts set forth in Fabre. In the instant action, the district court did not reference these cases, address the issue, or express a conflicting rule of law. Rather, it merely reversed and remanded the action for a new trial. Under the circumstances, no direct and express or even "implied" conflict exists. In addition, despite her assertion that this issue is now in conflict, Nash never raised this issue in the district court within her motion for rehearing (attached Exhibit "B"). As a result, she should be precluded from raising that issue before this Court under its conflict review powers, because the allegedly conflicting issues was never an issue in this appeal. Based upon the errors alleged by Respondents below, the district court was well within its power in ruling as it did and remanding the action for a new trial and there is no jurisdictional or jurisprudential basis for this Court to engage in further review.

CONCLUSION

WHEREFORE, the Respondents respectfully request that this Court deny Petitioner's request that this Court exercise its discretionary jurisdiction.

Respectfully submitted,

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(305) 789-9200

By _____
STEVEN E. STARK
Florida Bar No. 516864

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of August, 1995, to: HOWARD C. COKER, ESQ., COKER, MYERS, SCHICKEL, COOPER & SORENSON, P.A., 136 East Bay Street, Jacksonville, Florida 32202 and CORINNE L. HELLER, ESQ., COKER, MYERS, SCHICKEL, COOPER & SORENSON, P.A., 136 East Bay Street, Jacksonville, Florida 32202.

_____
STEVEN E. STARK

SES.35620.04.8D

IN THE SUPREME COURT OF FLODIDA

DOCKET NO. 85-990
(DCA NO. 93-3025)

LUCILLE NASH,

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-vs-

WELLS FARGO GUARD SERVICES, INC. OF FLORIDA,

Respondent.
_____/

INDEX TO APPENDIX

A. Opinion of the First District Court of Appeal dated April 4, 1995.

B. Appellee's Motion for Rehearing/Clarification, Motion for Rehearing En Banc, Motion for Certification Due to Conflict, and Motion for Certification as a Matter of Great Public Importance dated April 14, 1995.

Appendix A

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 93-3025

WELLS FARGO GUARD SERVICES INC. OF FLORIDA, a Florida corporation,

Appellant,

v.

LUCILLE NASH,

Appellee.

_____/

Opinion filed April 4, 1995.

An appeal from the Circuit Court for Duval County. Lawrence D. Fay, Judge.

Steven E. Stark of Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., Miami, for Appellant.

Corinne L. Heller of Coker, Myers, Schickel, Cooper & Sorenson, P.A., Jacksonville, for Appellee.

LAWRENCE, J.

We have for review a judgment awarding damages based on the negligence of Wells Fargo Guard Services, Incorporated (Wells Fargo) in its undertaking to provide security services on the premises of a parking garage. We reverse.

Lucille Nash (Nash) was robbed and pistol-whipped in the parking garage of Methodist Hospital in Jacksonville, on January 7, 1992. Wells Fargo supplied security services pursuant to a contract with the hospital. The jury returned a verdict for Nash in the amount of $556,000; the verdict included non-economic damages of $365,000.

The trial judge denied Fargo's reserved motion for directed verdict, which was based on an alleged lack of duty to Nash. We agree that Wells Fargo owed a duty to Nash, and that the motion for directed verdict was properly denied. See Kowkabany v. Home Depot, Inc., 606 So. 2d 716 (Fla. 1st DCA 1992); Restatement (Second) of Torts § 324A & cmt. c (1964).

We must reverse however, based on the verdict form used at the trial. Wells Fargo moved to include the hospital on the verdict form, despite that Nash had not sued the hospital. Wells Fargo based its motion on Messmer v. Teacher's Ins. Co., 588 So. 2d 610 (Fla. 5th DCA 1991), review denied, 598 So. 2d 77 (Fla. 1992), then pending for review before the Florida Supreme Court based on conflict with Fabre v. Marin, 597 So. 2d 883 (Fla. 3d DCA 1992). The trial judge denied Wells Fargo's motion, relying on the third district's disposition of the issue in Fabre.

The supreme court, in its conflict review of the two cases, quashed the third district's Fabre decision, and approved the fifth district's Messmer decision. Fabre v. Marin, 623 So. 2d

1182 (Fla. 1993). The supreme court held that, with respect to non-economic damages, section 768.81(3), Florida Statutes (Supp. 1988),[1] requires that a party's percentage of fault must be determined based on "all . . . entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants." Fabre, 623 So. 2d at 1185; see also Allied-Signal, Inc. v. Fox, 623 So. 2d 1180 (Fla. 1993) (holding that, with respect to non-economic damages, section 768.81(3) requires that an employer's comparative fault must be considered by the jury in a negligence suit by an employee against a manufacturer, even though the employer is immune from liability under the workers' compensation law).

We therefore must reverse and remand for a new trial incorporating a proper verdict form.

It is so ordered.

JOANOS and BENTON, JJ., CONCUR.

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[1] The statute in the instant case is the same as the one examined by the supreme court in Fabre. Ch. 91-110, § 38, Laws of Fla.

Appendix B

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CASE NO. 93-03025

WELLS FARGO GUARD SERVICE INC. OF FLORIDA, a Florida corporation,

Defendant/Appellant

vs.

LUCILLE NASH,

Plaintiff/Appellee.
_____/

APPELLEE'S MOTION FOR REHEARING/CLARIFICATION, MOTION FOR REHEARING EN BANC, MOTION FOR CERTIFICATION DUE TO CONFLICT, AND MOTION FOR CERTIFICATION AS A MATTER OF GREAT PUBLIC IMPORTANCE

The Appellee, LUCILLE NASH, by and through undersigned counsel, respectfully requests that this Court grant a Motion for Rehearing, a Motion for Rehearing En Banc, A Motion for Certification due to conflict and/or a Motion for Certification as a matter of great public importance. The Order in this case of April 4, 1995 (attached as "EXH. 1") suggests that there was a misunderstanding of the applicable facts and/or a misapplication of the law as it applies to assertion and waiver of the affirmative defense of third party negligence. In addition, the present decision of April 4, 1995, is in direct conflict with prior decisions of this Court and those of other districts within Florida. Appellee does not disagree with the law as enunciated in this Court's Order. However, Appellee suggests that the central issues associated with whether a third-party should have been placed on the verdict form in this particular case, were never addressed by this Court, although raised by Appellee in the Answer

Brief. As grounds for these Motions for Rehearing and/or Certification, Appellee offers the following support.

FACTUAL BACKGROUND

On February 20, 1992, Appellee/Plaintiff, Nash, filed a Complaint in the Duval County Circuit Court alleging negligence against Appellant/Defendant, Wells Fargo. (R. 1-4) Wells Fargo answered Plaintiff's Complaint on March 18, 1992. (R. 14-15) That Answer asserted the following positions:

> A. It (Wells Fargo) is not guilty.
> B. The incident was an unforeseeable event caused by a supervening, intervening, criminal act and is not the responsibility of this Defendant.
> C. This Defendant's rights and duties are prescribed by a written contract and, under the terms thereof, this Defendant owes no duty to the Plaintiff herein.
> D. Plaintiff herein is at best, an incidental beneficiary and entitled to no contract duties.
> E. This defendant owed no common law duties to the Plaintiff herein to prevent the occurrence and/or apprehend the assailant and, therefore, the complaint fails to state a cause of action against this defendant upon which relief can be based.

There was no assertion in the Answer of either (a) Plaintiff's contributory negligence or (b) the negligence of any third parties other than the intentional action of the assailant.

Pursuant to the Trial Court's Order of November 19, 1992, setting the cause for trial, the parties were required to file a pre-trial stipulation which contained "...(c) a concise statement of those issues of fact which remain to be litigated;" and "(d) any proposed amendments to the pleadings..." (R. 133-136) A Pre-trial Stipulation was filed jointly by both parties in accordance with

that Order. This Stipulation and the issues for trial were discussed at the Pre-trial Conference with the trial judge on May 6, 1993. The Order on that Pre-trial Conference (R. 271-275) identified the following issues to be tried by jury:

11. a. Did the defendant owe any duty to plaintiff?
    b. Was the defendant negligent in the performance of its duties? if so, did that negligence proximately cause injury and damages to the plaintiff?
    c. Was the plaintiff negligent, and if so, did her negligence proximately contribute to her injury and damages?
    d. What are plaintiff's lawful damages.

Additionally, that Order specified that "1. [t]here are no amendments or corrections to be made to the pleadings." After a discussion with Wells Fargo's counsel, on the first day of trial, both parties informed the judge that the contributory negligence of Plaintiff should not be an issue for submission.

> Mr. Higginbotham: In the pretrial stip, we inadvertently, being the plaintiff, in preparation of the pretrial stip, included as an issue, plaintiff's comparative negligence. That issue was never pled by the defendant, and Mr. Murray agrees, as I believe that it is not an issue so should not be in the case. (emphasis added)
>
> Mr. Murray: I agree with that, Judge. (T.5)

After that announcement, the case proceeded to trial on the remaining issues. The negligence of any third parties was still not raised by Wells Fargo as an issue in the case. The case was tried to a jury during the week of May 17, 1993, some year and three months after the filing of the Complaint.

During the course of the trial, Wells Fargo made multiple objections and representations to prevent certain arguments and

evidence which, in Wells Fargo's opinion, but not the opinion of the Plaintiff, would solely impact on the responsibility of the Methodist Hospital since Wells Fargo maintained that it owed no duty to Plaintiff.[1] Areas in the record which reflect this include the following:

1. Mr. Higginbotham:...This is a blowup of this sign as we enter the parking garage.

> Mr. Murray: If I may, Your Honor, it's Methodist Hospital's sign. They're not on trial here unless you prove we put that sign up. That's got nothing to do with the price of tea in China, and I think if it comes in, that is a highly prejudicial piece of evidence and there's absolutely no basis for bringing it in. (T. 77) (emphasis added)

From that point forward, Wells Fargo continued to argue that nothing that was done by Methodist should be admissible. (T. 77-87).

2. Regarding an evidentiary issue where Wells Fargo wanted to keep their own incident reports out of evidence, Wells Fargo's attorney stated:

> I mean, this is -- it doesn't go anywhere, Judge. It's just not -- this is all evidence that's directed against the owner or occupier of property. It has nothing to do with the claim against the contract guard service. (T. 134).

3. Later, while continuing to argue that Wells Fargo owed no

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[1]. This issue was also addressed in the appeal by Wells Fargo. This Court rejected Wells Fargo's claims of no duty and that part of this Court's Opinion is not at issue in this Motion.

duties to Ms. Nash, Wells Fargo's attorney stated:

> ...they're trying to strap Wells Fargo with a landowner's duty, you know, to try to truck in various incidents that have been reported in the building and say you should have had more security. That's a great argument made to Methodist Hospital if they were sitting here. (T. 146) (emphasis added).

This was followed by:

> Evidence of prior criminal activity is perfectly relevant if you've got a landowner. We don't have a landowner, and that's not our position. (T. 163) (emphasis added)

4. The next day, when an issue regarding documents prepared by Methodist was discussed, Wells Fargo's attorney stated and objection.

> It's a relevance objection...It's their own report of their own problems that they prepare for themselves and generate to their internal committee...I don't know what the relevancy is since you're suing Wells Fargo. (T. 198-199)

The Court prohibited introduction of any document created by Methodist based upon Wells Fargo's objection. (T. 203)

5. Later in the trial, Wells Fargo objected to questioning Methodist professionals about what information Wells Fargo had given to them. Wells Fargo suggested that the information was irrelevant to the issues. The Court sustained the objection and Plaintiff's attorneys were not allowed to inquire into the level of information supplied by Wells Fargo to Methodist. (T. 341-344).

6. When Plaintiff was on direct and testifying about the incident and events that occurred thereafter, Wells Fargo's

attorney, objecting to a line of questioning stated:

> Judge, I don't really care, why do we care in this trial what representations are bad that Methodist Hospital made? (T. 425) (emphasis added)

After the evidence was closed and both parties had rested, Wells Fargo, for the first time, raised the issue of Methodist being on the verdict form. However, Wells Fargo did not (a) timely raise the issue or (b) present any testimony regarding Methodist's negligence. Additionally, Wells Fargo requested no jury instruction on the issue of Methodist's negligence.

> Court: ...The defendant's instructions are pretty much the same. Are there any special instructions?
> Mr. Murray: There are no additional instructions to what plaintiffs submitted.
>
> Court: ...Were there any other instructions of yours that I'm not giving that should have an objection registered for the failure to give?
> Mr. Murray: No, sir. (T. 626)

This exchange occurred before any ruling on whether Methodist should be included on the verdict form.

Finally, during Wells Fargo's final argument, they never once asserted that the incident was the fault of Methodist or that Methodist was involved in any way. (T. 650-670). The argument was not made and the jury found Wells Fargo negligent.

In the appeal that followed, Wells Fargo asserted that the failure to include Methodist on the verdict form was reversible error. Nash's attorneys responded in the Answer Brief that the issue of Methodist's alleged negligence was (a) an untimely raised

affirmative defense and (b) unsupported by any evidence at trial which would have allowed for apportionment.

In the opinion of April 4, 1995, this Court reversed the final judgment in favor of Ms. Nash on the basis that the Trial Court made a wrong selection between the Messmer v. Teacher's Ins. Co., 588 So. 2d 610 (Fla. 5th DCA 1991) case and the case of Fabre v. Marin, 597 So. 2d 883 (Fla. 3rd DCA 1992).

MOTION FOR REHEARING/CLARIFICATION

While the decision of this Honorable Court correctly pointed out that the Trial Court had sided with the wrong case authority, the Appellee, Nash, had already conceded that issue in the Answer Brief. The issue which remained, and was not addressed by this Court, is whether Wells Fargo's failure to (a) raise the affirmative defense in its Answer (b) raise the issue by amendment to the pleadings (c) raise the affirmative defense or alert the Trial Court to its existence at the time of pre-trial (d) request jury instructions on the affirmative defense or (e) reveal the existence of the affirmative defense until both parties had rested their cases, acted as a waiver of the affirmative defense. Additionally, whether Wells Fargo's continual representation to the Trial Court that Methodist's negligence or participation were not issues, and indeed requiring that many pieces of evidence be kept out of evidence because of that stance, acted as a waiver of the affirmative defense remains as an issue to be addressed.

According to W.R. Grace & Conn. v. Daugherty, 636 So. 2d 746 (Fla. 2nd DCA 1994), the negligence of third parties is an

affirmative defense which requires affirmative proof. Defendants are required to give proper notice of affirmative defenses in their responsive pleadings. Pursuant to Rule 1.140(h), Fla. R. Civ. P.:

> A party waives all defenses and objections that the party does not present either by motion...or, if the party has made no motion, in a responsive pleading... (emphasis added)

As the alleged negligence of Methodist constitutes an affirmative defense, it was waived when Wells Fargo failed to mention it until after both parties rested. Since this Honorable Court did not address the issues of waiver and estoppel to untimely raise an affirmative defense in the Opinion rendered in this case, the Appellee respectfully moves that rehearing of these issues be granted.

MOTION FOR REHEARING EN BANC

In addition to those reasons stated above, Appellee would ask this Honorable Court to review this case en banc. Appellee's counsel expresses a belief based on reasoned and studied professional judgment, that the panel decision is of special importance and consideration by the panel is necessary in an effort to maintain uniformity of decisions within the First District.

In State v. Pepper, 155 So. 2d 383 (Fla 1st DCA 1963), the petitioner appealed a decision regarding a writ of mandamus which was issued and then quashed. Prior to trial, the parties met with the court for a pre-trial conference. From that conference, the court drafted a pre-trial order delineating the issues to be tried by both parties. After trial, the petitioner argued that error occurred when he was prevented from presenting evidence on issues

outside of the pre-trial order. The First District stated:

> The foregoing points on appeal call for consideration of issues outside the pleadings and foreign to the issues which the parties agreed should form the basis of the trial as reflected by the pre-trial conference order.
>
> Having agreed at the pre-trial conference that the only issue to be tried was whether appellant passed the examination taken by him ....appellant precluded himself from injecting into the trial any separate or different issues other than those agreed upon at the pretrial conference. The trial court was therefore correct in refusing to consider at the trial any new issues sought to be raised by appellant, and correctly excluded evidence offered for the purpose of proving issues different from those to which the parties agreed the trial would be confined.

The effect of this Court's Order in the present matter is to nullify the dictates of Pepper. Additionally, the Order nullifies the requirements of Rule 1.200(d), Fla. R. Civ. P., which states that:

> The court shall make an order reciting the action taken at a conference and any stipulations made. The order shall control the subsequent course of action unless modified to prevent injustice.

In order to give effect to the applicable Rules regarding waiver of affirmative defenses (1.140(h), Fla. R. Civ. P.) and mandates of pre-trial orders (1.200(d), Fla. R. Civ. P.), as well as the prior case law from this District supporting these Rules, Appellee moves that this cause be reconsidered en banc to address those issues raised above.

MOTION FOR CERTIFICATION AS A MATTER IN CONFLICT

As previously discussed, the Fifth District has held in W.R.

Grace, 636 So. 2d 746, that the negligence of third parties is an affirmative defense that must be properly pursued and proved by Defendant. Several additional cases in the Third and Fourth Districts discuss a defendant's burden of pleading and proving an affirmative defense. Bradford Builders, Inc. v. Dept. of Water & Sewers, 142 So. 2d 137 (Fla. 3rd DCA 1962), involved an action for breach of contract. At some point in the trial, the entire contract was placed into evidence. The defendant then moved for a directed verdict stating that the terms of the contract, in evidence, required performance within a specified time limit and plaintiff had not put on any evidence of compliance. The trial court granted the directed verdict. The Third District reversed. The contract defense was an affirmative defense sought by the defendant. Late performance was not pled by defendant. The Court stated:

> An available affirmative defense, if not asserted, is considered waived under 1.11(h), F.R.C.P., 30 F.S.A., unless, though not pleaded, the issue is tried as provided for in rule 1.15, F.R.C.P.. Id. at 138.

In the present case, Wells Fargo neither pled the issue, nor tried the issue of Methodist's negligence. In fact, Wells Fargo sought to, and was successful at blocking any evidence which mentioned Methodist at trial. Defendant's trial tactics did not evidence a true intent to ever assert or prove the affirmative defense. When affirmative defenses are abandoned in the pleadings and not raised during a scheduled pre-trial conference, they are waived and evidence which would support the unpled affirmative defense may be properly excluded. Sonnenblick-Goldman v. Feldman,

266 So. 2d 48 (Fla. 3rd DCA 1972). When affirmative defenses are abandoned in the pleadings, and not raised until the time of trial or thereafter, they are waived and the defendants are estopped from asserting them at trial. Peninsular Life Ins. Co. v. Hanratty, 281 So. 2d 609 (Fla. 3rd DCA 1973). Since Wells Fargo's pleading, pre-trial and trial actions evidenced a waiver of the affirmative defense, there should be no new trial ordered based upon a waived issue.

The Fourth District case of Kersey v. City of Riviera Beach, 337 So. 2d 995 (Fla. 4th DCA 1976), also conflicts with the decision of this Court. In that case, the appellant sought reversal of a trial court decision after the trial court had admitted evidence on an affirmative defense which had never been before pled. The Fourth District reversed the trial court and agreed with the appellant. "[I]t has long been held in Florida that affirmative defenses must be pleaded or they are considered waived." Id. at 997. (citations omitted). The only exception to that rule, as recognized by the Fourth District, is when the issue is tried by consent of the other party.

In the present case, the issue of Methodist's negligence was never pled. In addition, it was never tried as Wells Fargo blocked most mentions of Methodist and failed to put on any affirmative proof of their alleged negligence.

Finally, it would have been error for the trial court to permit evidence of an unpled affirmative defense during the course of the trial. In Meyers v. Garmire, 324 So. 2d 134 (Fla. 3rd DCA

1975), the Third District acknowledged that a trial court has broad discretion to modify a pre-trial order regarding issues to be presented at trial. However, the court also found that it was prejudicial and reversible error to allow presentation of evidence on an affirmative defense that plaintiff had not been apprised of, nor had ample time to prepare for.

In the present matter, not only did Wells Fargo block evidence regarding Methodist and fail to present any affirmative proof, it would have been reversible, prejudicial error of the trial court to have allowed the trial of this issue.

The present decision of this Court is in direct conflict with all of those decisions discussed above. In effect, this Court's decision permits a defendant to intentionally omit an available affirmative defense during the pendency of the litigation, intentionally omit it from the pre-trial order of the trial court and, without amendment of the pleadings nor proof to a jury, assert it after the close of all evidence at trial. This would essentially condone trial by ambush. This practice would be in clear conflict with decisions of every district and the goals of the Florida Rules of Civil Procedure to have an orderly trial, not trial by ambush and surprise.

MOTION FOR CERTIFICATION AS A MATTER OF GREAT PUBLIC IMPORTANCE

As the issues surrounding the use of non-parties on the verdict form is in its relatively early stages, this issue is bound to resurface. It is an issue of great public importance as the

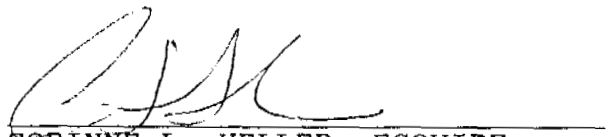
determination of when the issue must be raised and the extent to which it requires affirmative proof has not been squarely addressed by the Florida Supreme Court. Since there are a multitude of pending cases on the issue and there is a high likelihood of inconsistant determinations by the trial courts and District Courts, the determination needs to be made by the Supreme Court as to when the affirmative defense has to be raised, when it should be deemed waived and to what extent the defense requires affirmative proof by the defendant asserting it.

WHEREFORE, Appellee, Nash, requests this Honorable Court to grant rehearing in this case and/or certify the issues discussed above to the Florida Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Steven E. Stark, Esquire, Courthouse Center, 11th Floor, 175 N.W. First Avenue, Miami, Florida 33128-1835, by U.S. Mail this 12th day of April, 1995.

COKER, MYERS, SCHICKEL,
COOPER & SORENSON, P.A.



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