ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,807

Petition from the Third District Court of Appeal

Lower Tribunal No. 96-1513

FILED
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Chief Deputy Clerk

MARY ARECA BABCOCK,

Petitioner,

v.

JAMES MARVIN WHATMORE,

Respondent.

RESPONDENT'S ANSWER BRIEF

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ABBREVIATIONS

In this brief, the parties are referred to by their surnames: "Whatmore" for the Respondent / Defendant and "Babcock" for the Petitioner / Plaintiff. References to the Appendix are to "App." and the appropriate tab number.

ISSUE

Whether a Defendant Waives a Timely Asserted Defense of Lack of Jurisdiction over the Person by Proceeding on The Merits.

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner's Combined Statement Of The Case And Of The Facts is accepted with the following additions and corrections.

Mary Areca Babcock, ("Babcock"), a Florida resident, filed a complaint against James Marvin Whatmore, ("Whatmore"), a North Carolina resident. (App. 2) The summons was addressed to Whatmore at his home in North Carolina. (App. 1) Babcock pleaded the existence of jurisdiction over Whatmore pursuant to Florida Statute Section 48.193(1)(e).[1] The sole relief requested in the complaint was a money judgment to aggregate two prior money judgments.

Whatmore first filed a Motion to Dismiss, for failure to state a cause of action and for lack of jurisdiction over his person. (App. 4) Immediately thereafter,* Whatmore filed a Motion for Relief from Judgments which raised two defenses to the underlying judgments: (a) denial of due process as to the first judgment and (b)

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1 A section of Florida's "long-arm" statute dealing, inter *alia*, with claims for alimony and child support.

2 Both motions were filed on the same day. The motion raising Whatmore's objection to personal jurisdiction was filed first as shown by the clerk's docket. (App.8)

payment as to the second. (App. 5) Whatmore filed affidavits in support of his objection to *in personam* jurisdiction, in which he specifically denied having sufficient contacts with Florida to be subject to the court's jurisdiction. (App. 6 and 7) Babcock's affidavit did not refute the facts in Whatmore's affidavits. (App. 3) The Motion to Dismiss was noticed and heard. The Motion for Relief from Judgments was never called up for hearing.

The trial court denied Whatmore's Motion to Dismiss, finding in pertinent part that:

> although the Complaint does not contain jurisdictional allegations within the scope of Florida Statute Section 48.193(1)(e), the Defendant's objection to personal jurisdiction was waived by the filing of a Motion for Relief from Judgments in this action. (App.9)

The Third District Court of Appeal reversed and remanded with directions to dismiss the case for lack of *in personam* jurisdiction, holding that Whatmore had timely asserted the jurisdictional objection, that the Motion for Relief from Judgments was not a request for affirmative relief but rather an assertion of affirmative defenses, and that no waiver of the jurisdictional objection had occurred. *Whatmore* v. Babcock, 685 So.2d 82 (Fla. 3d DCA 1996). This Petition followed.

SUMMARY OF ARGUMENT

The Third District Court of Appeal correctly ruled, in *Whatmore* v. Babcock, 685 So.2d 82 (Fla. 3d DCA 1996), that Whatmore had timely asserted his defense of lack of jurisdiction over the person in his first motion and that this defense was not waived by Whatmore's subsequent assertion of affirmative defenses.

Babcock was suing to obtain a judgment aggregating two prior money judgments. Whatmore raised his threshold defense of lack of jurisdiction over his person, as mandated by Florida Rule of Civil Procedure 1.140(b). Whatmore's second motion was similarly compelled by the Florida Rules of Civil Procedure. Whatmore wished to assert two additional defenses, that the underlying judgments were, respectively, void for lack of notice and void due to payment, While a defendant may normally wait until he answers to assert affirmative defenses, these defenses were in regard to existing judgments and Whatmore was therefore required by Florida Rule of Civil Procedure 1.540(b) to assert these defenses "[o]n motion" and "within a reasonable time."

The Third District Court of Appeal recognized the second motion for what it was, the assertion of defenses, and ruled that no affirmative relief had been sought that was inconsistent with the jurisdictional objection. This Court should affirm the decision below.

The Third District Court of Appeal went on to observe, in *obiter dicta*, that even if Whatmore's second motion had sought affirmative relief, this would not have waived his prior jurisdictional objection. In doing so, the court cited precedent from the Third, Fourth and Fifth District Courts of Appeal that once the defense has been properly asserted, it is preserved for all purposes.[3] This is in conflict with the ruling of the Second District in Hubbard *v. Cazares,* 413 So.2d 192 (Fla. 2d DCA 1981), *rev. denied* 417 So.2d 329 (Fla. 1982), which held that a timely objection to personal jurisdiction may nevertheless be waived by a defendant who goes beyond matters of defense and seeks affirmative relief.

The better reasoned rule of law is in fact that adopted by the majority of the District Courts. A defense of a lack of jurisdiction over the person raises an important constitutional issue of due process. While the defense is personal and may therefore be waived, a waiver should not be easily found. The defendant's due process rights should not be jeopardized merely by following procedures and rules governing all litigants, while awaiting a jurisdictional decision.

Adoption of a bright line rule, moreover, will save the courts from the expense and burden of analyzing myriad possible factual scenarios to determine if any

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[3] Citing, *Ferrari* v. *Rubin*, 616 So.2d 611 (Fla. 5th DCA 1993); Logan *v. Mora*, *555* So.2d 1267 (Fla. 3d DCA 1989); *Scarso* v. *Scarso*, 488 So.2d 549 (Fla. 4th DCA 1986).

warrant a waiver of the personal jurisdiction objection. Such a rule will recognize a waiver when a defendant seeks access to the court voluntarily and intentionally, but not when the actions taken are clearly required to preserve a defendant's rights and not intended to surrender the jurisdictional point.

This Court should affirm the decision below and adopt the majority position as the law in this State.

ARGUMENT

Whatmore Timely Asserted the Defense of Lack of Jurisdiction over the Person.

The law in Florida is clear that the defense of a court's lack of jurisdiction over the person of a defendant is a threshold defense that must be raised either in the first pleading or in a preliminary motion if one is made. Fla.R.Civ.P. 1.140(b). If a Defendant takes affirmative steps in the action without *first* contesting personal jurisdiction, he is deemed to have submitted to the jurisdiction of the court. See *Odom v. Odom*, 568 So.2d 988 (Fla. 3d DCA 1990), and cases therein cited. On the other hand, if a Defendant raises the defense of lack of jurisdiction over the person at the earliest opportunity, even if raised simultaneously with other defenses, the objection is preserved and he may defend and participate in a trial on the merits without waiving the objection. State ex. *rel. E/i Lilly & Co. v. Shields, 83* So.2d 271 (Fla. *1955); Logan v. Mora,* 555 So. 2d 1267 (Fla. 3d DCA 1989); *Huffman v Heagy,* 122 So. 2d 335 (Fla. 3d DCA *1960); Ferrari v. Rubin,* 616 So. 2d 611 (Fla. 5th DCA

1993); *Dimino v. Farina, 572 So.* 2d 552,555 (Fla. 4th DCA 1990); *Scarso v. Scarso,* 488 So. 2d 549,550 (Fla. 4th DCA 1986); but see *Hubbard v. Cazares, 413 So.* 2d 1192 (Fla. 2d DCA 1981), rev. denied, 417 So. 2d 329 (Fla. 1982).

In the instant case, Whatmore was served with a complaint alleging that the court had jurisdiction over his person pursuant to Florida Statute Section 48.193(1)(e). The complaint was not actually seeking the kind of relief provided for by the long-arm statute, but rather was seeking to breathe new life into money judgments that had lain fallow since being entered in 1977 and 1980. Whatmore first filed his threshold motion to dismiss for reasons including lack of jurisdiction over his person. His jurisdictional objection was therefore timely. This point was recognized by the Third District Court of Appeal and is not contested by the Petitioner.

The questions that remain are whether Whatmore's subsequent actions were requests for "affirmative relief' and, if so, whether they amounted to a waiver of his prior jurisdictional objection.

Whatmore's Rule 1.540(b) Motion Was Not a Request <u>for Affirmative Relief.</u>

Immediately following his assertion of the jurisdictional challenge, Whatmore filed a "Motion for Relief from Judgments" which raised two defenses to the underlying judgments: (a) denial of due process as to the first judgment and (b) payment as to the second. These are classic affirmative defenses. Indeed, "payment" is specifically listed as an example of an affirmative defense in Florida

Rule of Civil Procedure 1 .11 O(d). Whatmore's assertion that the first judgment was entered improperly and was therefore void is also a textbook example of an avoidance or affirmative defense.

Due to the unusual factual predicate for the suit below[4], Whatmore had no choice but to assert these defenses by motion or he risked losing them. Florida Rule of Civil Procedure 1.540(b) provides in pertinent part that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: . . . (4) that the judgment or decree is void; or (5) that the judgment or decree has been *satisfied,* released or discharged. . . *The motion shall be made within a reasonable time. . . .* (emphasis added).

The prior judgments were, respectively, 18 and 15 years old. As shown in Whatmore's affidavit, he asserted that he had first learned of the underlying judgments when he was served with the complaint. Given the age of the judgments, he could not risk waiting for a determination of the threshold motion asserting lack of jurisdiction over his person before raising his Rule 1.540(b) defenses. Such a delay might have been considered by the trial court to be unreasonable The method of asserting the defenses, "[o]n motion," is also dictated by the Rule. Fla.R.Civ.P. 1.540(b).

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4 The plaintiff was proceeding to seek a judgment upon already existing judgments. Therefore, the defendant had to comply with the Florida Rules of Civil Procedure particularly applicable to judgments, as well as those applicable to first time claims.

An analogy can be drawn to the assertion of a compulsory counterclaim, Objectively, a counterclaim seeks relief. The fact that the party is required to assert a compulsory counterclaim under penalty of forever losing his rights, has resulted in the determination that filing such a pleading is not a request for affirmative relief, and consequently does not waive a prior jurisdictional objection. *Cumberland Software, Inc. v. Great American Mortgage Corp., 507* So.2d 794 (Fla. 4th DCA 1987).

Whatmore's actions were in strict accordance with the rules. The Third District Court of Appeal correctly recognized the substance of the motion as the assertion of defenses rather than a request for affirmative relief. The Petitioner cites no cases holding to the contrary. Inherent in the Third District Court's decision in this case is the recognition that Whatmore's Rule 1.540(b) motion was the proper assertion of affirmative defenses which could otherwise be lost and therefore was not a request for affirmative relief. That determination should be affirmed by this Court.

A Timely Asserted Defense of Lack of Jurisdiction over the Person Should Be Preserved for All Purposes.

This Court accepted jurisdiction to resolve a conflict between the District Courts of Appeal as to whether a timely asserted objection to *in personam* jurisdiction is waived by subsequent actions taken in the case.

Florida Rule of Civil Procedure 1 .140 is the current embodiment of former Rule No. 1.1 1, 1954 Rules of Civil Procedure, which was in effect when *E/i Lilly* was

decided. Both versions of the rule provide similar methods for the assertion of threshold defenses. Shortly after enactment of the prior rule, this Court held in *Eli Lilly*, that a defendant who has raised an objection to the court's jurisdiction over his person is not prejudiced by subsequently participating in the trial and defending the matter on the merits and may have the jurisdictional ruling reviewed upon appeal if an adverse final judgment is entered in the cause. Since the *Eli Lilly* decision, a party who contests the court's jurisdiction over his person has not been required to suffer a default in order to preserve the objection. Subsequent decisions have further expanded on the point that a party is not required to suffer disadvantage at the hands of its opponent in order to preserve its jurisdictional objection.

The most striking recent example is the case of *Banco De Costa Rica v. Rodriguez, 573* So.2d 833 (Fla. 1991). In that case a lawsuit was commenced against Banco De Costa Rica ("BCR") in Florida. BCR, a foreign bank, had not yet been served with process when the plaintiff served a subpoena and a notice of taking deposition upon a local bank where BCR had an account. In order to protect against the improper conduct of the plaintiff,[5] BCR filed a motion to quash the subpoena and the notice of taking deposition. The trial court denied the motion. BCR then moved to dismiss for lack of jurisdiction over the person, which was also

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In seeking to commence discovery prior to service of process upon the defendant, and without an order of the court.

denied by the trial court. The Third District, in a split decision, affirmed the trial court, finding that BCR's first motion sought "affirmative relief' which waived the subsequent jurisdictional objection. This Court disagreed, reasoning that BCR's actions were required to prevent improper conduct by the plaintiff, and that "BCR had no alternative but to seek relief from the court". *Banco De Costa Rica, 573* So.2d at 834. The essence of that ruling is that a court should not find a waiver of the due process right to object to personal jurisdiction where the conduct of the defendant is forced, coerced, or otherwise not consistent with a voluntary invocation of the court's jurisdiction.

Similarly, innocuous acts are not deemed to waive an objection to personal jurisdiction. In *Public Gas Co., v. Weatherhead* Co., 409 So.2d 1026 (Fla. 1982), this Court held that a notice of appearance filed prior to the objection is not a waiver. The Court adopted the District Court's rationale that

> "the mere filing of an entirely neutral and innocuous piece of paper, which indicates no acknowledgment of the court's authority, contains no request for the assistance of its process, and, most important, reflects no submission to its jurisdiction should [not] be given just that effect. . . . It cannot be accepted in a judicial era which requires that, as far as is consistent with orderly procedure, the rights of parties be decided on the merits of their positions." *Public Gas, 409* So.2d 1026.

The common thread running through the decisions is that while an objection to personal jurisdiction can be waived, due process considerations demand that a waiver not be artificially construed. If a defendant complies with the requirements

of Florida Rule of Civil Procedure 1.140(b) and timely invokes the objection, then the courts should recognize and preserve that objection for all purposes. The defendant having given notice to his opponent and the court that he objects to being involved in the proceeding as a whole, it should make no difference if the particular actions the defendant takes thereafter, standing alone, can be viewed as affirmative or defensive. A waiver should not be construed from the defendant's reluctant but forced participation in the litigation. The jurisdictional issue should, instead, be determined on its own merits.

The District Courts of Appeal differ on whether a proper objection to personal jurisdiction is preserved for all purposes or whether that objection may later be waived. The majority view, advanced by three District Courts of Appeal and cited with approval below, is that once the defense has been timely interposed it is preserved for all purposes and is not waived even if the litigant later seeks affirmative relief. *Ferrari v. Rubin*, 616 So. 2d 611 (Fla. 5th DCA 1993); *Logan v. Mora*, 555 So.2d 1267 (Fla. 3d DCA 1989); *Scarso v. Scarso*, 488 So.2d 549 (Fla 4th DCA 1986). The Second District, to the contrary, has held that a jurisdictional defense, although interposed in a timely manner, may nevertheless be waived by subsequent actions of the party if these go beyond matters of defense and seek

affirmative relief. Hubbard v. Cazares, 413 So.2d 1192 (Fla. 2d DCA 1981), rev. denied, 417 So.2d 329 (Fla. 1982).[6]

The majority view recognizes the importance of the question of personal jurisdiction and preserves the defendant's right to have that issue determined on its own merits. This is the better reasoned approach and the one that does not force a defendant into the proverbial Hobson's choice between preserving the jurisdictional objection or being disadvantaged in the proceedings while awaiting the court's ruling on the merits of that objection. Under the majority rule, a defendant awaiting a determination of the impropriety of *in personam* jurisdiction[7] will still be afforded the right to make the same claims and assert the same objections as other litigants before the court.

If the rule set forth in Hubbard were adopted, a defendant objecting to personal jurisdiction would frequently have to choose between suffering procedural

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In Hubbard, the defendant objected to personal jurisdiction and then sought a change of venue. In a split decision, the Second District Court of Appeal held that the request for change of venue went beyond matters of defense, and rose to the level of seeking affirmative relief, and thereby waived the prior jurisdictional challenge. Hubbard, 413 So.2d 1192,1193. This view of the facts in Hubbard is directly contradicted by the Fourth District Court of Appeal's later determination that a request for a change of venue was defensive, and did not waive a prior jurisdictional objection. *Dimino v. Farina, 572* So.2d 552 (Fla. 4th DCA 1990).

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A matter that cannot always be determined prior to completion of preliminary, jurisdictional discovery. *Venetian Salami* Co., v *Parthenais*, 554 So.2d 499 (Fla. 1989).

disadvantage or risking a waiver of his jurisdictional objection. Adoption of the Hubbard standard could be seen as an invitation to unscrupulous plaintiffs to bait defendants by seeking improper preliminary relief, propounding unwarranted discovery,[8] filing cases in intentionally inconvenient venues and a host of other tactics that would force the appellate courts to slog through a case by case analysis of whether a particular act amounts to a waiver of the jurisdictional objection.[9] Such

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A telling example of just such conduct is that described in *Banco De Costa Rica v. Rodriguez,* 573 So.2d 833 (Fla. 1991), where the defendant was baited into seeking relief from the court.

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The District Courts of Appeal have been faced with endless inquiries as to what is an affirmative request and what is defensive conduct in the context of a defendants objection to personal jurisdiction. For example, the following conduct has been examined and found to be a waiver of a jurisdictional objection: actively participating in a cause for over a year without setting a motion objecting to personal jurisdiction for hearing, Ludwig *v. Schweigel*, 1997 Fla. App. Lexis 9302 (Fla. 5th DCA 1997); filing a Rule 1.140(b) motion to dismiss for lack of subject matter jurisdiction, without including lack of jurisdiction over the person, *Coto-Ojeda v. Samuel, 642* So.2d 587 (Fla. 3d DCA 1994), filing a stipulation on the merits, *Grand Couloir Corp., v. Consolidated Bank, N.A., 596* So.2d 697 (Fla. 2d DCA 1992); filing a motion for change of venue, *A/sup v. Your Graphics Are Showing, Inc.,* 531 So.2d 222 (Fla. 2d DCA 1988); *Hubbard* v. *Cazares,* 413 So.2d 1192 (Fla. 2d DCA 1981) rev. denied, 417 So.2d 329 (Fla.1982); filing a stipulation for settlement, Woods v. *Luby* Chevrolet, *Inc.,* 402 So.2d 1316 (Fla. 4th DCA 1981) rev. *denied, 412* So.2d 467 (Fla. 1982).

Conduct which has been found not to waive the objection includes: filing a motion for attorneys' fees incurred in advancing a motion to dismiss, *Heineken v. Heineken*, 683 So.2d 194 (Fla. 1 st DCA 1996); objecting to a co-defendant's motion to share in the proceeds of a foreclosure sale, *Parker v. Heilpern*, *637* So.2d 295 (Fla. 4th DCA 1994); filing a notice of appearance containing a reservation as to jurisdiction, followed by a motion for protective order, *Waterman Oy v. Carnival*

a rule of law has no place in the jurisprudence of this state.

The majority, bright line rule, shifts the focus from the debate over whether a particular action can be categorized as “defensive” or “offensive” back to where it should be, on whether the underlying objection to jurisdiction was properly asserted. This Court should disavow the Second District’s *Hubbard* decision, adopt the rule of the Third, Fourth and Fifth District Courts of Appeal, and hold that a timely assertion of the defense of lack of jurisdiction over the person is preserved for all purposes.

CONCLUSION

Florida’s courts and the litigants who appear in them will be better served by a clear rule of non-waiver of a timely asserted defense of lack of jurisdiction over the person. A bright line rule that litigants must only raise their objection clearly and in their first pleading or threshold motion and that thereafter they may seek any relief available to any other litigant is in accord with the Florida Rules of Civil Procedure

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Cruise Lines, Inc., 637 So.2d 724 (Fla. 3d DCA 1994); filing a motion to dismiss for failure to serve process within 120 days, *Honoraf v. Genova,* 579 So.2d 286 (Fla. 3d DCA 1991); filing a motion to stay litigation pending appeal, *Permenter v. Feurtado*, 541 So. 2d 1331 (Fla. 3d DCA 1989); filing a motion for stay pending the resolution of a jurisdictional issue on appeal, *Fell* v. *Lesher,* 529 So.2d 831 (Fla. 4th DCA 1988); filing a motion for summary judgment alleging a defense of joint venture, *Kimbrough* v. Rowe, 479 So.2d 867 (Fla. 5th DCA 1985); filing a motion for enlargement of time, *Barrios v Sunshine State Bank,* 456 So.2d 590 (Fla. 3d DCA 1984); filing a motion for continuance, *Orange Motors of Coral Gab/es, Inc. v. Rueben H. Donnelley Corp.,* 415 So.2d 892 (Fla. 3d DCA 1982); filing a motion to dissolve a notice of */is pendens* and to increase the amount of a temporary injunction bond, *Green v. Roth,* 192 So.2d 537 (Fla. 2d DCA 1966).

and prior decisions of this Court. Such a rule will be a simple, just guide to the bench and bar and will spare litigants the uncertainty and expense of the current focus on the affirmative or defensive nature of each type of relief being sought.

This Court should affirm the decision of the Third District Court of Appeal in *Whatmore v. Babcock*, 685 So.2d 82 (Fla. 3d DCA 1996), and overrule the contrary position of Hubbard *v.* Cazares, 413 So.2d 329 (Fla. 2d DCA 1996).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to James C. Cunningham, Jr., Counsel for Petitioner, Bailey & Jones, P.A., 300 Courvoisier Centre, 501 Brickell Key Drive, Miami, Florida 33131 this 17th day of Septem ber, 1997.

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