IN THE SUPREME COURT OF FLORIDA

'CASE NO. 89,807

Petition from the Third District Court of Appeal

Lower Tribunal No. 96-1513

MARY ARECA BABCOCK,

Petitioner,

v.

JAMES MARVIN WHATMORE,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner's Combined Statement Of Case And 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. Babcock plead the existence of jurisdiction over Whatmore pursuant to §48.193(1)(e) Fla. Stat. (1993).[1] The sole relief requested in the complaint was a monetary judgment to aggregate two prior judgments.

Whatmore first filed a motion to dismiss for failure to state a cause of action and for lack of jurisdiction over his person. 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 and (b) payment as to the second.

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.

The Third District Court of Appeal reversed with directions to dismiss the complaint, holding that Whatmore had timely objected to personal jurisdiction, 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.

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

SUMMARY OF THE ARGUMENT

The decision below, in the case of *Whatmore v.* Babcock, 685 So.2d 82 (Fla. 3d DCA 1996), was that because Whatmore had not sought affirmative relief, the trial court had erred in finding a waiver of Whatmore's prior challenge to personal jurisdiction. This decision does not conflict with Hubbard *v. Cazares,* 413 So.2d 329 (Fla 2d DCA 1996), where the Second District held that Hubbard's request for affirmative relief waived her prior objection to personal jurisdiction. In both cases timely objections to personal jurisdiction were interposed. In *Hubbard,* the Second District dealt squarely with the effect of a subsequent request for affirmative relief, while in *Whatmore*, the Third District determined there had been no request for affirmative relief. As the *ratio decidendi* of *Whatmore* does not conflict with *Hubbard,* the petition for review should be denied.

ARGUMENT

WHATMORE v. BABCOCK, 685 SO. 2D 82 (FLA. 3D DCA 1996) NEITHER EXPRESSLY NOR DIRECTLY CONFLICTS WITH *HUBBARD v.* CAZARES, 413 SO. 2D 329 (FLA. 2D DCA 1982), AND THE PETITION FOR REVIEW SHOULD BE DENIED.

Petitioner invokes this Court's discretionary jurisdiction pursuant to Art. V, §3(b)(3) Fla. Const., ostensibly to resolve a conflict between district courts of appeal.[2] The stated basis for review is an alleged conflict between the decision of the Third District Court of Appeal in *Whatmore* v. *Babcock,* 685 So. 2d 82 (Fla. 3d DCA 1996), and the decision of

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[2] Art. V, § 3 (b) Fla. Const., provides that the Florida Supreme Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same question of law.

the Second District Court of Appeal in Hubbard v. *Cazares*, 413 So. 2d 329 (Fla 2d DCA 1996). There is no conflict between the decisions.

It has long been the settled law in Florida that a defendant who timely asserts a challenge to a court's jurisdiction over his person is not prejudiced by thereafter participating in the trial of the suit and defending on the merits. *State ex rel. Eli Lilly & Co. v. Shields, 83* So.2d 271 (Fla. 1955).

In *Hubbard,* the defendant objected to personal jurisdiction but thereafter sought affirmative relief from the *court.* The *Hubbard* court held that a request for change of venue went beyond matters of defense and rose to the level of seeking affirmative relief from the court thereby waiving the prior jurisdictional challenge.

In *Whatmore,* the defendant first objected to personal jurisdiction and thereafter filed affirmative defenses to the complaint. The Third District held that the assertion of affirmative defenses was not a request for affirmative relief, and therefore the trial court had erred in finding that the jurisdictional objection had been waived. The decision in *Whatmore* does not conflict with the decision of the Second District in *Hubbard.*

The Petitioner in looking for conflict resorts to *dicta* in Whatmore, where the Third District went on to discuss what might have been if, *arguendo*, affirmative relief had been sought. While the court stated that even if the defenses raised by Whatmore had been deemed requests for affirmative relief, that would not amount to a waiver of Whatmore's challenge to personal jurisdiction, this is mere *dicta* and should not provide a basis for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

As the decision in *Whatmore* v. Babcock, 620 so. 2d. 82 (Fla. 3d DCA 1996) neither expressly nor directly conflicts with Hubbard v. *Cazares*, 413 so. 2d 329 (Fla. 2d DCA 1982), this Court should deny the petition for review.

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 on this 27th day of February, 1997.

Craig P. Kalil