OA 6-5-97

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,311
3d DCA CASE NO. 94-2166

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,

Plaintiff/Petitioner,

v.

SECURITY BANK, N.A.,

Defendant/Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF

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INTRODUCTION

The Respondent, SECURITY BANK, N.A., was the Garnishee below. The Petitioner, BELLSOUTH ADVERTISING & PUBLISHING CORPORATION, was the Plaintiff below. Both parties shall be referred to as they appeared in the lower court. References designated by the symbol "A" refer to Petitioner's Appendix attached to Petitioner's Brief on Jurisdiction. The Third District Court of Appeal is herein referred to as the "Court of Appeal." References to that court's written opinion are to the opinion included in Petitioner's Appendix and are designated by an "A" and a page number.

STATEMENT OF THE CASE AND FACTS

BellSouth Advertising ("BellSouth") sued Garfield & Associates ("Garfield") and a judgment was entered in BellSouth's favor for $36,576.00. (Al), On April 13, 1994, BellSouth served a writ of garnishment on Security Bank ("the Bank") to ascertain what assets the Bank held on behalf of the debtor, Garfield. (A2-A4). The writ nowhere stated that the Bank's own property was in jeopardy or that the Bank could be held liable for the full amount of the judgment BellSouth had obtained against Garfield if the Bank failed to answer. (A2-A3). The Bank mailed the writ to its counsel, but it was never received.

The Bank did not timely answer the writ. Without notice to the Bank, a default judgment was entered in the sum of $36,576.00. (AS). In the absence of a hearing on the issue of damages, fmal judgment was entered against the Bank for $36,576.00. Id. Immediately upon being served with the judgment, the Bank moved to set it aside on the grounds that the Bank's failure to timely answer was based on excusable neglect and that the Bank held only $374.21 belonging to Garfield. (A6). The trial court denied the Bank's motion to set aside the final judgment. (A9).

The Bank appealed the final judgment of the trial court to the Third District Court of Appeal. (A10). The Court of Appeal held that the trial court did not err in failing to set aside the default against the Bank. (Al 5-1 7). However, the Court of Appeal reversed the trial court's entry of final judgment against the Bank for the sum of $36,576.00. (A17). The Court of Appeal held that Florida law does not authorize imposing damages against the Bank for a sum greater than the amount the Bank owed to Garfield. (A 18-26). The Court of Appeal also held that the Bank was entitled to notice and a hearing on damages before final judgment could be entered. (A2 1-23).

BellSouth filed a notice to invoke discretionary jurisdiction. (A42). After briefs on jurisdiction were filed by both parties, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

This Court should affirm the Third District Court of Appeal's decision that the trial court erred by entering final judgment against the Bank for the full amount of BellSouth's judgment against Garfield. The principle of subrogation defines the judgment creditor's rights. That principle and the express provisions of the garnishment statute limited the amount BellSouth was entitled to recover from the Bank. Service of the writ of garnishment made the Bank liable only for the value of any property it held on Garfield's behalf. By having the writ served, BellSouth stepped into Garfield's shoes and could assert against the Bank only those rights that Garfield could have asserted.

Even if some provision of the garnishment statute could be read to impose liability on the Bank for the full amount of the underlying judgment, the Bank was entitled to a hearing before final judgment was entered against it. The Florida Rules of Civil Procedure governing default judgments require a hearing when the damages at stake are unliquidated. In this case, the damages were unliquidated. The fact that BellSouth had obtained judgment against Garfield did not fix the damages with respect to the Bank. Therefore, the Bank was entitled to a hearing on the issue of damages.

Assuming again that the garnishment statute authorized the trial court to enter judgment against the Bank for the full amount of BellSouth's judgment against Garfield, the statute cannot be enforced in a manner that deprives a garnishee of due process. Due process required notice to

the Bank that its failure to answer the writ of garnishment would place the Bank's own property in jeopardy. The Bank received no notice by the writ or any other means that its own property was in peril if it failed to answer. The trial court therefore entered judgment against a garnishee in a manner that deprived it of due process.

The Court of Appeal had jurisdiction to consider the extent of the Bank's liability to BellSouth under Florida's garnishment statute. The matter was appealed from a final judgment. The Bank preserved the issue for appeal by raising it at the trial court level. Even if it had not done so, the Court of Appeal had jurisdiction to consider the issue of damages because the trial court committed fundamental error

The Court of Appeal properly awarded the Bank attorneys' fees.

ARGUMENT

I. FLORIDA'S GARNISHMENT STATUTE DOES NOT AUTHORIZE IMPOSING LIABILITY ON THE BANK FOR THE FULL AMOUNT OF THE UNDERLYING JUDGMENT.

A. Because the principle of subrogation animates the garnishment statute, BellSouth was entitled to recover no more from the Bank than Garfield could have recovered had it sued for the same funds.

The principle animating garnishment is one of subrogation. See. e.g., Oper v. Air Control Products. Inc., 174 So.2d 561,563 (Fla. 3d DCA 1965), citing Pleasant Valley Farms v. Carl (Southern Bank and Trust), 106 So. 127 (Fla. 1925) (Garnishment is process whereby the creditor is subrogated to debtor's rights against garnishee, and, on service of the writ, plaintiff takes the place of defendant and is substituted for him in action against garnishee). Because the creditor is subrogated to the debtor's rights against the garnishee, the creditor cannot recover more from the

garnishee than the debtor could if it sued the garnishee for the same funds. See. e.g., Reaves v. Domestic Finance Co., 152 So. 718,720 (Fla. 1934), petition denied 156 So. 235; Seaboard Surety Co. v. Acme Wellpoint Corp., 156 So.2d 688,690 (Fla. 2d DCA 1963). Based on these well-established principles, the Court of Appeal properly concluded that the Bank was liable only in the amount of Garfield's funds that it had in its possession. (A18).

The garnishment statute embodies the principle of subrogation. Sections 77.0 1 through 77.28, Fla.Stat. (1973), govern the rights and liabilities of parries to a garnishment action and expressly limit the garnishee's liability. Section 77.01, Fla.Stat. (1973), establishes the right of garnishment. It permits a creditor to garnish "any debt due by defendant to by the third person and any tangible or intangible personal property in possession or control of a third person." Under this provision, the creditor may recover from the garnishee only that property the garnishee holds on the debtor's behalf. Section 77.06(1), Fla.Stat. (1973), similarly provides that service of the writ makes the garnishee liable only for those '"debts due by him to defendant for any tangible or intangible personal property of defendant in his possession or control . . ." This provision expressly limits the garnishee's liability. Other provisions do the same. For example, § 77.083, Fla.Stat. (1973), provides: "No judgment in excess of the amount remaining unpaid on the final judgment against the defendant or in excess of the amount of the liability of the garnishee to the defendant. whichever is less, shall be entered against the garnishee." (Emphasis added).

By its terms, the garnishment statute limits the garnishee's liability to the value of the judgment debtor's property the garnishee holds at the time the writ is served. These provisions embody the principle of subrogation. The garnishee is not to be placed in any worse condition

than if the debtor himself had brought suit upon the claim which is garnished. (A19), citing Howe v. Hyer, 17 So. 925,926 (Fla. 1895).

In interpreting the garnishment statute and determining the limits of the garnishee's liability, Florida courts have held without exception that the garnishee's liability cannot exceed the garnishee's liability to the judgment debtor. The Court of Appeal followed a century of Florida law in reaching its decision. Its decision should be affirmed. A careful analysis of the statute governing garnishment, an analysis of the Florida Rules of Civil Procedure governing default and due process considerations compel that result. As discussed below, there is no statutory basis for any other decision.

B. Section 77.081, Fla.Stat. (1973), does not apply to post-judgment garnishment and provides no authority for holding the bank liable for the full amount of the underlying judgment.

Garnishment is a purely statutory remedy and cannot be extended beyond statutory authority. McLeod v. Cooper, 88 F.2d 194 (1937) cert. denied 57 S.Ct. 938,301 U.S. 705, 81 L.Ed. 1359, rehearing denied 58 S.Ct. 5,302 U.S. 773, 82 L.Ed. 599; Scogin v. Scogin's Inc., 287 So.2d 712,713 (Fla. 2d DCA 1974); Seaboard Sur. Co. v. Acme Wellpoint Corp., 156 So.2d 570 (Fla. 1973). Provisions of the garnishment statute must be strictly adhered to. Florida Power & Light Co. v. Crabtree Const. Co.. Inc., 283 So.2d 570, 572 (Fla. 4th DCA 1973). Absent some express statutory authority, the limit of the garnishee's liability cannot be expanded beyond §§ 77.01 and 77.06, Fla.Stat. (1973).

Petitioner claims that § 77.081, Fla.Stat. (1973), authorized the trial court to hold the Bank liable for the full amount of the underlying judgment. Petitioner's entire argument rests on

its interpretation of § 77.081. Petitioner reads that section to apply to post-judgment garnishments, That reading, however, defies the plain language of § 77.081, Fla.Stat. (1973), itself and is at odds with that section's legislative history. Section 77.081, Fla.Stat. (1973), applies exclusively to pre-judgment garnishments.' It does not authorize final judgment against the Bank for the full amount of the garnishor's claim against the judgment debtor. The section must be read within the context of provisions expressly limiting the garnishee's liability and in light of the subrogation principle animating the garnishment statute.

i. Plain Language.

By its plain language, § 77.081, Fla.Stat. (1973), applies only to pre-judgment garnishments. The section provides:

> (I) If the garnishee fails to answer as required, a default shall be entered against him. (2) On entry of judgment for plaintiff, a final judgment shall be entered against the garnishee for the amount of plaintiffs claim with interest and costs. No final judgment against a garnishee shall be entered before the entry of, or in excess of, the final judgment against the original defendant with interests and costs. If the claim of the plaintiff is dismissed or judgment is entered against him the default against the garnishee shall be vacated and judgment for his costs entered.

The words, "on entry of judgment for plaintiff," in the first sentence of § 77.081(2), Fla.Stat. (1973), clearly contemplate that default occurs before judgment is entered. The second sentence prohibiting entry of a final judgment against the defaulting garnishee before judgment is entered against the defendant assumes that no final judgment has been entered against the defendant in the

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'Even Judge Jorgensen acknowledges in his dissent that it is "nowhere explicitly stated that section 77.081 which was part of the formerly separate pre-judgment interest provisions, is intended to now apply to post-judgment garnishment as well." (A34).

underlying case. Finally, the third sentence describes a pre-judgment claim by the plaintiff against the garnishee. It describes the effect of a dismissal of the plaintiff's claim or an unfavorable outcome to the plaintiff prior to the entry of judgment again the garnishee. These sentences can be understood only in the context of pre-j udgment garnishment.

To support its argument that § 77.081, Fla.Stat. (1973), applies to both pre- and post-judgment garnishment, Petitioner asks this Court to consider the statute's form, Petitioner asserts that when a particular provision of Chapter 77 applies exclusively to pre-judgment garnishment, the title to the provision so indicates. Petitioner argues that because the title to § 77.081, Fla.Stat. (1973), does not explicitly refer to "pre-judgment," the section applies to both pre- and post-judgment garnishment Considering the section's plain language, however, Petitioner's argument is unpersuasive. By its terms, § 77.081, Fla.Stat. (1973), applies exclusively to pre-judgment garnishment. There would therefore be no need to include the word "pre-judgment" in the section's title.

ii. Legislative History.

In addition to the plain language of § 77.08 1, Fla.Stat. (1973), legislative history establishes that it applies only to pre-judgment garnishments. Prior to its recodification in 1965, § 77.081 was part of the formerly separate pre-judgment interest provisions. See §§ 77.20, 77.21, Fla.Stat. (1965). The language of the old provision relating to pre-judgment default, § 77.20, Fla.Stat. (1965), sheds light on the purpose and meaning of its successor, $77.081, Fla.Stat. (1973). Section 77.20, Fla.Stat. (1965), provided:

> Default and final judgment may be rendered against the garnishee, as in cases of garnishment after judgment; and such judgment shall be for the amount claim by the sheriff; but no execution shall issue thereon or payment thereof be enforced until the plaintiff shall have recovered judgment against the defendant, and then only for the amount so recovered with costs.

Section 77.20, Fla.Stat. (1965), permitted entry of a default judgment against the garnishee prior to the resolution of the underlying suit. However, there could be no execution on the judgment until the defendant's liability to the plaintiff has been established. Section 77.20's final sentence limited the plaintiffs recovery from the garnishee. It spoke to the case where the garnishee holds property whose value exceeds the amount of the underlying judgment. In that circumstance, the most the judgment creditor could recover from the garnishee was the amount he could recover from the debtor. The word "only" conveyed the intention to limit the garnishee's liability in that circumstance. The principle of subrogation requires such a limitation on the creditor's recovery. The creditor's rights can never rise above the debtor's rights against the garnishee.

There is no reason to believe that the legislature intended to abandon the principle of subrogation in recodifying the garnishment statute. The principle is embodied in the section that creates the right of garnishment and in the section describing the effect of the writ. See §§ 77.01, 77.06, Fla.Stat. (1973). It was embodied in the earlier provisions discussed above dealing with pre-judgment garnishment. Section 77.081, Fla.Stat. (1973), combines those earlier provisions, Although § 77.08 1, Fla.Stat. (1973), may be inartfully drafted, it does not express a clear legislative intent to abandon the principle of subrogation animating the garnishment statute as a whole.

Further, basic tenets of statutory interpretation require that § 77.081, Fla.Stat. (1973), be read consistently with the provisions limiting the garnishee's liability and in a manner that gives meaning to the statute in its entirety. See Forsythe v. Longboat Key Beach Erosion Control District, 604 So.2d 452, 455 (Fla. 1992). A statute which would lead to an absurd or unreasonable result should be avoided. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). Reading the statute in its entirety and in light of the legislative history of § 77.081, even after the garnishee's default, the garnishee's liability cannot exceed the value of the property the garnishee holds on the debtor's behalf.

iii. **Florida Case Law.**

Petitioner asserts that the First, Second and Fourth Districts have interpreted § 77.08 1, Fla.Stat. (1973), to apply to post-judgment garnishments. See Petitioner's Initial Brief on the Merits, 9, citing International Travel Card. Inc. v. R.C. Haslet Inc., 42 1 So.2d 215, 216-17 (Fla. 1 st DCA 1982); Sentry Indemnity Co. v. Hendricks Enterprises, 371 So.2d 115 (Fla. 4th DCA 1979); Hauser v. Dr. Chatelier's Plant Food Co. Inc., 350 So.2d 548 (Fla. 2d DCA 1977). Petitioner's assertion mischaracterizes existing case law. The three cases Petitioner cites merely touch on § 77.08 1. They do not discuss its application in any detail or rely on it. Additionally, Hauser supports the Court of Appeal's decision in this case.

Sentry. supra., involved a claim for liquidated damages and spoke to the trial court's error in entering judgment in excess of the liquidated damages specified in the writ. Sentry only mentions § 77.081, Fla.Stat. (1973), and does not apply or interpret it. In that case the writ specifically identified the amount to be garnished. Sentry at 116. The case now before

this Court, Sentry involved a case in which the damages sought were liquidated. Id. The amount to be garnished was less than the underlying judgment and exactly the amount held by the garnishee. Id.

International Travel Card makes only passing reference to § 77.081, Fla.Stat. (1973). The case addresses whether a judgment debtor's motion to dissolve a post-judgment writ of garnishment was timely. It does not address the extent of the garnishee's liability.

Hauser supra, only mentions and does not apply or interpret §77.08 1, Fla. Stat. (1973). More important, Hauser supports Hauser Bank's position in this case. Hauser was used to sustain judgment against a garnishee for the full amount of the underlying judgment. Hauser at 549, 550. Reading § 77.081, Fla.Stat. (1973), in the context of Florida's garnishment statute as a whole and in light of Rule 1.500, Fla.R.Civ.P., the court held that final judgment could not be entered against the garnishee without notice to the garnishee and a hearing on the issue of damages. Id. at 550.

These cases simply do not support Petitioner's position. None reject the basic principle that the creditor is subrogated to the debtor's rights against the garnishee. In Hauser, the court adhered to that principle. The Hauser court held that, absent evidence concerning the existence and amount of any debt owed by the garnishee to the judgment debtors, there was no basis for a judgment against the garnishee. Id. at 549. The test for determining the existence and extent of the garnishee's liability to the judgment creditor is whether and to what extent the garnishee is liable to the debtor. Id.

There is no authority in these three cases or in any other case decided by a Florida court

for Petitioner's argument that judgment could be entered against the Bank for a sum greater than any debt the Bank owed to Garfield. In the absence of such authority, this Court should uphold the Court of Appeal's decision and refuse to reverse a century of Florida law.

II. FLORIDA RULES OF CIVIL PROCEDURE REQUIRED A HEARING ON THE ISSUE OF DAMAGES BECAUSE THE DAMAGES BELLSOUTH SOUGHT TO IMPOSE ON THE BANK WERE UNLIQUIDATED.

Even if § 77.08 1, Fla. Stat. (1973), is construed to impose liability on a garnishee for the full amount of the underlying judgment, the provision must be enforced in light of the Florida Rules of Civil Procedure, Under those Rules and the cases interpreting them, the Bank was entitled to a hearing on the issue of damages.

Under Rule 1.500, Fla.R.Civ.P., a default admits the plaintiffs entitlement to liquidated but not unliquidated damages. Bowman v. Kinaland Development, Inc., 432 So.2d 660 (Fla. 5th DCA 1983). In addition, Rule 1.440(c), Fla.R.Civ.P., provides that "[i]n actions in which the damages are not liquidated, the order setting an action for trial shall be served on the parties who are in default in accordance with rule 1.080(a)." Section 77.081, Fla.Stat. (1973), must be read in light of the Rules. See Hauser v. Dr. Chatelier's Plant Food Co.. Inc., 350 So.2d 548, 550 (Fla. 2d DCA 1977) (Section 77.081 must be read in pari materia with Rule 1.500). If the Rules and the statute conflict, the statute must defer to the rule on a procedural matter. Id., citing Article V, § 2(a), Florida Constitution; § 25.371, Fla.Stat. (1973). As discussed below, the damages BellSouth sought against the Bank were unliquidated. Accordingly, the procedural requirements of the Rules should have governed the Bank's rights in this case. The Bank was entitled to a hearing and notice on the issue of damages.

A. The damages were unliquidated.

The damages sought by BellSouth from the Bank were unliquidated. The Bank's default established its liability only. Pursuant to Rules 1.500 and 1.440(c), Fla.R.Civ.P. BellSouth still had to prove its damages at a hearing after notice to the Bank.

The damages were not liquidated simply because BellSouth had obtained judgment against Garfield. A garnishment proceeding is separate and distinct from the main action, Space Coast Credit Union v. The First F.A., 467 So.2d 737,739 (Fla. 5th DCA 1985). The outcome of the main action does not determine the obligations of the garnishee in a separate garnishment proceeding. See, e.g., Carpenter v. Benson, 478 So.2d 353,354 (Fla. 5th DCA 1985). As the Court of Appeal rightly notes, the purpose of the writ as reflected in its language is to determine the existence and extent of the garnishee's liability. (A 19-20). In a garnishment action, the judgment holder has the burden of proving that the garnishee possesses the debtor's property or is liable to it from some debt. Reeves v. Don L. Tullis & Associates, Inc.., 305 So.2d 813, 815 (Fla. 1st DCA 1975). Without such proof, the extent of the garnishee's liability, if any, remains undetermined.

There are no cases in Florida holding that the damages in a garnishment action are liquidated simply because the plaintiff has obtained judgment against a defendant. Petitioner therefore urges this Court to rely on Conejos County Lumber Co. v. Citizens Savings & Loan Association, 459 P.2d 138 (N.M. 1969) for the proposition that the damages were liquidated because they were "fixed by operation of law" when judgment was entered against Garfield prior

to the issuance of a writ of garnishment. Because Conejos arose under an entirely different statutory scheme, it does not provide this Court with meaningful precedent.

In Conejos, a New Mexico statute unequivocally authorized entry of judgment against a garnishee for the full amount of the judgment rendered against the defendant. Conejos at 140. For that reason, the Conejos court could reasonably conclude that the garnishee's damages were fixed by operation of law and were therefore liquidated. There is no law in Florida that operated to fix the Bank's damages at the amount of the underlying judgment. As discussed above, § 77.08 1, Fla. Stat. (1973), does not apply to post-judgment garnishments. It did not fix the extent of the Bank's liability as Petitioner claims.

The writ's statement that judgment had been entered against Garfield in the amount of $36,576.00 did not liquidate damages with respect to the Bank. See Judge Jorgenson's Dissenting Opinion (A33). Petitioner acknowledges that Bowman v. Kingsland Development. Inc., 432 So.2d 660 (Fla. 5th DCA 1983) establishes the test for whether damages are liquidated. According to Bowman, "[d]amages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e. from a pleaded agreement between the parties, by arithmetical calculation or by application of definite rules of law." Id. at 662. The writ was the "pleading" in this case. It did not permit the trial court to determine with exactness the proper amount to be awarded BellSouth in its claim against the Bank. The exact amount could not be determined by agreement, mathematical calculation or definite rules of law.

Petitioner's argument that the Bank's damages could be determined from the "cause of action as pleaded" misconstrues the purpose behind the requirement that the amount of the judgment be stated in the writ. Its purpose is apparent. Where the value of the property the garnishee holds exceeds of the amount of the underlying judgment, the writ notifies the garnishee that it need not surrender the excess. In such circumstances, the garnishee needs to know the amount it must withhold from a creditor on the debtor's behalf. A statement of the amount of the underlying judgment in the writ puts the garnishee on notice. The purpose behind the statement of the amount of the judgment in the Writ is not remedial. Its presence does not state the extent of the garnishee's liability if the garnishee fails to reply. The writ did not create a legally sufficient basis for imposing on the Bank liability for the plaintiffs underlying judgment against the original defendant.

III. THE TRIAL COURT'S RULING DENIED THE BANK DUE PROCESS.

A. **The Bank was entitled to notice that its failure to answer the writ would place the Bank's own property in jeopardy.**

In Carpenter v. Benson, 478 So.2d 353 (Fla. 5th DCA 1985), the court held that in the absence of any notice that the garnishee's own property was in jeopardy, entry of judgment against a garnishee for an amount in excess of any debt the garnishee owed to the judgment debtor would deprive the garnishee of due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 9 of the Florida Constitution. Id. at 355; see also Hauser v. Dr. Chatelier's Plant Food Co.. Inc. 350 So.2d 548, 550; fn. 1. (DCA 2d 1977). In Carpenter, the garnishee was served with a writ identical to the one served on the Bank in this

case. The garnishee failed to answer and a default judgment was entered. The default was later set aside. Plaintiff appealed claiming he was entitled to recover the full amount of the underlying judgment from the garnishee. The Fifth District Court of Appeal rejected that argument, stating:

> Neither the writ nor the statute authorizing it provides any notice to a garnishee that his own property is in jeopardy if he fails to answer. The writ calls on him only to disclose what money or personal property of the original defendant he holds and to provide information about said defendant's assets which may be in the possession or control of other persons. Therefore a judgment against the garnishee after service of this writ for an amount in excess of any debt which he owes the judgment debtor would violate due process because of insufficient notice. Id. at 355.

In this case, the writ similarly provided no notice to the Bank that its own property was in jeopardy. It called on the Bank only to disclose what money or property the Bank held on Garfield's behalf. Under Carpenter, the Bank was entitled to notice. Without notice, it violated due process when the trial court entered judgment against the Bank for an amount exceeding the value of Garfield's property.

The same result has been reached in other jurisdictions. Courts have reached the result even where the controlling garnishment statute expressly permits a trial court to enter judgment against a defaulting garnishee for the full amount of the underlying judgment. Due process requires that the garnishee be notified of the consequence of its failure to respond. In the absence of notice to the garnishee that its own property is in jeopardy, courts have found the writ of garnishment defective. The garnishee cannot be deprived of its property under these circumstances. See, e.g., Freelend v. Green, 601 P.2d 289 (Ariz. 1978) (Due process requires notice to garnishee of consequences that might result from its failure to respond to writ of garnishment); Ware v. Phillips, 468 P.2d 444 (Wash. 1970).

In Ware v. Phillivs, SUM&, two garnishees sought to set aside a default judgment entered against them in excess of the value of the debtor's property and for the full amount of the underlying judgment. By statute, if the garnishee failed to answer a writ of garnishment, the trial court was permitted to render judgment against such garnishee for the full amount claimed by plaintiff against the defendant. Id. at 445. After the garnishees failed to answer the writ, final judgment was entered against them in excess of their liability to the debtor and they appealed. The Washington Supreme Court vacated the judgement based on due process considerations. Nothing in the writ of garnishment stated that a claim was being asserted against the garnishees or that a judgment might be taken against them if it failed to answer. Id. at 447. The writ did not apprise the garnishees that their property was in jeopardy. Id. The Ware court held that in the absence of such notice, the garnishees were deprived of due process when the trial court entered judgment against them for the full amount of the underlying judgment. Id.

The writ the Bank received in this case did not notify it of the consequence of its failure to answer. Even if $77.081, Fla.Stat. (1973), permits entry of a default judgment for the full amount of BellSouth's judgment against Garfield, it cannot be enforced in a manner that deprives the Bank of due process.[2]

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[2]United Presidential Life Ins. v. King, 36 1 So.2d 710 (Fla. 1978) is consistent with these holdings. The case addressed whether the garnishee received notice. It does not address the content of that notice. I Jnited therefore did not decide whether due process requires notice to the garnishee that, as a consequence of its failure to answer the writ, the garnishee's own property may be placed in jeopardy.

B. The trial court's decision imposed an unauthorized penalty on the Bank

The Ware court rejected an argument also asserted by Petitioner in this case that entry of judgment against the garnishee for the full amount of the underlying judgment serves as a legitimate penalty for the garnishee's failure to answer the writ. The court acknowledged that a legislature may create a presumption that when a party fails to answer, it admits the validity of the claim. Id. at 448. But a statute that operates to deny a fair opportunity to rebut that presumption violates due process. Id. If the legislature's intent was to punish the garnishee for contempt, it chose punishment which the constitution prohibits. Id., citing Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841 (1897).

IV. THE COURT OF APPEAL HAD JURISDICTION TO VACATE THE FINAL JUDGMENT ON DAMAGES.

A. This was an appeal from a final judgment.

The Bank prosecuted the appeal to the Court of Appeal as an appeal from a fmal judgment pursuant to Rule 9.110, Fla.R.Civ.P. The Notice of Appeal appealed an Order rendered August 10, 1994 in which final judgment was entered against the Bank for $36,576.00. (A10).

In reviewing this case, the Court of Appeal reviewed a fmal order. It was not reviewing a non-final order as suggested by Petitioner. The Order appealed from relates to the trial court's entry of a final judgment against the Bank for the sum of $36,576.00. (AS). Therefore, the scope of the Court of Appeal's authority is not limited in the manner suggested by Petitioner.

B. The Bank properly preserved the issue regarding the proper measure of damages in a garnishment proceeding.

As the Court of Appeal notes, the Bank properly preserved for appeal the issue of its damages. The Bank's documents filed with the trial court asserted that the Bank had a meritorious defense. In substance, therefore, the Bank asserted that it could be held liable only for so much of Garfield's money as it held in his account. (A30). That assertion placed issue of the garnishee's liability before the trial court and therefore preserved that issue for appeal. Id.

C. **The Court of Appeal had jurisdiction to consider fundamental error.**

If the Bank failed to raise the issue of damages at the trial level, the Court of Appeal had jurisdiction in this case to consider fundamental error by the trial court. The Court of Appeal properly viewed as fundamental error the trial court's refusal to set aside a final judgment against the Bank in which damages were assessed against the Bank at $36,576.00.

Generally, questions not presented to and ruled on by the trial court are not subject to appellate review. See American Home Assurance Co. v. Keller, 347 So.2d 767,772 (Fla. 3d DCA 1977).

The rule is subject to exception. An appellate court may consider and rule upon a fundamental error even though the issue is first raised or revealed on the record on appeal. Id. In this case, the trial court erred by imposing on the Bank damages that were not authorized by law. The garnishment statute did not entitle BellSouth to the relief it sought against the Bank. The Court of Appeal properly determined that an award of a judgment which has no legal foundation constitutes fundamental error which the court is required to notice and correct. (A 30), fn. 11,

citing Stevens v. Allegro Leasing, Inc., 562 So.2d 380 (Fla. 4th DCA 1990); Marks v. Delcastillo, 386 So.2d 1259, 1267,68 (Fla. 3d DCA 1980), review denied, 397 So.2d 778 (Fla. 1981); Keyes Co. v. Sens, 382 So.2d 1273, 1276 (Fla. 3d DCA 1980); Pet Fair, Inc. V. Humane Society of Greater Miami, 583 So.2d 407,409 (Fla. 3d DCA 1991).

V. THE COURT OF APPEAL PROPERLY GRANTED THE BANK ATTORNEYS' FEES.

The Bank was entitled to attorneys' fees as determined by the Court of Appeal. (A 36). A garnishee is entitled to attorneys' fees if it is a "stake holder innocently drawn into the controversy." Ebsry Foundation Co. v. Barnett Bank of South Florida. N.A., 569 So.2d 806,806 (Fla. 3d DCA 1990). In Ebsry, the court denied the garnishee its attorneys' fees because the garnishee had resisted the writ of garnishment. The garnishee claimed its right to set off amounts the debtor owed the garnishee-bank on notes the bank claimed were due and in default. The bank resisted the garnishment on its own behalf and for its own interests. Id. Therefore, it was not entitled to recover its attorneys' fees.

This case is different. The Bank was not trying to avoid paying BellSouth a sum of $374.21, the money held on Garfield's behalf. It denied that it should pay its own money to satisfy a judgment BellSouth had obtained against Garfield. The Bank was innocently drawn into a controversy regarding the status of its own property. The cases cited by Petitioner do not prohibit the recovery of attorneys' fees in this instance.

CONCLUSION

This Court should affirm the Court of Appeal's ruling that the trial court erred when it entered judgment against the Bank for the full amount of the judgment BellSouth had obtained against Garfield. In making its determination, the Court of Appeal adhered to a century of Florida case law holding that the creditor's rights in a garnishment action cannot rise higher than the debtor's rights against the garnishee. A reversal of the Court of Appeal's decision by this Court would reverse 100 years of Florida precedent.

The Court of Appeal's decision should be affirmed and the Respondent, Security Bank should be awarded its costs and attorneys' fees and all other relief this Court deems proper.

Respectfully Submitted,

J. Michael Fitzgerald
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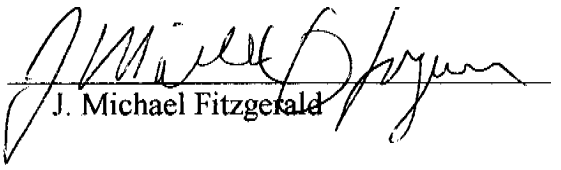
By: 
J. Michael Fitzgerald

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1 lth day of April, 1997 to Howard W. Mazloff, Esquire, Law Offices of Howard W. Mazloff, P.A., Dadeland Towers, Suite 3 10, 9300 S. Dadeland Blvd., Miami, Florida 33 156.