IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,807

Petition from the Third District Court Of Appeals
Lower Tribunal No. 96-1513

MARY ARECA BABCOCK,

Petitioner,

vs.

JAMES MARVIN WHATMORE,

Respondent.

Petitioner's Brief on Jurisdiction

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February 3, 1997

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TABLE OF AUTHORITIES

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COMBINED STATEMENT OF CASE AND THE FACTS

Petitioner invokes this Court's jurisdiction pursuant to Fla. Const., art. V, § 3 (b) (3) to resolve conflict between *Whatmore* v. *Babcock,* So. 2d (Fla. 3rd DCA December 26, 1996) and Hubbard v. *Cazares,* 413 So. 2d 1192 (Fla. 2nd DCA 1981), *rev. denied,* 417 So. 2d 329 (Fla. 1982). The third district held that a Rule 1.540(b) motion for relief from judgments is not a request for affirmative relief and that a request for affirmative relief, when made simultaneously with a jurisdictional challenge, does not waive the jurisdictional challenge. A conformed copy of the third district's opinion is annexed.

On October 18, 1995, petitioner, Mary Areca Babcock ("Babcock") sued James Marvin Whatmore ("Whatmore") alleging jurisdiction pursuant to Fla. Stat. § 48.193(1)(e) (1993). On October 20, 1977, a final judgment dissolved Babcock's marriage to Whatmore and awarded Babcock a monetary judgment of $160,556.43. The complaint alleged that the judgment remains unpaid. *On* February 17, 1980, a judgment awarded Babcock $10,080.00 for Whatmore's failure to pay child support, which according to the complaint, also remains unpaid. The complaint seeks to have both judgments reduced to a single new judgment.

On November 30, 1995, pursuant to Rule 1.540(b) of the Florida *Rules of Civil Procedure,* Whatmore moved for relief from the judgments, claiming both underlying judgments were void. Simultaneously, he moved for dismissal of the action challenging the trial court's *in personam* jurisdiction. The trial court denied

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Whatmore's Motion to Dismiss, finding that Whatmore waived his jurisdictional challenge by filing the Rule 1.540(b) Motion for Relief from Judgments.

Whatmore took an appeal to the Third District. On December 26, 1996 the Third District reversed the trial court.

SUMMARY OF THE ARGUMENT

The third district's decision expressly and directly conflicts with the second district's decision in *Hubbard.* Whereas the third district holds that a Rule 1.540(b) motion for relief from judgments is not a request for affirmative relief and that a request for affirmative relief, when made simultaneously with a jurisdictional challenge, does not waive the jurisdictional challenge, the second district holds that a request for change of venue is a request for affirmative relief, and a request for affirmative relief waives a timely filed jurisdictional challenge.

This Court should exercise its discretionary jurisdiction to resolve the decisional conflict between the second and third districts. Resolving the conflict in this case also resolves conflict among *Hubbard* and decisions from the fourth and fifth districts.

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ARGUMENT

WHATMORE v. BABCOCK, SO. 2D. (FLA. 3RD DCA DECEMBER 26, 1996) EXPRESSLY AND DIRECTLY CONFLICTS WITH HUBBARD v. CAZARES, 413 SO. 2D 329 (FLA. 2ND 1982) AND THIS COURT SHOULD ACCEPT JURISDICTION.

This Court has discretionary jurisdiction to review a decision which "expressly and directly conflicts with a decision of another district court of appeal . . .." Fla. Const., art. V, § 3(b) (3). This petition presents for review a conflict between Whatmore, supra, from the third district and *Hubbard, supra,* from the second district.

In *Whatmore,* the third district held that a Rule 1.540(b) motion for relief from judgments cannot "be properly characterized as one seeking affirmative relief." *Whatmore,* p. 4. Moreover, even if Whatmore's Rule 1.540(b) motion is a request for affirmative relief, his jurisdictional challenges still was not waived. *Whatmore,* p. 5.

The third district acknowledges that its decision conflicts with the second district's decision in *Hubbard.* In that case, the plaintiff sued Hubbard, a California resident, relying on Florida's long-arm statute for jurisdiction. Hubbard challenged the court's in *personam* jurisdiction by a motion to quash service of process and to dismiss. Later, the parties moved for a change of venue. When the venue motion was denied, an appeal was taken to the second district, and that court reversed. *See The Church of Scientology of California,* Inc. v. Cazares, 401 So. 2d 810 (Fla. 2nd DCA 1981).

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When the motion to dismiss was heard, the trial court denied the motion and again an appeal was taken. The second district held "that a request for change of venue following a timely asserted challenge to personal jurisdiction is a request for affirmative relief which constitutes a waiver of the jurisdictional challenge." *Hubbard, 413 So.* 2d at 1193. The rationale was that "a motion for change of venue requests the court to exercise its jurisdiction over the movant and is inconsistent with an objection by the movant to the existence of that jurisdiction." *Id.* at 1194.

The conflict between the second and third districts on this point of law recurs in Florida but has escaped resolution by this Court. For example, conflict also exists between the fifth district's decision in *Ferrari v. Rubin,* 616 So.2d 611 (Fla. 5th DCA 1993) and *Hubbard,* conflict which was noted by the fifth direct. *Ferrari, 616 So.* 2d at 612. Additionally, the fourth district's decisions in *Dimino v. Farina, 572* So. 2d 552 (Fla. 4th DCA 1989) and *Scarso* v. *Scarso,* 488 So. 2d 549 (Fla. 4th DCA 1986) conflict with *Hubbard,* which the *Dimino* panel recognized.

CONCLUSION

The third district's decision below expressly and directly conflicts with the second district's *Hubbard* decision on the legal issue of whether 1) a Rule 1.540(b) motion is a request for affirmative relief, and 2) whether a motion seeking affirmative relief waives an earlier or simultaneously asserted jurisdictional challenge. This Court has jurisdiction pursuant to Fla. Const. art. V, § 3(b) (3) and should exercise that jurisdiction to make

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uniform Florida's law. Because there is a conflict between the third district's *Whatmore* decision and the second district's *Hubbard* decision, and conflict exists among *Hubbard* and decisions of the fourth and fifth districts, this Court should accept jurisdiction of this case to resolve this conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Hendrik G. Milne, Esq., Aballi Milne Kalil & Garrigo, P.A., 1980 SunTrust International Center, One Southeast Third Avenue, Miami, Florida 33131, this 3rd day of February, 1997.

_____
Of Counsel

66-jur.brf
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