SUPREME COURT OF FLORIDA

TARA DANIEL,

Petitioner,

vs.

MICHAEL S. DANIEL,

Respondent.

Case No. 89,363

Second DCA No. 95-04573

PETITIONER'S REPLY BRIEF

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Additional Authority:

INTRODUCTORY STATEMENT

In this Brief, the Petitioner, TARA DANIEL. will be referred to as the Mother or the Petitioner. The Respondent, MICHAEL S. DANIEL, will be refereed to as Legal Father or the Respondent. Designations to the Record will be referred to as (R:) followed by the appropriate page number(s). Designations to the Appendix will be referred to as (A:) followed by the appropriate page number(s).

STATEMENT OF THE FACTS AND THE CASE

A final judgment was entered by the Circuit Court for Pinellas County on November **8, 1995,** dissolving the parties marriage. A timely notice of appeal was thereafter filed by the Respondent, appealing the Order of the trial Court requiring the Petitioner to support the minor child, CIARA DANIEL, who was born during the parties' marriage. (R: 143-148)

On appeal, the Second District relied on Albert v. Albert, 415 So.2d 818 (Fla. 2d DCA 1982), in holding that the Respondent has no duty to pay child support upon the dissolution of the marriage,

The Second District Court also certified the following question as being of great public importance:

> IS THE PRESUMPTION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY, AND THE BIRTH CERTIFICATE REMAINS UNCHANGED? (A: 19)

giving rise to the present appeal to this Honorable Court,

Pursuant to this Court's Order Postponing Decision on Jurisdiction and Briefing Schedule, the Petitioner timely filed her Initial Brief appealing the decision of the Second District in this case. The Respondent then filed his Answer Brief in which he opted to address only the question certified by the DCA, and to ignore the remainder of the DCA's decision.

SUMMARY OF ARGUMENT

The Petitioner herein asserts that her Initial Brief, filed pursuant to this Court's Order Postponing Decision on Jurisdiction and Briefing Schedule, was absolutely proper in addressing all of the issues arising from the decision of the Second District in this case. There is no authority for the Respondent's assertion that the Initial Brief must be limited to the issues raised by the specific certified question and nothing more.

ARGUMENT

The Respondent's Answer Brief in this case begins as follows:

"Only the District Court of Appeals, not the litigants, has the authority to certify a question to this Court to be of great public importance. (F.R.A.P. 9.030(2)(a)(v)) The issue certified by the Second District Court of Appeals is as follows:

> **IS THE PRESUMPTION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY, AND THE BIRTH CERTIFICATE REMAINS UNCHANGED?**

Although the Petitioner herein seeks to reargue the entire merits of the matter before the Second District and not just the merits of the certified question, they fail to allege any conflict or other basis for this Court's jurisdiction.

Therefore, the Respondent will limit his argument to the certified question." (A: 11)

The Petitioner fully agrees with Respondent's assertion that only the District Court, and not the litigants, can actually certify a question to be of great public importance. The remainder of the above quoted statement implies that Petitioner was improper in appealing the entirety of the lower court's decision, instead of limiting our argument to the certified question. Quite the contrary, the undersigned was merely doing his duty as an advocate by zealously representing the Petitioner and alerting this Honorable Court to the many other issues arising from the lower court's decision. The Petitioner has initiated an appeal of the lower court's decision. Common sense mandates that a litigant appealing a lower court's decision cannot be limited in their appeal by the very same court he is appealing. As this Honorable Court is aware, a lower court cannot direct the State Supreme Court to do anything, especially limit what the Highest Judicial Authority in the State can hear on appeal.

Article V, § 3 (b)(4), Fla. Const., dealing with jurisdiction of the Supreme Court, clearly indicates that the Supreme Court, "[m]ay review any ***decision*** of a district court of appeal that passes upon a question certified by it to be of great public importance, or

that is certified by it to be in direct conflict with a decision of another district court of appeal." (emphasis supplied).

A review of the well established case law interpreting Article V, § 3 (b)(4), Fla. Const. unequivocally states that the Supreme Court's scope of review over decisions which certify a question to be of great public importance extends to the ***decision*** of the district court, rather than the certified question. The Supreme Court decided this very issue thirty-five years ago in Confederation of Canada Life Insurance Co., v. Arminan, 144 So.2d 805 (Fla. 1962), which held, "In this review, wherein the question was certified to us by the district court of appeal as being one of great public interest, we are interested in the ***entire decision*** of that ***court,*** and ***not jut in the "question" certified."*** (emphasis supplied) Id. at 807, *citing* Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961) (A:18).

Additionally, footnote one (1) in Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976), a Supreme Court decision arising from a certified question of grate public importance from the Second District, stated, "[a]ll parties agree that our review extends to the "decision" of the district court, rather than the question on which it passed." Id. at 612 (A:24). This leaves no doubt that the Petitioner's Initial Brief was proper in addressing the issues arising from the lower *court's decision.* Both of the above quoted cases are included in the appendix for the Court's convenience,

The Petitioner asks that this Court **not** grant the Respondent leave of court to file a Supplemental brief in this case, The Respondent is charged with knowing the law and, as such, knew or should have known that he was obligated to address the issues raised by the Petitioner's Initial Brief in his Answer Brief. Respondent opted to limit his argument to the certified question and should be required to live with that decision. Granting leave of Court would further delay this case to the detriment of the child.

Delay would continue to prejudice CIARA DANIEL and frustrate the minor child's right to support under existing law.

CONCLUSION

For the aforementioned reasons, the Petitioner requests this Honorable Court to address the issues raised by the entire decision of the district court in this case. In addition, the Petitioner prays that this Court will deny the Respondent's request for leave of Court to file a Supplemental Brief.

Respectfully Submitted,

CARL T. BOAKE, ESQUIRE
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery to Peter N. Meros, Esquire, 1301 Fourth Street North, Post Office Box 27, St. Petersburg, Florida 33731, this 7 day of JANUARY, 1997.

LAW OFFICES OF
WALLACE, FINCK, BOAKE & COLCLOUGH

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INDEX TO APPENDIX

SUPREME COURT OF FLORIDA

TARA DANIEL,

Petitioner,

vs.

MICHAEL S. DANIEL,

Respondent.
_____/

CASE NO. 89,363

Second DCA No. 9504573

RESPONDENT'S ANSWER BRIEF

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8 13-822-4929
Attorney for Respondent

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Other References:

INTRODUCTORY STATEMENT

The Petitioner, TARA DANIEL, will be referred to as the natural mother or the Petitioner. The Respondent, MICHAEL S. DANIEL, will be referred to as the legal father or the Respondent.

Designations to the Record will be referred to as (R-) followed by the appropriate page number.

Designations to the Appendix will be referred to as (A-) followed by the appropriate page number.

STATEMENT OF THE FACTS AND THE CASE

THE CASE

A Final Judgment of Dissolution of Marriage was er ered by the trial Court on November 8, 1995 dissolving the marriage between the parties. (R-135-142) . That Final Judgment was appealed to the Second District Court of Appeals. (R-143-148). The Second District filed their Opinion on October 18, 1996, reversing the trial Court in part. (A-1-6).

The Second District in their Opinion also certified to this Court the following question as being of great public importance:

> **"IS THE PRESUMF'TION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY, AND THE BIRTH CERTIFICATE REMAINS UNCHANGED?"**

Thereafter on November 7, 1996, the Petitioner filed a Notice to Invoke Discretionary Jurisdiction stating:

> "Notice is given that Appellee, TARA DANIEL, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered October 18, 1996. The decision passes on a question certified to be of great public importance."

No briefs were filed by the Petitioner with regard to jurisdiction pursuant to Florida Rule

of Appellate Procedure 9.120(d).[1] Thereafter this Court entered its Order Postponing Decision on Jurisdiction and Briefing Schedule, dated November 26, 1996, requiring a Brief on the merits on or before December 23, 1996. The Brief filed by the Petitioner was not limited to the merits of the certified question, but attempts to reargue all of the issues that had been before the Second District Court of Appeals. The Brief does not allege conflict or any other basis for expanding the jurisdiction of this Court beyond the certified question. Therefore, the Respondent's Brief will be limited to the merits of the certified question and if this Court feels that other issues should be briefed, the Respondent asks leave of Court to file a Supplemental Brief on those issues. [2]

THE FACTS

The facts before this Court are essentially undisputed and are contained within the findings of fact made by the trial court in paragraphs 3 and 4 of the Final Judgment.(R-138- 142). The parties were married to each other on December 26, 1992. At the time of the parties' marriage, the Husband knew that the Wife was pregnant with a child of another man. It was stipulated by the parties that MICHAEL DANIEL is not the natural

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[1] No briefs on jurisdiction would be required pursuant' to Florida Rule of Appellate Procedure 9.120(d) if the Petitioner concedes that the only issue before the Court is the certified question.

[2] The District Court reversed the trial Court's decision requiring the Respondent, MICHAEL DANIEL, to pay support for CIARA DANIEL, after his dissolution of marriage from the Petitioner. "Here since the Husband is neither the child's natural nor adopted father and he has not contracted for her care and support, he has no duty to pay child support upon the dissolution of marriage."(A-3)

father of the child, Furthermore the Court specifically found:

> "The Husband herein, MICHAEL DANIEL, did not agree to adopt CIARA DANIEL; did not agree to support her after the parties herein were divorced; did not contract for her support; nor do any facts exist which would require him to pay support under the doctrine of equitable estoppel. He did, however, bond with the child, love her and supported her voluntarily during the time that the parties were together."

After CIARA's birth in March of 1993, the parties lived together only until August of 1993 at which time they separated. They got back together briefly thereafter and their fmal separation was in November of 1993 .(Final Judgment, page 2, paragraph 4)(R-138-142). A Guardian Ad Litem was appointed by the Court for the minor child, (R-58). The Guardian Ad Litem's report was offered into evidence. (R-58). The Guardian Ad Litem identifies the natural father of CIARA and recognized that he was regularly employed and capable of paying support as evidenced by the fact that he is currently supporting a four month old daughter and also supports his girlfriend's child by a prior marriage.(R-58). The trial court found that the Respondent herein was obligated to pay support for CIARA DANIEL on the following basis:

> "It is the specific finding of this Court that the Supreme Court case of Privette v. Privette, 617 So.2d. 305, (Fla. 1993) changes the law in Florida: 'only a natural or adopted parent has a duty of support to a minor child. ' It is the finding of this Court that the presumption of legitimacy imposed upon a legal father (the husband of the child's mother at the time of the child's birth) also implies a duty of support even after a dissolution of the parties' marriage. It is the belief of this Court that support follows legitimacy and to find otherwise would leave the mother in the lurch by having to make a decision of support vs. legitimacy. "

It is important to note that:

NEITHER PARTY CHALLENGED THE LEGITIMACY OF THE CHILD DURING THE PROCEEDING.

SUMMARY OF ARGUMENT

The Second District chooses what question to certify, not the litigants. The Petitioner apparently seeks review of the entire case, not just the certified question. There is no conflict alleged nor a Brief submitted on the jurisdiction of this Court to consider matters other than what was certified by the Second District. It is respectfully submitted by the Respondent that the sole issue before the Court is the certified question.

It is not the position of either the Petitioner or the Respondent that their dissolution of marriage had any effect whatsoever on the legitimacy of the child. The child was born during a lawful marriage and is legitimate. The parties to a divorce cannot change that by stipulation.

ARGUMENT

Only the District Court of Appeals, not the litigants, has the authority to certify a question to this Court to be of great public importance. (F.R.A.P. 9.030(2)(a)(v)) The issue certified by the Second District Court of Appeals is as follows:

> **"IS THE PRESUMPTION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND, BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY AND THE BIRTH CERTIFICATE REMAINS UNCHANGED?"**

Although the Petitioner herein seeks to reargue the entire merits of the matter before the Second District and not just the merits of the certified question, they fail to allege any conflict or other basis for this Court's jurisdiction. To the contrary, every District in the State of Florida is in accord with this Court's ruling with regard to the support issue. Alpert v. Alpert, 415 So.2d. 818, (2nd DCA 1982); Portuondo v. Portuondo, 570 So.2d. 1338, (3rd DCA 1990), review denied 581 So.2d. 166, (Fla. 1991); Swain v. Swain, 567 So.2d. 1058, (Fla. 5th DCA 1990); Bostwick v. Bostwick, 346 So.2d. 150, (Fla. 1st DCA 1977); Tavlor v. Tavlor, 279 So.2d. 364, (Fla. 4th DCA 1973).

Therefore, the Respondent will limit his argument to the merits of the certified question.

Neither the Petitioner nor the Respondent have ever taken the position that their dissolution of marriage had any effect whatsoever on the legitimacy of the child. Their

stipulation before the trial Court, that the Respondent herein was not the natural father of the child, was simply a recitation of fact and created no issues with regard to legitimacy. As correctly stated by the District Court:

"Only one person can be the biological father of a child."

The legal concept of legitimacy does not address the identity of the natural father. To the contrary, all that is required is that the mother be married at the time of the child's birth.

As stated by Judge Whatley in the Second District Court's opinion:

> "Paternity and legitimacy are related concepts, but nonetheless separate and distinct concepts."

Paternity deals with determining fatherhood while legitimacy deals with compliance with the law: "born to legally married parents". The American Heritage College Dictionary, 775 (3d ed. 1993). It is undisputed herein that the Petitioner and Respondent were married to each other at the time that CIARA was born. There is no claim that their marriage was illegal.

> "A child born or conceived during a lawful marriage is a legitimate child. Matter of adoption of Baby James Doe,572 So.2d. 986,(1st DCA 1990)."

> "In Florida, an illegitimate child is one both conceived and born at a time its mother is not lawfully married.. . " Lopez v. Lopez, 627 So.2d. 108, (1st DCA 1993); Dennis v. Department of H.R.S., 566 So.2d. 1374, (5th DCA 1990).

The laws dealing with legitimacy have evolved for the purpose of protecting the innocent children who have had no choice in their fate.

> "We start from the premise that illegitimate children are not 'non-persons'. They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment. " Levv v. Louisiana, 391 US 68, 20 L.Ed.2d. 436 (1968).

CIARA DANIEL was born during the lawful marriage of the Petitioner and Respondent and was thus born legitimate. That status cannot be changed by a mere stipulation of the parties.

CONCLUSION

It is respectfully requested that this Court answer the certified question as follows:

THE PRESUMPTION OF LEGITIMACY IS NOT OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND, BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY AND THE BIRTH CERTIFICATE REMAINS UNCHANGED.

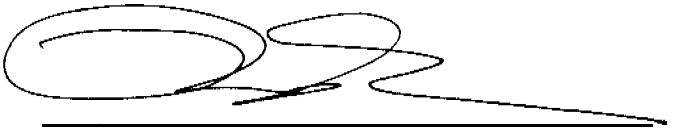
Respectfully submitted,

PETER N. MEROS
Attorney for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Carl T. Boake, Esquire, P.O. **Box** 60, St. Petersburg, FL 33731, and that the original and seven copies of the foregoing Brief has been mailed to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida, this 9th day of January, 1997.

MEROS, SMITH & OLNEY, P.A.



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Attorney for Respondent

counsel to obtain such benefits. In support thereof he referred to our statements in Taff.

This Court ruled, as it was compelled to do by the provisions' of Section 440.34(1), that since the compensation was paid within 21 days of the filing of the claim the em-' ployer was not responsible for the attorneys' fees. In the instant case the increased compensation was not paid within 21 days of the claim.

[5] Thus, it must be concluded that the Act does not protect a claimant as far as attorneys' fees are concerned in those cases such as Carillon, where' compensation is not paid within 21 days after notice of the injury but is so paid after the filing of the proper claim by an attorney the claimant has been compelled to employ. But the Act as a whole is so designed as to facilitate a claimant's prosecuting his own claim without the necessity of any assistance from **an** attorney. The Act does not guarantee that a claimant will be paid within 21 days of the employer's notice of the injury or of the filing of the claim; it does not even guarantee that if the employer does not do so, it shall be penalized by being assessed with attorneys' fees. The Act does provide that if the employer does not pay the claim made within 21 days after the filing of the claim and the claimant has been compelled out of necessity to engage the services of an attorney, and such services have resulted in the claimant's being paid compensation benefits, the employer shall bear the cost of those legal services,

[6] It is true that the claimant has the burden of proving the extent of his disability. After he filed his claim in this case the burden was on him to proceed with the diligent prosecution of that claim. Rule **No.** 3, Florida Industrial Commission Rules of Procedure. Here, he did not even request a hearing when he filed his claim and it would appear the City was entitled to do nothing further at that point.

To avoid the liability of attorneys' fees, however, the employer in this case should have made some effort towards establishing a rating to which both could agree so that it could pay compensation based thereon within 21 days after the claim was filed, Or, it should have cooperated to such an extent as to make the' services of an attorney for the claimant entirely unnecessary. Apparently it did not do so.

Accordingly, the award. of 'an attorney's fee being proper, and the amount thereof reasonable, our decision heretofore reached to grant claimant's motion to dismiss the petition for certiorari is adhered to and the petition for rehearing is hereby denied.

It is so ordered.

ROBERTS, C. J.; and TERRELL, THOMAS and THORNAL, JJ., , concur.

CONFEDERATION OF CANADA LIFE INSURANCE COMPANY, a/k/a Confederation Life Association, Petitioner,

v.

Manuel Antonio VEGA Y ARMINAN, Respondent.

No. 31739.

Supreme Court of Florida.

Sept. 19, 1962.

Action on policy written in Cuba and issued by Canadian -insurer. The Circuit Court, Dade County, J. Fritz Gordon, J., overruled a motion to dismiss, and the insurer appealed. The District Court of Appeal affirmed, 135 So.2d 867, and the insurer brought certiorari. The Supreme 'Court, O'Connell, J., held that the, subjecting of the Canadian insurer, which had obtained authority to do business in Florida, to serv-

ice of process and jurisdiction of Florida state courts in the action arising outside Florida did not violate requirement of constitutional due process.

Writ denied.

1. Courts ⇐216

Where question is certified to Supreme Court by District Court of Appeal as one of great public interest, Supreme Court is interested in the entire decision: and not just in the question certified.

2. Corporations ⇐668(1)

Foreign corporation qualifying to do business in state becomes amenable to process even as to causes of action not arising out of its transactions therein.

3. Constitutional Law ⇐305

Subjecting Canadian insurer, which had obtained authority to do business in Florida, to service of process and jurisdiction of Florida state courts in action by Cuban citizen living in Florida on policy written in Cuba did not violate requirements of constitutional due process. F.S.A. § 624.0221 and subd. 3.

Shutts, Bowen, Simmons, Prevatt & Boureau and Cotton Howell, Miami, for petitioner.

Helliwell, Melrose & DeWolf and David P. Karcher, Miami, for respondent.

O'CONNELL, Justice.

The District Court of Appeal, Third District, certified the subject case to be one involving: a matter of great public interest. Accordingly, this Court has jurisdiction of the cause in certiorari proceedings under Florida Constitution, Art. V, Sec. 4(2), F.S.A. See Susco Car Rental System of Florida v. Leonard, Fla.1959, 112 So.2d 832.

The respondent, Manuel Antonio Vega y Arminan, instituted these proceedings in the Circuit Court for Dade County against the petitioner, Confederation of Canada, Life Insurance Co.,: a, Canadian insurance corporation. Respondent, a citizen of Cuba but residing in Florida, alleged that he had purchased an insurance policy from the petitioner in 1928, paid all the required premiums, and had demanded payment of the cash surrender value thereof, but the petitioner had refused to make such payment. He prayed for judgment against the petitioner in the amount of the cash surrender value plus a reasonable. attorney's fee.

Petitioner filed a motion to dismiss the complaint on the ground,.among others, that the court lacked jurisdiction over the subject matter and over the respondent.

The trial court entered an order denying the motion to dismiss, whereupon the respondent sought review by the district court of appeal through an interlocutory appeal. That court affirmed, writing the opinion herein reviewed, which opinion is reported in Fla.App., 135 So.2d 867.

It was noted by the district court that the policy was issued to respondent while he was a resident of Cuba and was accepted by the petitioner at its home office in Canada.

That court also observed that service of process was obtained upon the petitioner, who had qualified to do business in this state, by perfecting service on the *Commissioner* of Insurance of the State of Florida, pursuant to Sec. 624.0221, F.S.A., which reads in part as follows:

> "(1) Each insurer applying for authority to transact insurance in this state, whether domestic, foreign or alien, shall file with the commissioner its appointment of the commissioner and his successors in office, on a form as furnished by the commissioner, as its attorney to receive service of all legal process issued against it in any

civil action or proceeding in this state, and agreeing that process' so served shall be valid and binding upon the insurer, The appointment shall be irrevocable, shall bind the' insurer and any successor in interest as to the assets or liabilities of the insurer, and shall remain in effect as long as there is outstanding in this state any obligation or liability of the insurer resulting from its. insurance transactions therein

"(2) * * *

"(3) Service of process upon the commissioner as the insurer's attorney pursuant to such an appointment shall be the sole method of service of process upon an authorized domestic, foreign: or alien insurer in this state."

The district court said that petitioner had contended its registration under the above statute did not make it amenable to process in an action based upon a policy not written in the State of Florida. The court's reply was that the action was transitory and thus the action could be brought by the respondent against the petitioner in any jurisdiction where service of process could be made on the petitioner.

Petitioner argued that the language in the concluding, sentence of subsection (1) of the above statute ("as long as there is outstanding in this state any obligation or liability of the insurer resulting from its insurance transactions therein") limited the authority of the insurance commissioner to accept service only as to causes of action arising out of the petitioner's activities in this state. The court expressed its conviction that this language limited the *duration* of the express agency but did not limit the authority granted to the agent.

It was also argued before the court by the petitioner that the test as to whether or not it was amenable to process issuing out of the courts of this state was the "minimum contact" rule. The court determined that such rule applied to true substituted service statutes, such as Sec. 626.0505, F.S.A., and not to'those cases where process is served upon an expressly: designated agent of the corporation pursuant, to statutes such as Sec. 624.0221; F.S.A., supra.

Finally, the court commented upon' petitioner's assignment of error pertaining to the doctrine of forum non conveniens., It found the doctrine had not been presented to the trial court as ground for the motion to dismiss. The appellatk court stated that, nevertheless, it 'had examined' the record in the light of the discretion vested in the trial judge under the doctrine of forum non conveniens and had found no abuse of discretion, even had the issue been brought to his attention,

Thi district court. of appeal , thereupon affirmed the order of the trial judge denying the motion to dismiss. the complaint;

Petitioner on this review by writ of certiorari raises two, primary points for, consideration. In addition, it reiterates its position that the Florida court was a forum non conveniens,

[1] In this review, wherein the question was certified to us by-the district court of appeal as being one of great public interest, we are interested in the entire decision of that court and not just in the "question" certified. Zirin v. Charles Pfizer & Co., Fla. 1961, 128 So.2d 594.

In its opinion the district court of appeal expressed the view the trial judge had not abused his, discretion on the, question of forum non conveniens, even had the issue been presented to him. Quite, obviously this question was not properly before the district court. Therefore that part of its opinion dealing therewith is obiter. Accordingly, under the facts of this case we are not privileged to consider and decide the question. We will not discuss it.

Although we have assumed jurisdiction in' this cause under the certification by the district court, petitioner advances the theory that the instant decision is one which is in direct conflict with a decision of this

Court, to-wit: Zirin v.' Charles. Pfizer & Co., Fla., 128 So.2d 594, supra.

Disposal of this last mentioned point will facilitate our disposition of the major points on this review; hence, we will first treat this contention.

The instant case involves the amenability of a foreign insurance corporation which has qualified to do business in this state (and thus has expressly appointed the insurance commissioner as. its agent to receive service of process in any civil action or proceeding brought in this state) to service of process relating to a cause of action not arising within this state. The statute applicable is Sec. 624.0221, supra, which in subsection (3) provides that service upon the commissioner shall be the sole method of service of process upon an authorized insurer, domestic or foreign.

The Zirin case, on the other hand, involved a foreign 'corporation, not an insurer, which had not qualified to do business within this state. The applicable statute was Sec. 47.171, F.S.A.

The two cases involve two different kinds of corporations (qualified and non-qualified) and two different statutes (Sec. 624.-0221 and Sec. 47.171). The instant case pertains to an expressly designated agent for the receiving of service of process where the sole method of obtaining service upon' the corporation is by serving that agent. The Zirin case pertains to an agent *impliedly* authorized to receive such service and service upon him was not the sole method of obtaining service upon the foreign corporation.

The two cases are not in conflict.

Petitioner's major points on this review are that (1) Sec. 624.0221 cannot be construed to extend to service of process in a cause of 'action not arising out of the corporation's activities in this state and (2) if so construed, the statute is violative of eonstitutional due process.

Petitioner's brief and argument 'reflects confusion as to the applicable law.' The statute and cases pertaining to service of process upon an actual representative or an implicdly appointed agent of a foreign corporation *not authorized* to do business within the state wherein the suit is brought are not applicable to the instant issue. The issue before us is restricted to those cases wherein the foreign corporation, as a condition precedent to its operations within the state, has expressly designated a public official as its agent for the purpose of receiving service of process. The, question is whether that designation incorporates causes, of action arising without the state and, if so, does the corporation thereby suffer a denial of due process of law.

[2] Much has been written on this issue and while there is some conflict, the decided weight of authority is to the effect such a foreign corporation qualifying to do business in the state becomes amenable to process even as to causes of action not arising out of its transactions therein and thereby suffers no denial of due process of law.

A very comprehensive treatment of this subject (amenability to suit on causes of action not arising in the state of the forum) is given in Anno: 145 A.L.R. 630 (1942), supplemented in 162 A.L.R. 1424 (1945). While we do not rely on these annotations, as authority for our decision we have found them helpful to an understanding of the questions in issue. The cases cited in these annotations are used to support our decision,

Thcsc annotations include treatment 'of both those corporations qualified to do business within the state and those not qualified and note that much of the apparent conflict among the jurisdictions may be reconciled by noting in which of those two classifications the corporation falls. It appears from the annotations and the cases cited therein to be almost universally accepted that a foreign corporation not qualified to do 'business within the state but actually

transacting such business therein (or having "minimum contacts" therein, as referred to by the district court of appeal in its opinion) is amenable to being sued in that state only as to causes of action arising out of its transactions in that state.

The original annotation in 145 A.L.R. noted some conflicts on the issue with which me are concerned, pertaining to foreign corporations authorized to do business in the state. In the supplement in 162 A.L.R. 1424 it is commented that "in most of the few cases decided since the previous annotation, the courts have condemned such substituted service as to transactions occurring without the state." Only a very few cases were referred to as being applicable.

Since the publication of the supplement in 162 A.L.R. the publishers of that service have kept cumulative the list of cases which may be properly related to the original annotation and we have examined each one of the thirty-odd cases cited. We find that the great majority involved foreign corporations not authorized to do business within the state wherein the action was commenced. Some related to corporations which had at one time been qualified but had withdrawn from the state and thus purportedly revoked the appointment of the public official as their agent. Few of the cases involved the specific issue with which we are involved here.

Of those applicable, several appeared to limit the amenability of the corporation to suit only on a cause of action arising in the state, but could be distinguished because of the peculiar provisions of the applicable statutes. A very few were flatly to the effect that such limitation was applicable, although the pertinent statute was not materially distinguishable from ours. On the other hand, several either directly or impliedly support the majority view that such corporations are amenable to service of process as to causes of action arising without the state: Tomerlin v. London & Lancashire Indemnity Co. of America, 76 F. Supp. 168 (E.D.Ill.1944); Hunter Packing Co. v. Trinity-Universal Ins. Co., 76 F.Supp. 173 (E.D.I11.1947); Gibbons & Reed Co. v. Standard Accident Ins. Co., 191 F.Supp 174 (D.Utah 1960); and State ex rel. Blackledge v. Latourette, 1949, 186 Or. 84, 205 P.2d 849, 8 A.L.R.2d 803.

As pointed out in Anno: 2 L.Ed.2d 1664, at p. 1670, the question of whether a foreign corporation may be sued in a state on a cause of action in personam which did not arise within the state without violating constitutional due process had not been authoritatively settled until the Supreme Court of the United States issued its opinion in Perkins v. Benquet Consolidated Mining Co., 1951, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485, reh. den. 343 U.S. 917, 72 S. St. 645, 96 L.Ed. 1332

The Perkins case involved actions in personam brought in the courts of Ohio against a foreign corporation which had not registered to do business in Ohio and had not designated an agent in that state for the purpose of receiving service of process. The causes of action did not arise out of transactions within Ohio. Service of process was perfected on the president of the corporation while he was in Ohio.

The U. S. Supreme Court stated that its decision required answer to the question of whether the due process clause of the Fourteenth Amendment of the Federal Constitution precluded Ohio from subjecting a foreign corporation to the jurisdiction of its courts in an action in personam which did not arise in the state. The identical question is raised here. That court answered the question saying:

> "* * * we hold that the Fourteenth Amendment leaves Ohio free to take or decline jurisdiction over the corporation." 342 U.S. at p. 438, 72 S. Ct. at p. 415.

And further it said:

> "The instant case takes us one step further to a proceeding in *personam* to

enforce a cause of action not arising out of the corporation's activities in the state.: of the forum. Using the tests mentioned above we find no requirement of federal due process that either *prohibits* Ohio from opening. its courts to the cause of action here 'presented or *compels* Ohio to do so. * * * " 342 U.S. at p. 445,' 72 S.Ct. at p. 418.

"In, the Perkins case the corporation had neither, registered to do business in Ohio nor designated a resident agent to receive service of process in that state;, In the case now.. before- us the petitioner corporation had done both.

'If a suit. in personam on a cause not arising in the state of the forum maybe properly brought against a, foreign corporation which has not registered to do business or designated an agent for accepting service of process, without offending the require; ment, of due process, as was held in the Perkins case, logic and reason compel the conclusion that such an action may be properly brought against a: foreign corporation which has by registering to do business in this state and by designating the commissioner- of insurance as it5 'agent pursuant to 624.0221, F.S.A. subjected itself to the "service of all legal process issued against it in any civil action or proceeding in this state."

The Perkins case makes clear that notice to the corporation must be fair and ample. In this case it is not contended that the petitioner corporation did not have fair and ample notice of the suit against it.

[3] We therefore conclude, as did the district court, that subjecting the petitioner to service of process and the jurisdiction of the 'courts of this state does not violate the requirement of constitutional due process in this case."

As stated in the Perkins case provisions for making foreign corporations subject to service of process' and subject to the jurisdiction of its courts, in cases such as this, is a matter within the legislative discretion of the state.

While it might be' that Florida could by legislative act deny its process. and use of its courts in actions against foreign corporations on causes not arising within this state, our legislature has not done So. Until it does such actions may be properly pursued in the courts of this state where process is properly served according to law;

The pertinent statute draws no distinction between actions when brought by, a citizen or resident of this state against such a nonresident corporation and actions brought by a non-citizen or non-resident, and we see no reason or basis in these days to make that distinction. However, the annotations above referred to indicate that some decided cases have made a distinction on such a basis.

We also agree with the district court of appeal that the clause "as long as there is outstanding in this state any obligation or liability of the insurer resulting from its insurance transactions therein", found in Sec. 623.0221, applies to the duration of the commissioner's power to accept service of process and not as to the extent of his power. See 145 A.L.R. pp. 656–657. This matter is also discussed in 23 Am.Jur., Foreign Corporations, Sections 493-497, which discussion corroborates the conclusions we have reached here.

We have concluded that Sec. 624.0221 contemplates service of process on foreign-corporations, such as the *one* involved here, even as to actions arising outside this state, and that subjecting the corporation to service of process in this manner and to suit in this state on such an action does not deny the corporation constitutional due process.

For the reasons above expressed the petition for writ of certiorari is hereby denied.

ROBERTS, C. J., and TERRELL, THOMAS; DREW, THORNAL and SEBRING (Ret.),> JJ., concur..

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The use of such a pamphlet was again challenged in *Shoultz v. State,* 106 So.2d 424 (Fla.1958). This Court referred to its opinion in *Ferrara* and declined to reconsider the issue, In its opinion the Court said :

> "However, we would like to take this opportunity to reaffirm our criticism of the provision of this handbook which admonishes jurors not to question witnesses. . . . We suggest, however, that the pamphlet herein considered should be modified to eliminate this admonition in order that future criticism may be avoided,' for we cling to the view that upon appropriate occasions a trier of fact might be justified in propounding a question." 106 So.2d at 425–26.

The trial judge in his discretion, could have refused to allow the questioning or he could have permitted it. Rather than exercise his discretion in, passing upon the propriety of defense counsel's statement, the judge declared a mistrial.

The mistrial was'grounded upon a finding by the trial judge that defense counsel's conduct was improper. There can be no improper conduct on the part of an attorney who places the judge in a position to rule upon some question which involves discretion. The judge may be bitterly opposed to the suggested procedure and he may, in his discretion, disallow the procedure, but it is not improper for the attorney to make the request. or attempt to follow the procedure.

Where anything is done during the course of a trial which the court could allow in its discretion, there can be no manifest necessity for declaring a mistrial. In determining that the conduct of the attorney was legally sufficient reason for a mistrial, the trial court abused its discretion.

Jeopardy attached and the peremptory writ of mandamus should issue.

BOYD and HATCHETT, JJ., concur.

HILLSBOROUGH ASSOCIATION FOR RETARDED CITIZENS, INC., et al., Petitioners,

v.

CITY OF TEMPLE TERRACE et al., Respondents.

No. 48504.

Supreme Court of Florida.

May 12, 1976.

Rehearing Denied July 8, 1976.

Suit was brought by city and several residents to enjoin operation of home for the mentally retarded on ground that home was a nuisance and was in violation of city zoning ordinance. The Circuit Court for Hillsborough County, Vernon W. Evans, Jr., J., entered judgment that ordinance could not be enforced against operators of home, and plaintiff appealed. The District Court of Appeal, 322 So.2d 571, reversed and remanded, and writ of certiorari issued. The Supreme Court, England, J., held that sovereign immunity furnished no guide for decision since municipal zoning power is constitutionally delegated, that balancing of interests test is to be applied in determining extent to which state agencies are subject to municipal zoning ordinances and that except where a specific legislative directive requires a nonconforming use in a particular area, local administrative proceedings provide the forum in which the competing interests of governmental bodies are to be weighed.

Decision of District Court of Appeal affirmed.

Roberts, J., concurred in judgment adopting District Court of Appeal's decision.

I. Appeal and Error ⇐861

On District Court of Appeal's certification of a question of great public interest the superior court's scope of review extends to the "decision" of the district court, rather than the question on which it

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passed. West's F.S.A.Const. art. 5, § 3(b) (3).

2. Zoning ⇐601

Although school board was granted leave to file a brief as friend of the court the board's contentions that constitutional genesis of school boards 'differs from that of other state agencies and that school boards have location powers paramount to local zoning authority were not appropriate for resolution in dispute involving whether Department of Health and Rehabilitative Services was subject to municipal zoning requirements as reghrds location of respite care center, West's F.S.A.Const. art. 8, § Z(b) ; West's F.S.A. §§ 166.011 et seq., 166.021(4).

3. Zoning ⇐237, 786

A balancing of interests test is to be applied in determining whether a state agency is immune from municipal zoning ordinances ; under such test the governmental unit seeking to use land contrary to applicable zoning regulations has burden of proving that public interest favoring the proposed use outweighs those mitigating against a use not sanctioned by zoning regulations of the host government. West's F. S.A.Const. art. 8, § Z(b); West's F.S.A. §§ 166.011 et seq., 166.021(4).

4. Zoning ⇐236

Whether private nonprofit corporation, which had contracted with Division of Retardation of Department of Health and Rehabilitation Services to provide a respite care center and which established such a center in a privately owned house located in area zoned for single family residences, was immune from operation of municipal zoning ordinance was to be decided under a balancing of interests test; the corporation, through the state agency, was not automatically immune from operation of the ordinances. West's F.S.A.Const. art. 8, § 2(b); West's F.S.A.' §§ 166.011 et seq., 166.021(4).

5. Zoning ⇐321

Requiring state agencies to seek local approval for nonconforming land uses serves the public benefit in that. administrative resolution,' rather. than judicial resolution; provides less,' expensive and most expeditious way of settling intergovernmental disputes.

6. Zoning ⇐237

Sovereign immunity was no guide in determining, whether state agencies are subject to municipal zoning ordinances since municipal zoning power is constitutionally delegated. West's F.S.A.Const. art; S, § 2(b) ; West's: F.S.A. §§ 166.011 et seq., 166.021(4).

7. Zoning ⇐321

A state agency is to cooperate with a local government when "the former decides to achieve an object by means of a nonconforming land use; except where a specific legislative directive requires a nonconforming use in the particular area, local administrative proceedings 'will provide the forum in which the competing interests of governmental,, bodies are weighed. West's F.S.A.Const. art. 8, § Z(b); West's F.S.A. §§ 166.011 'et seq., 166.021(4).

8. Zoning ⇐5

The state has the power to exempt 'itself from local zoning ordinances. West's F.S.A.Const. art. 8, § 2(b); West's F.S.A. §§ 166.011 et seq., 166.021(4).

Thomas A. Clark and Thomas J. Roehn, Carlton, Fields, Ward, Emmanuel, Smith' & Cutler, Tampa, for petitioners.

Theodore C. Taub and Robert C. Gibbons, Gibbons, Tucker, McEwen, Smith; Cofer & Taub, Tampa, fbr respondents.

Robert L. Shevin, Atty. Gen., James D. Whisenand, Deputy Atty. Gen., and Sharyn L. Smith, Asst. Atty. Gen., for a'micus curiae.

James G. Mahorner; Tallahassee, for State of Florida Dept. of Health and Rehabilitative Services, amicus curiae.

John W. Bowen, Rowland, Petruska, Bowen & McDonald, Orlando, for The School Rd. of Orange County, Florida, amicus curiae:

ENGLAND, Justice.

[1] The Second District Court of Appeal has certified to us, pursuant to Article V, § 3(b) (3) of- the Florida Constitution, a question of great public interest' on which it passed in a decision reported at 322 So. 2d 571.[1] The question involves the extent to which agencies of the state are subject to municipal zoning ordinances.

The Hillsborough Association for Retarded Citizens, Inc. is a private non-profit corporation under contract with' the Division of Retardation of the' Department of Health and Rehabilitative Services to provide a'respitc care 'center where the guardians' of retarded persons can leave their charges for short periods of 'time. The Association established such a center in a privately-owned house located in an area of the City of Temple Terrace zoned for single family residences, in clear violation of municipal' ordinances. 'It had not sought prior permission to engage in a non-conforming use.

[2–5] As the district court noted, the issue involved in this case has statewide significance, important intergovernmental consequences, and no clear precedent in this jurisdiction. We have heard oral argument and had the benefit of briefs from' the named parties, the Attorney General of Florida, and the Department of Health and Rehabilitative Services.[2] These presentations on the very difficult legal issues involved in this case have been thorough and skillful. Our review of the matter persuades us to adopt the position asserted by the City and adopted by the district court.[3] The opinion authored by Judge Grimes below has also simplified our task, being a craftsmanlike product which has fully explored and evaluated the issues and their legal effects. We cannot improve on his analysis, and it would serve no purpose to rephrase it. We adopt his opinion as our own.

[6] The only point of law urged here which is not addressed in the opinion below is the. applicability of our decision in *Dickinson v. City of Tallahassee*, 325 So.2d 1 (Fla.1975), adopted after the district court had ruled. In *Dickinson we* held that the state was immune from a municipal utility tax, in part because Article VII, § 9(a) of the Florida Constitution did not expressly waive the state's sovereign immunity from taxation and in part because the applicable statute did not expressly confer on municipalities the power to impose a utility tax on the state. Sovereign immunity is no guide here as we deal with a zoning power of municipalities which is derived from Article VIII, § 2(b) of the Florida Constitution by way of the

1. All parties agree that our review extends to the "decision" of the district court, rnther than the question on which it passed. *Rupp v.* Jackson, 238 So.2d 86 (Fla.1970).

2. After oral argument, the School Board of Orange County wns granted leave to file a brief ns a friend of the Court. The Board argues that the constitutional genesis of school boards differs from that 'of other state agencies, and that school boards have been granted location powers paramount to local zoning authority. The City of Temple Terrace has controverted these assertions. The issues raised by the school board ate not appropriately reaolvad in this proceeding where it is not a party and no dispute presently exists. For that reason we expressly decline to pass on the applicability of this decision to those agencies.

3. An ancillary benefit iu resolving intergovernmental disputes results from our adoption of the City's view. By requiring stnte agencies to seek local approval for non-conforming uses, an administrative solution is always present in the form of zoning appeals. In contrast, if the state were not required to seek local approvnl, the city would always be forced to litigate its disngreement, as happened here. It serves the public's benefit to resolve these controversies in a way which does not mnndate the most expensive and least expeditious way of settling intergovernmentnl disputes.

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Municipal Home Rule Powers Act.[4] This constitutional delegation of municipal authority differentiates *Dickinson*.

[7, 8] We conceive that the effect of our decision will be that the state will always cooperate with local government when it has decided to achieve an objective by means of a non-conforming use. Except where a specific legislative directive requires a non-conforming use in the particular area, local administrative proceedings will provide the forum in which the competing interests of governmental bodies are weighed.[6]

The procedural circumstances of this case call for a determination by the trial court rather than the local zoning authority, though generally we would expect the courts in the future to defer action until administrative proceedings were completed. For this reason, the decision of the district court is affirmed.

OVERTON, C. J., and ADKINS and SUNDBERG, JJ., concur,

ROBERTS, J., concurs in judgment adopting DCA decision.

WEST KEY NUMBER SYSTEM

SOUTHSIDE MOTOR COMPANY, ETC., et al., Petitloners,

v.

Governor Reubln O'D. ASKEW, etc., et al., Respondents.

No. 48519.

Supreme Court of Florida.

May 12, 1976.

Proceedings were instituted on a petition for a writ of mandamus upon allegations of the improper grant of permission to operate an automobile dealership. The Supreme Court, Boyd, J., held that a replacement automobile dealer did not come within purview of licensing statute applicable to the establishment of new motor vehicle dealerships and thus requirements of such statute were inapplicable, since replacement dealer, which was placed in an existing established dealer point which had become open by virtue of a franchise cancellation, did not pose a threat to other existing dealerships since the replacement dealer did not offer additional competition.

Peremptory writ of mandamus denied.

Licenses ⇐16

A replacement automobile dealer did not come within purview of licensing statute applicable to the establishment of new motor vehicle dealerships, and thus requirements of such statute were inapplicable, since replacement dealer, which was placed in an existing established dealer point which had become open by virtue of a franchise cancellation, did not pose a threat to other existing dealerships since the replacement dealer did not offer additional competition. West's F.S.A. §§ 120.72(4)(a), 320.642.

J. Ben Watkins of Watkins, Hill & Marts, and Wilson W. Wright, Tallahassee, for petitioners.

Edwin E. Strickland, Gen. Counsel., and Enoch J. Whitney, Asst. Gen. Counsel of the Dept.' of Highway Safety and Motor Vehicles, Tallahassee, for respondents.

Stephen Stratford and Walter G. Arnold of Arnold, Stratford & Booth, Jacksonville, for Crown Ford, Inc., intervenor.

John B. Kent and Fred' H. Kent of Kent, Sears, Durden , & Kent, Jacksonville, for Ford Motor Co,, intervenor.

4. Section 166.021(4), Fla.Stat. (1973).

5. *See*, Note, *Governmental Immunity From Local* Zoning *Ordinances*, 84 Harv.L.Rev. 869, 883-885 (1971). Petitioner has raised here its concern that local governments will be able to thwart state policy by refusing to approve zoning for , legislative projects. The courts are available, however, to review the' balance struck in administrative proceedings. Beyond that, as petitioner states in its brief, "the Stnte of Florida possesses the power to exempt itself from local zoning ordinances."