

0-5

IN THE SUPREME COURT OF FLORIDA

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

**FILED**

SID J. WHITE

DEC 2 1996

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

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 BRIEF ON JURISDICTION

✓  
LAW OFFICES OF  
HOWARD W. MAZLOFF, P.A.  
Dadeland Towers, Suite 310  
9300 S. Dadeland Blvd.  
Miami, Florida 33156  
Phone: (305) 670-6760  
Fla. Bar No. 138107

**TABLE OF CONTENTS**

	<b><u>PAGE:</u></b>
Table of Contents....." ...	i
Table of Cases .....	ii
Introduction.....	1
Statement of the Case and the Facts .....	2-3
Summary of Argument .....	4
Argument .....	5-9
Conclusion .....	10
Certificate of Service .....	11

TABLE OF CASES

	<u>PAGE:</u>
1. <u>All American Semi-Conductor, Inc. v. Ellison Graphics Corporation</u> , 594 So.2d 342 (Fla. 4 DCA 1992).	5
2. <u>Ebsary Foundation Co. v. Barnett Bank of South Florida, N.A.</u> , 569 So.2d 806 (Fla. 3d DCA 1990).	5
3. <u>Bowmar v. Kingsland Development, Inc.</u> , 432 So.2d 660 (Fla. 5th DCA 1983).	6
4. <u>United States Fire Ins. Co. v. C &amp; C Beauty Sales, Inc.</u> , 21 Fla. L. Weekly D1090, 1091 (Fla. 3d DCA May 8, 1996).	6
5. <u>International Travel Card, Inc. v. R.C. Hasler, Inc.</u> , 411 So.2d 215 (Fla. 1st DCA 1982).	8
6. <u>Sentry Indemnity Co. v. Hendricks Enterprises</u> , 371 So.2d 1105 (Fla. 4th DCA 1979).	8,9
7. <u>Hausler v. Dr. Chatelier's Plant Food Co.</u> , 350 So.2d 548 (Fla. 2d DCA 1977).	8,9

### 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 hereto shall be referred to by the symbol "A".

### STATEMENT OF THE CASE AND THE 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 (A1) 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. (A8). 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 (A11-A13), which were filed by both parties. On July 24, 1996, the opinion was filed. (A14-A35). on August 7, 1996, an Order was entered by the District Court of Appeal which granted attorney's fees to the Garnishee. (A-36). Plaintiff filed a timely Motion for Rehearing En Banc (A37-A38) and

a Motion for Review of Attorneys 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).

### SUMMARY OF ARGUMENT

I. The Order granting attorney's fees to the garnishee in this case expressly and directly conflicts with a decision of the Fourth District which holds that an award of attorney's fees to a Garnishee acting on its own behalf and for its own interest is limited to the \$100.00 deposit of the Gamishor.

II. The decision of the Third District in this case expressly and directly conflicts with decisions that hold that a default admits Plaintiff's entitlement to liquidated damages. The damages in this case were clearly liquidated as the amount of the judgment against Defendant was clearly stated in the Writ and Motion for Writ of Garnishment.

III. The decision of the Third District in this case expressly and directly conflicts with the holdings of three cases from other districts which hold that Section 77.081(2), Florida Statutes applies to post-judgment garnishments. The decision of the Third District in this case held that Section 77.081(2) applies exclusively to prejudgment garnishment.

## ARGUMENT

### POINT I

THE ORDER DATED AUGUST 7, 1996 OF THE THIRD DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT IN ALL AMERICAN SEMI-CONDUCTOR, INC. V. ELLISON GRAPHICS CORPORATION, 594 So.2d 342 (FLA. 4 DCA 1992).

In this case, the Garnishee was defending a Judgment against itself (A5) and was therefore acting on its own behalf and for its own interest rather than as an innocent stakeholder. An examination of the Notice of Appeal (A-10) clearly 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." Under these circumstances, the Fourth District has held that an award of attorney's fees to the Garnishee is limited to the \$100.00 deposit of the garnishor. The Third District by its Order dated August 7, 1996 (A36) inexplicably granted Garnishee's motion for attorney's fees in clear, express and direct conflict with the All American Semi-Conductor case, as well as the Third District case of Ebsary Foundation Co. v. Barnett Bank of South Florida, N.A., 569 So.2d 806 (Fla. 3d DCA 1990). The granting of attorney's fees as to the brief submitted in response to the District Court of Appeal's order dated February 9, 1996 is contrary to the law enunciated by both of these cases.



## POINT II

THE DECISION OF THE THIRD DISTRICT IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT IN BOWMAN V. KINGSLAND DEVELOPMENT, INC., 432 So.2d 660 (FLA. 5th DCA 1983) .

The Bowman case holds the following as quoted by the Third District in the opinion filed in this case:

A default also admits the Plaintiff's entitlement to liquidated damages due under the pleaded cause of action, but not unliquidated 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). Page 7 of the **Opinion. (A20).**

The damages in this case were liquidated as stated by Judge Jorgenson in his dissenting opinion:

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. 3d 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 Kingsland Dev., Inc., 432 So. 2d 660, 662 (Fla. 5th DCA 1983) ) . **Page 20 of the Opinion. (A33).**

The Third District in its Opinion concludes that "Clearly Bellsouth's garnishment claim against the bank was for an unliquidated sum, not a liquidated **sum.**" There is no analysis only a bare conclusion. How can a claim be any more liquidated than when it has been reduced to judgment and specifically stated in a Motion for Garnishment after Judgment (A-4) and Writ of Garnishment? The Third District committed error in finding that Plaintiff's garnishment claim against the Garnishee was for an unliquidated sum.

### POINT III

THE DECISION OF THE THIRD DISTRICT IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FIRST, SECOND, AND FOURTH DISTRICTS IN THE FOLLOWING CASES:

- a) International Travel Card, Tnc. v. R.C. Hasler, Tnc., 411 So.2d 215 (Fla. 1st DCA 1982);
- b) Sentry Indemnity Co. v. Hendricks Enterprises, 371 So.2d 1105 (Fla. 4th DCA 1979); and,
- c) Hausler v. Dr. Chatelier's Plant Food Co., 350 So.2d 548 (Fla. 2d DCA 1977).

In each of these cases, the Court applied Section 77.081(2) of the Florida Statutes to post-judgment garnishments. The Third District in this case specifically held as follows:

By its plain words, subsection 77.081(2) applies only to a prejudgment writ of garnishment. The history of subsection 77.081(2) shows that it was drawn from prior statutory provisions dealing exclusively with prejudgment garnishment. **Page 11 of the Opinion. (A24).**

This holding was crucial to the Third District's holding that Plaintiff could not recover \$36,576.00 from the garnishee. If section 77.081(2) applies to post-judgment garnishment, then Plaintiff's judgment for \$36,576.00 is not only authorized, it is mandated. The Third District dismissed these cases without any analysis whatsoever when it held as follows:

There are cases which assume, without discussion, that subsection 77.081(2) applies to post-judgment garnishment, see International Travel Card, Tnc. v. R.C.

Hasler, Inc., 411 So. 2d 215, 216-17 (Fla. 1st DCA1982); Sentry Indemnity Co. v. Hendricks Enterprises, 371 So.2d 1105, 1106 (Fla. 4th DCA 1979); Hausler v. Dr. Chatelier's Plant Food Co., 350 So.2d at 550; 1 Stephen B. Rakusin, Florida Creditors' Rights Manual § 2.08B.2, at 146 (1995), but there is no indication in those cases that the inapplicability of subsection 77.081(2) was called to the attention of the court. **Page 11-12 of the opinion. (A24-A25).**

This holding, without analysis, by the Third District directly and expressly conflicts with each of the aforementioned cases.

### CONCLUSION

The decision of the Third District in this case creates a direct conflict on the three enumerated points of law with decisions of other District Courts of Appeal. The decision is incorrect on each of these points and conflicts with the other cited cases which reflect the correct rules of **law**. As a result, uniformity in the case law of this state has been lost creating uncertainty on each of these issues. The development of such conflicts require the Supreme Court to accept jurisdiction to resolve this case on the merits.

It is unusually important that jurisdiction of this case be accepted by the court and that it be properly decided on the merits. The majority opinion of the Third District has created these conflicts in their zeal to avoid what they perceived to be an unfortunate and unjust result, the **imposition** of a Final Judgment against the Garnishee for the full amount of Plaintiff's Judgment of \$36,526.00 as a result of Garnishee's default. The decision of the Third District in this case proves the old adage that "**hard cases make bad law.**"

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the above and foregoing was served by mail on this 26 of November, 1996, to: J. **MICHAEL FITZGERALD, ESQ.**, Attorney for Appellant, Fitzgerald & Portuondo, 2665 South Bayshore Drive, Suite M-103, Coconut Grove, Florida 33133.

LAW OFFICES OF  
HOWARD W. MAZLOFF, P.A.  
Attorneys for Petitioner  
Dadeland Towers, Suite 310  
9300 South Dadeland Blvd.  
Miami, Florida 33156  
Phone: (305) 670-6760

By: 

HOWARD W. MAZLOFF  
(Fla. Bar No. 138107)