OA 6-5-97 app ref

FILED
SID J. WHITE
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By_____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

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

BELLSOUTH ADVERTISING& PUBLISHING CORPORATION,

Plaintiff/Petitioner,

vs.

SECURITY BANK, N.A.,

Defendant/Respondent.

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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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. Petitioner's Appendix attached to the Petitioner's Brief on Jurisdiction shall be referred to by the symbol "A". The Record on Appeal which will be forwarded to the Supreme Court of Florida by the District Court of Appeal on April 7, 1997 will be referred to by the symbol "R"

STATEMENT OF THE CASE AND FACTS

On April 13, 1994, Plaintiff served the Garnishee with a Writ of Garnishment (A2-A4) in order to collect $36,576.00 pursuant to a Final Judgment (Al) from the Judgment debtor's bank account. No answer was filed by the Garnishee and on May 16, 1996, a Final Judgment against Garnishee was entered in the amount of $36,576.00, (A5). On May 20, 1994, Garnishee moved to set aside the Final Judgment against it. (A6-A7). The Motion was unsworn. A hearing was held on July 13, 1994 at which time the Trial Court advised Garnishee that a further showing was necessary in order to set aside the Final Judgment. An order on Garnishee's Motion to Set Aside Final Judgment was entered on July 19, 1994. (AS). On August 10, 1994, a second hearing was held at which no further showing was made by Garnishee. The Motion remained unsworn and no testimony was offered. For this reason, the trial judge entered the Order Denying Motion to Set Aside Final Judgment. (A9). The Garnishee appealed this judgment to the District Court of Appeal, Third District, (A10). Oral Argument was held on March 1, 1995. On February 9, 1996, the District Court of Appeal entered an Order requesting supplemental briefs (Al 1 -Al 3), which were filed by both parties. On July 24, 1996, the opinion was filed. (R15-36). On August 7, 1996, an Order was entered by the District Court of Appeal which granted attorney's fees to the Garnishee. (A36). Plaintiff filed a timely Motion for Rehearing En Banc (A37-A3 8) and a Motion for Review of Attorney's Fees Order Pursuant to Rule 9.400(c) F.R.A.P. (A39-A40). These motions were denied by Order dated October 9, 1996. (A41). The Notice to Invoke Discretionary Jurisdiction was filed on November 6, 1996 (A42). Briefs on jurisdiction were filed by both parties and by Order Accepting Jurisdiction and Setting Oral Argument dated February 28, 1997, this honorable court accepted jurisdiction,

SUMMARY OF ARGUMENT

I. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT ON DAMAGES WHILE AFFIRMING THE REFUSAL OF THE TRIAL COURT TO SET ASIDE THE DEFAULT ON THE ISSUE OF LIABILITY FOR THE FOLLOWING REASONS:

a. THE WRIT OF GARNISHMENT SOUGHT TO RECOVER A LIQUIDATED SUM FROM THE BANK.

The Writ of Garnishment sought to recover a liquidated sum from the Garnishee/Bank. The amount had been fixed by operation of law when the Judgment against the principal debtor, Garfield, was entered for $36576.00.

I. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT ON DAMAGES WHILE AFFIRMING THE REFUSAL OF THE TRIAL COURT TO SET ASIDE THE DEFAULT ON THE ISSUE OF LIABILITY FOR THE FOLLOWING REASONS:

b. SECTION 77.081(2) FLORIDA STATUTES APPLIES TO POST JUDGMENT GARNISHMENTS.

Section 77.081(2), Florida Statutes requires the Court to enter an Ex Parte Default Final Judgment against the Garnishee for the full amount claimed in the Writ of Garnishment for Plaintiffs claim against Garfield of $36,576.00.

I, THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT ON DAMAGES WHILE AFFIRMING THE REFUSAL OF THE TRIAL COURT TO SET ASIDE THE DEFAULT ON THE ISSUE OF LIABILITY FOR THE FOLLOWING REASONS:

c. THE DISTRICT COURT OF APPEAL HAD NO JURISDICTION TO REACH THE MATTERS DISCUSSED IN ITS OPINION UNDER THE NOTICE OF APPEAL FILED IN THIS CASE.

Garnishee did not appeal the Final Judgment against Garnishee dated May 18, 1994. Instead, Garnishee moved to set aside this Final Judgment and then appealed the denial of this Motion. This appeal does not encompass the merits of the order that Garnishee sought to vacate. As a result, the Court erred in reversing the Final Judgment after deciding that the Trial Court did not abuse its discretion in denying the Motion to Vacate.

I. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT ON DAMAGES WHILE AFFIRMING THE REFUSAL OF THE TRIAL COURT TO SET ASIDE THE DEFAULT ON THE ISSUE OF LIABILITY FOR THE FOLLOWING REASONS:

d. A DEFAULT AND FINAL DEFAULT JUDGMENT ON DAMAGES IN A GARNISHMENT PROCEEDING SHOULD BE EITHER BOTH AFFIRMED OR BOTH REVERSED.

Based on the garnishment statute as well as applicable case law, a default and final default judgment on damages in a garnishment proceeding should be both either affirmed or both reversed, there is no middle ground. As a result, the District Court of Appeal erred when it affirmed the default but reversed the final default judgment.

II. THE DISTRICT COURT OF APPEAL ERRED IN GRANTING ATTORNEY'S FEES TO RESPONDENT BANK BASED ON SECTION 77.28 FLORIDA STATUTES WHERE THE RESPONDENT WAS ACTING ON ITS OWN BEHALF AND FOR ITS OWN INTEREST AND NOT AS AN INNOCENT STAKEHOLDER INNOCENTLY DRAWN INTO THE CONTROVERSY,

The Third and Fourth District Courts of Appeal have both held that attorney's fees cannot be awarded to a Garnishee bank under Section 77.28, Florida Statutes where the bank was acting on its own behalf and for its own interest and not as an innocent stakeholder. In this case, the bank was seeking to overturn a judgment for $37,576.00 against it.

ARGUMENT

POINTS ON APPEAL

I. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT ON DAMAGES WHILE AFFIRMING THE REFUSAL OF THE TRIAL COURT TO SET ASIDE THE DEFAULT ON THE ISSUE OF LIABILITY FOR THE FOLLOWING REASONS:

a. THE WRIT OF GARNISHMENT SOUGHT TO RECOVER A LIQUIDATED SUM FROM THE BANK.

b. SECTION 77.081(2) FLORIDA STATUTES APPLIES TO POST JUDGMENT GARNISHMENTS,

c. THE DISTRICT COURT OF APPEAL HAD NO JURISDICTION TO REACH THE MATTERS DISCUSSED IN ITS OPINION UNDER THE NOTICE OF APPEAL FILED IN THIS CASE.

d. A DEFAULT AND FINAL DEFAULT JUDGMENT ON DAMAGES IN A GARNISHMENT PROCEEDING SHOULD BE EITHER BOTH AFFIRMED OR BOTH REVERSED.

II. THE DISTRICT COURT OF APPEAL ERRED IN GRANTING ATTORNEY'S FEES TO RESPONDENT BANK BASED ON SECTION 77.28 FLORIDA STATUTES WHERE THE RESPONDENT WAS ACTING ON ITS OWN BEHALF AND FOR ITS OWN INTEREST AND NOT AS AN INNOCENT STAKEHOLDER INNOCENTLY DRAWN INTO THE CONTROVERSY.

POINT I

I. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT ON DAMAGES WHILE AFFIRMING THE REFUSAL OF THE TRIAL COURT TO SET ASIDE THE DEFAULT ON THE ISSUE OF LIABILITY FOR THE FOLLOWING REASONS:

a. THE WRIT OF GARNISHMENT SOUGHT TO RECOVER A LIQUIDATED SUM FROM THE BANK.

The opinion of the District Court of Appeal (R15-36) is based on the conclusion that the writ of garnishment sought to recover an unliquidated sum. This conclusion which was reached without analysis is incorrect.

The definition of a liquidated sum was explained in Bowman v. Kingsland Development, Inc., 432 So.2d 660 (Fla. 5th DCA 1983):

> A default also admits the plaintiffs entitlement to liauidated damages due under the pleaded cause of action, but not unliauidated damages. Damages 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 an arithmetical calculation or by application of definite rules of law..., However, damages are not liquidated if the ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment....A defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages, Protection of this right is provided by Florida Rule of Civil Procedure 1.080 (h) (1) and the last sentence in Rule 1.440 (c).

Id. at 662-63 (emphasis in original, citations omitted); see also Tand v. C.F.S. Bakeries, Inc., 559 So.2d 670, 671 (Fla. 3rd DCA 1990); Gulf Maintenance & Supply. Inc. v. Barnett Bank, 543 So.2d 813, 818 (Fla. 1st DCA 1989); Buffington v. Torcise, 504 So.2d 490, 491 (Fla. 3rd DCA 1987); 33 Fla. Jur. 2d Judgments and Decrees $275 (1994).

As stated by Judge Jorgenson in his dissenting opinion below:

> "In this case, the amount of the judgment against the defendant was clearly stated in the writ and motion for Writ of Garnishment and is thus fully liquidated, See United States Fire Ins. Co. v. C & C Beauty Sales, Inc., 21 Fla. L. Weekly D1090, 1091 (Fla. 3rd DCA May 8, 1996) ("Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded.") (emphasis added) (quoting Bowman v. Kingsland Dev., Inc., 432 So.2d 660,662 (Fla. 5th DCA 1983))."

While no Florida case on point was found by the District Court or the parties, the Supreme Court of New Mexico case of Conejos County Lumber Co. v. Citizens Savings & Loan Association, 459 P.2d 138 (N.M. 1969) is directly on point.

There, a writ of garnishment was issued and served on the Garnishee. The Garnishee failed to answer the writ of garnishment and a default judgment was entered in the amount of $2,058.18 for Plaintiff and against the Garnishee. The Garnishee moved to set aside the default judgment and the Trial Court denied the motion. Garnishee appealed on the grounds that the default judgment should be set aside because the amount was unliquidated and granted without proof. The Supreme Court of New Mexico held as follows:

> "The argument must fail. The amount had been fixed by operation of law when the judgment against the principal debtor Jack Elden was entered prior to the issuance of the Writ of Garnishment against appellant." 459 P.2d at 140.

In the case at bar, the amount had been fixed by operation of law when the Judgment against Garfield was entered for $36,576.00 (R1). The issuance of the Writ of Garnishment clearly stated this amount claimed and it was thus fully liquidated. (A2-4)

As the claim of Plaintiff against Garnishee was for a liquidated sum, the District Court of Appeal committed error when it reversed the Trial Court and required proof of Garnishee's

obligation before entry of the final judgment against the Garnishee.

POINT I

I. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT ON DAMAGES WHILE AFFIRMING THE REFUSAL OF THE TRIAL COURT TO SET ASIDE THE DEFAULT ON THE ISSUE OF LIABILITY FOR THE FOLLOWING REASONS:

b. SECTION 77.081(2) FLORIDA STATUTES APPLIES TO POST JUDGMENT GARNISHMENTS.

Once again, the District Court of Appeal, without analysis, has jumped to the conclusion that 77.081 (2), Florida Statutes does not apply to post judgment garnishments as in the case at bar. In doing so, the Third District has ignored holdings from the First, Second and Fourth District that this section applies to post-judgment garnishments. See International Travel Card. Inc. v. R.C. Haslet, Inc., 411 So.2d 215, 216-17 (Fla. 1st DCA 1982); Sentry Indemnity Co. v. Hendricks Enterprise& 371 So.2d 1105, (Fla. 4th DCA 1979); Hauser v. Dr. Chatelier's Plant Food Co., 350 So.2d at 550; I Stephen B. Rakusin, Florida Creditors' Rights Manual § 2.08B.2, at I46 (1995).

As Judge Jorgenson stated in his well reasoned dissenting opinion in this case:

> "In the case of prejudgment garnishment, the legislature, with section 77.08 1, had enacted a provision which could, in the case of default, require a prejudgment Garnishee bank to pay 100 times or more than the amount the defendant had on deposit. There is no basis for the court's reasoning that similar consequences could not be intended to also apply to the postjudgment Garnishee merely because of their magnitude or severity. The courts of several other states have similarly recognized statutory provisions that impose full judgment-debt liability on the defaulting postjudgment Garnishee. See, e.g., In re Pioneer Oil & Gas Co., 333 F. Supp. 1055, 1058 (E.D. La. 1971); Aluminum Co. Of America V. Higgins, 635 S.W.2d 290,298 (Ark. Ct. App., 1982); Barnett Home Appliance Corp. V. Guidry, 224 So.2d 134, 136 (La. Ct. App.), writ refused, 226 So.2d 922 (La. 1969); Conejos County Lumber Co. v. Citizens Savings & Loan Association, 459 P.2d 138, 140 (N.M. 1969); Bianco v. Pullo, 171 A.2d 620,626 (Pa. Super. Ct. 1961)."

The weight of authority in other states holds that full judgment debt liability must be imposed on the defaulting post judgment Garnishee. The reasoning is that if the Garnishee holds less than the full judgment he has a duty to answer the writ and so advise the Plaintiff and the court. If he fails to do so, he must pay the full amount of Plaintiffs judgment. This is what occurred in this case. See, e.g., Barnett Home Appliance Corp. v. Guidry, 224 So.2d 134, (La. Ct. App.), writ refused, 226 So.2d 992 (La. 1969) and Aluminum Co of America v. Higgins, 635 S.W.2d 290, 298 (Ark. Ct. App., 1982).

The Aluminum Co. of America case is especially instructive. As stated by the Supreme Court of Arkansas:

> "The fallacy in appellant's argument is that under the facts and applicable law in this case, appellee's garnishment action did not impound the debtor's property or money in the possession of appellant at the time the writ was served, Rather, appellant, as Garnishee, failed to tile any responsive pleading to the action within the time fixed by Statute, and, under Arkansas law, a judgment for the amount sought was rendered against appellant, not the debtor. See Karoley v. A.R. & T. Electronics. Inc., 235 Ark. 609,363 S.W.2d 120 (1962). If appellant had properly filed an answer limiting its liability to the monies it may have held for and owed to the debtor-employee, we unquestionably would have reached a different conclusion."

Moreover, an examination of the garnishment statute, Chapter 77, Florida Statutes, shows that when a subsection applies solely to prejudgment garnishment that the title so indicates. See, e.g., $77.03 1, Issuance of writ before judgment; $77.22, Before judgment; effect of judgment for Defendant. $77.24 Before judgment; discharge.

In addition, where the subsection applies solely to prejudgment garnishment, it is stated in the text as well. For example, §77.07, Florida Statutes states as follows:

> "(1) The Defendant, by motion; may obtain the dissolution of a writ

> of garnishment, unless the petitioner proves the grounds upon which the writ was issued and unless, in the case of a prejudgment writ..."

Also, an examination of the text of the subsection shows that it speaks in the alternative concerning both a pre-judgment and post-judgment garnishment as follows:

> "On the 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 interest and costs."

"Plaintiffs claim", in §77.08 1 (2) Florida Statutes, means Plaintiffs claim in the main action, which, in the case at bar, was for $36,576.00. This term is used in the garnishment statute in contexts that can only refer to the Plaintiffs claim in the main suit and not Plaintiffs garnishment claim, i.e., Plaintiffs claim against the property of Garfield held by the Garnishee.

For example, Section 77.031 (2) Florida Statutes, can only be referring to the Plaintiffs claim in the main action when it states:

> To obtain issuance of the writ, the plaintiff, or his agent or attorney, shall file in the court where the action is pending a verified motion or affidavit alleging by specific facts the nature of the cause of action; the amount of the debt and that the debt for which the plaintiff sues is just, due and unpaid; that the garnishment is not sought out to injure either the defendant or the Garnishee; and that the plaintiff believed that the defendant will not have in his possession, after execution is issued, tangible or intangible property in this state and in the county in which the action is pending on which a levy can be made sufficient to satisfy the plaintiffs claim.

§77.081 (2) itself speaks of the claim of Plaintiff in terms that can only refer to the main action:

> If the claim of the plaintiff is dismissed or judgment is entered against him the default against Garnishee shall be vacated and judgment for his costs entered.

$77.24 also speaks of Plaintiffs claim as the cause of action against the Defendant in the main case:

> If Garnishee admits a debt to or possession of property of defendant in excess of a sum sufficient to satisfy plaintiffs claim, on motion of defendant and notice to plaintiff, the court shall release Garnishee from responsibility to plaintiff for any debt to or property of defendant except in a sum deemed by the court sufficient to satisfy plaintiffs claim with interest and costs.

$77.27 also uses the phrase "Plaintiffs claim" to denote claims in the main action not the claim against Defendant's property in garnishment.

The case of Sentry Indemnity Co. v. Hendricks Enterprises, 371 So.2d 1105, (Fla. 4th DCA 1979) should have controlled the opinion of the District Court of Appeal, In that case the Plaintiff commenced garnishment proceedings against the Garnishee after obtaining a final judgment for $3,436.15 plus costs of $39.00 against the Defendant. The garnishment motion alleged the full amount of the judgment and that the garnishor expected to recover the sum of $1,800.00 from the Garnishee. No answer was filed by the Garnishee and a default and final judgment was entered for the total sum of $3,490.15. The Garnishee filed a motion to set aside the default judgment. The motion to set aside the default judgment was denied by the Trial Court. The Garnishee appealed to the District Court of Appeal for the Fourth District.

Firstly, the court decided that the order denying the motion to set aside the default should be affirmed. With respect to the final judgment against the Garnishee for the full amount, the court stated the following:

> "In entering the final judgment on default the Trial Court had before him an unsworn motion for writ of garnishment after judgment, proof of service on the Garnishee, a default properly entered by the clerk of the court and the garnishor's unsworn motion for final judgment on

default. No evidence was received.

> By suffering a default to be entered against him the defaulting party admits only the well pleaded facts and acquiesces in the relief sought. Williams v. Williams, 227 So.2d 746 (Fla. 2nd DCA 1969); Bay Products Corp.. v. Winters, 341 So.2d 240 (Fla. 3rd DCA 1976). See also, Hauser v. Dr. Chatelier's Plant Food Co.. Inc., 350 So.2d 548 (Fla. 2nd DCA 1977). Unlike the well reasoned opinion in Hauser, supra, the motion for writ of garnishment and the writ here each specified the sum of $1,800.00 as that sought by the garnishor from the Garnishee. That was the amount for which the Garnishee suffered a default, and by so doing, admitted was due and owing to the judgment debtor, Under these circumstances we hold that $1 ,800.00 was "the amount of the plaintiffs claim" as that term is used in Section 77.08 1, Florida Statutes (1977) and the Trial Court erred in entering final judgment in excess of that amount plus interest and costs."

In the case at bar, the motion for garnishment and the writ specified the sum of $36,576.00 as that sought by the garnishor from the Garnishee. What is more significant is that the Fourth District did permit an ex parte default judgment for $1 $00.00. The Plaintiff was not required to give notice of trial on damages and adduce proof of the amount of money held by the garnishee as the District Court of Appeal required in this case. The District Court of Appeal in the opinion below did not distinguish or even discuss the Sentry case but merely dismissed it as assuming, without discussion, that §77.08 1 (2) applies to post-judgment garnishment. The Third District further stated that "there is no indication in these cases that the applicability of §77.081 (2) was called to the attention of the Court." However, the Appellant in Sentry by appealing the entry of the Final Default Judgment and Order Denying Motion to Set Aside Default Judgment surely put the applicability of §77.081 (2) in issue.

In view of the foregoing, the clear mandate of $77.08 1 (2), Florida Statutes is for the entry of the final judgment against the Garnishee for the amount of Plaintiffs claim, $36,576.00, with

interest and costs.

POINT I

I. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT ON DAMAGES WHILE AFFIRMING THE REFUSAL OF THE TRIAL COURT TO SET ASIDE THE DEFAULT ON THE ISSUE OF LIABILITY FOR THE FOLLOWING REASONS:

C. THE DISTRICT COURT OF APPEAL HAD NO JURISDICTION TO REACH THE MATTERS DISCUSSED IN ITS OPINION UNDER THE NOTICE OF APPEAL FILED IN THIS CASE.

This appeal is from an order denying a Motion to Set Aside a default judgment for mistake inadvertence or excusable neglect (R9) (R1 1) (R12). The Order on Appeal is the denial of a Rule 1.540 (b) motion (R1 1). Such an order is a non-final order which is reviewable under Rule 9.130 (a) (5), F.R.A.P. See, e.g., Silva v. Pedro Realty. Inc., 411 So.2d 872 (Fla. 1982); Sunny South Aircraft Service. Inc. v. Inversiones, 1120 C.A., 417 So.2d 676 (Fla. 1982); See also WJA Realty v. Schofile, 640 So.2d 1165 (Fla. 3rd DCA 1994).

The scope of review of a non-final order is confined to the matters involved in the order and can extend to a consideration only of the matter to which the order relates. Florida Flood Control Dist. V. Dupuis, 109 So.2d 595 (Fla. 3rd DCA 1959). The order appealed from in this case relates only to the issue of whether Appellant made a sufficient showing in the unsworn Motion to Set Aside Default Judgment to vacate the Final Judgment Against Garnishee for mistake, inadvertence or excusable neglect. (R-9) (R-l 1) (R-12). No other matters may be reviewed by this court. See Hotel-Motel. R.E. & B.U. v. Black Angus of Lauderhill, 290 So.2d 48 1 (Fla. 1974).

The opinion of the District Court of Appeal in this case (R15-36) goes to the merits of the

Final Judgment against Garnishee (R9) which was entered on May 16, 1994. Appellant did not notice an appeal of that judgment. Rather, Appellant noticed its appeal of "the order of this court rendered August 10, 1994. That order is one which denies the setting aside of a default judgment entered on a writ of garnishment against Garnishee/Appellant." (R12).

Appellant's appeal from the Order denying his Motion to Set Aside Default Judgment does not encompass the merits of the order that he sought to vacate. See Troiano v. Tizon, 632 So.2d 25 1, (Fla. 3rd DCA 1994). As this Honorable Court stated in Bland v. Mitchell, 245 So.2d 47 (Fla. 1970):

> "(A) denial...of a motion to vacate final judgment cannot bring up for review the merits of the final judgment sought to be vacated. The inquiry must be confined to determining whether in ruling on the motion the Trial Court abused its discretion on the facts and circumstances asserted in the motion's behalf. The motion does not affect the finality of the final judgment or suspend its operation."

The Troiano case is strikingly similar to the case at bar and therefor quite instructive. There, an order was entered by the Trial Court on January 28, 1993. Instead of appealing the order, Troiano filed a Motion to Vacate pursuant to Rule 1.540 FRCP, The Trial Court denied that motion. Troiano appealed from the order denying relief, The Third District held that the Trial Court did not abuse its discretion in denying the Motion to Vacate and that they were precluded from addressing the merits of the January 28, 1993 order.

In this case, the Garnishee did not appeal the Final Judgment against the Garnishee entered on May 18, 1994 (R8). Instead, Garnishee moved to set aside the Final Judgment (R9) and, when this Motion was denied, Garnishee appealed the Order Denying Motion to Set Aside Final Judgment (R14). As in Troiano, the Third District was precluded from addressing the merits of the May 18, 1994 Order. As a result, the inquiry ended when the Third District affirmed the Trial Court's refusal

to set aside the default,

POINT I

I. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT ON DAMAGES WHILE AFFIRMING THE REFUSAL OF THE TRIAL COURT TO SET ASIDE THE DEFAULT ON THE ISSUE OF LIABILITY FOR THE FOLLOWING REASONS:

d. A DEFAULT AND FINAL DEFAULT JUDGMENT ON DAMAGES IN A GARNISHMENT PROCEEDING SHOULD BE EITHER BOTH AFFIRMED OR BOTH REVERSED:

Judge Jorgenson's dissent below (R33-36) states the Plaintiffs position in this regard quite eloquently. The Court is requested to consider the dissent in support of this point.

In addition, a party moving to Set Aside a Default must also move to set aside the Final Judgment entered thereon. If such a Motion is not filed, the Trial Court is correct to deny the Motion to Set Aside the Default even where the answer of Defendant was served prior to the entry of default by the clerk. Straughn v. G.J.M., Inc., 372 So.2d 1163 (Fla. 1st DCA 1979). This indicates that a default and final judgment must be either both affirmed or both reversed. There is no middle ground as taken by the District Court of Appeal below.

Similarly, as stated in Point I (c), the only issue that should have been decided by the District Court of Appeal was whether or not the Trial Court abused its discretion when the Motion to Vacate was denied. Once the District Court of Appeal decided that there was no abuse of discretion, both the default and the Final Judgment entered therefor must be affirmed. See, Bland v. Mitchell, supra.

POINT II

II. THE DISTRICT COURT OF APPEAL ERRED IN GRANTING ATTORNEY'S FEES TO RESPONDENT BANK BASED ON SECTION 77.28 FLORIDA STATUTES WHERE THE RESPONDENT WAS ACTING ON ITS OWN BEHALF AND FOR ITS OWN INTEREST AND NOT AS AN INNOCENT STAKEHOLDER INNOCENTLY DRAWN INTO THE CONTROVERSY.

On February 10, 1995, Garnishee moved the District Court of Appeal for attorney's fees and costs, pursuant to §77.28, Florida Statutes in connection with the appeal. On August 7, 1996, the Third District granted the motion "as to the brief submitted in response to this court's order dated February 9, 1996 and remanded to the Trial Court to set the amount." (A36).

In this case, the Garnishee was defending a judgment against itself (R8) and was acting on its own behalf and for its own interest rather than as an innocent stakeholder. An examination of the Notice of Appeal (R12) shows that Garnishee was appealing an order "which denies the setting aside of a Default Judgment entered on a Writ of Garnishment against Garnishee/Appellant." The bank sought to reverse the judgment against it for $36,576.00.

Under the circumstances, the Third District and the Fourth District have held that an award of attorney's fees to the Garnishee is limited to the $100.00 deposit of the Garnishor. All American Semiconductor, Inc. v. Ellison Graphics Corporation, 594 So.2d 342 (Fla. 4th DCA 1992); Ebsary Foundation Co. V. Barnett Bank of South Florida, N.A., 569 So.2d 806 (Fla. 3rd DCA 1990). Ebsary also holds that a bank cannot be awarded a reasonable attorney's fee under $77.28, Florida Statutes where the bank is resisting the Writ of Garnishment on its own behalf,

The Order dated August 7, 1996 (A36) was entered in error and must be reversed.

CONCLUSION

The District Court of Appeal committed reversible error in its opinion in this case. (R-l 5-36). In its zeal to avoid what was perceived to be an unjust result, the Third District did not follow the law. Rather, an eighteen page opinion was written to avoid affirming the Trial Court.

The result reached was incorrect and would result in a bad precedent. The action of the Trial Court must be affirmed with the opinion of the District Court of Appeal quashed with the dissent of Judge Jorgenson adopted as the opinion of this Court.

CONCLUSION

The District Court of Appeal committed reversible error in its opinion in this case. (R-l 5-36). In its zeal to avoid what was perceived to be an unjust result, the Third District did not follow the law. Rather, an eighteen page opinion was written to avoid affirming the Trial Court.

The result reached was incorrect and would result in a bad precedent. The action of the Trial Court must be affirmed with the opinion of the District Court of Appeal quashed with the dissent of Judge Jorgenson adopted as the opinion of this Court.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 19 day of March, 1997 to: J. Michael Fitzgerald, Esq., FITZGERALD & PORTUONDO, 2665 South Bayshore Drive, Suite M-l 03, Coconut Grove, Florida 33 133.

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