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FILED
SID J. WHITE
JUL 25 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA,

CASE NO. 89,807
L.C. CASE NO. 96-01513

MARY ARECA BABCOCK,

Petitioner,

vs.

JAMES MARVIN WHATMORE,

Respondent.

On Petition for Writ of Certiorari To The
District Court of Appeals, Third District of Florida

PETITIONER'S BRIEF ON THE MERITS

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July 24, 1997

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TABLE OF AUTHORITIES

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STATUTES

OTHER AUTHORITIES

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ISSUE

Does a defendant waive a timely asserted personal jurisdiction defense by simultaneously invoking the trial court's jurisdiction by requesting affirmative relief under Fla.R.Civ.P. 1.540(b)?

COMBINED STATEMENT OF CASE AND FACTS

This case is before the Court on a Writ of Certiorari to the Third District Court of Appeals to resolve decisional conflict between *Whatmore v. Babcock,* 685 So.2d 82 (Fla. 3d DCA 1996) and Hubbard v. *Cazares,* 413 So.2d 1192 (Fla. 2nd DCA 1982). Florida Constitution, Article V, § 3(b)(3). In *Whatmore, supra,* the Third District held that a Fla.R.Civ.P. 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. In *Hubbard,* the Second District held that a timely personal jurisdiction challenge is waived if a defendant subsequently seeks affirmative relief.

On October 20, 1977, a final judgment dissolved petitioner Mary Areca Babcock's ("Babcock") marriage to respondent James Marvin Whatmore ("Whatmore") and awarded Babcock a monetary judgment of $160,556.43. On February 17, 1980, a judgment awarded Babcock $10,080.00 for Whatmore's failure to pay child support. On October 18, 1995, Babcock sued Whatmore, invoking Florida's jurisdiction pursuant to Fla. Stat. § 48.193(1)(e) (1993). The

complaint alleged that the judgments remain unpaid, and sought to have both judgments reduced to a single new judgment.'

On November 30, 1995, pursuant to Fla.R.Civ.P. 1.540(b), Whatmore moved for relief from the judgments, claiming both judgments are void. A-2. If the trial court granted this motion, Whatmore was willing to recognize the trial court's jurisdiction over him. If the court denied this request, then Whatmore claimed the court could not exercise in *personam* jurisdiction over him. In his Motion to Dismiss Plaintiff's Complaint, Motion for a More Definite Statement and Motion for Attorney's Fees, Whatmore stated:

> 1. Simultaneous with the filing of this Motion, Whatmore has filed a Motion for Relief from Judgment. Thus, this Motion to Dismiss, Motion for a More Definite Statement and Motion for Attorney's Fees is being filed in the alternative, in the event the Motion for Relief for Judgments is not granted in favor of Whatmore. (Emphasis added).

A-3.

On June 7, 1996, Circuit Court Judge Jon I. Gordon denied Whatmore's Motion to Dismiss, finding that "the Defendant's objection to personal jurisdiction was waived by the filing of a Motion for Relief from Judgments in this action." A-4.

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

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[1] Whatmore now resides in North Carolina. A-1. Babcock may not be able to bring her action in North Carolina. N.C. Stat. §1-47 provides that an action "upon a judgment or decree of any court of the United States, or of any state or territory thereof, [must be brought within 10 years] from the date of its rendition." N.C. Stat. §1C-1703 provides that a foreign judgment "has the same effect and is subject to the same defenses as a judgment of [North Carolina1 ."

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May 28, 1997, this Court granted Babcock's petition for writ of certiorari to review the Third District's *Whatmore* decision.

SUMMARY OF ARGUMENT

Florida Rule of Civil Procedure 1.140(b) does not permit a defendant to challenge the trial court's exercise of personal jurisdiction, while simultaneously seeking affirmative relief. A defendant's request for affirmative relief is a recognition that the trial court has personal jurisdiction of the defendant and has lawful power to grant the defendant's requested relief. Or stated otherwise, a defense request that the trial court exercise its jurisdiction over the defendant's person and grant a defense request for affirmative relief is inconsistent with a challenge to personal jurisdiction. Therefore, any request for affirmative relief made simultaneously with or subsequent to a jurisdictional challenge waives that jurisdictional challenge.

A defendant preserves a challenge to a trial court's exercise of personal jurisdiction if the challenge is made by motion before pleading, or if no motion is made, if the challenge is made in the initial pleading. *See Fla.R.Civ.P.* 1.140(b). The challenge is not waived if it is "joined with other *defenses or objections* in a responsive pleading or motion." *Id.*, emphasis added. The rule, therefore, permits a defendant to appear and defend, while simultaneously challenging the lawfulness of the trial court's exercise of personal jurisdiction.

The *Whatmore* decision can lead to anomalous results. For example, a defendant could challenge the court's personal

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jurisdiction, while simultaneously asserting counterclaims, cross-claims, third party claims, and seeking affirmative relief. If the main claim goes against the defendant, the defendant could claim that the trial court had no personal jurisdiction (having once raised the issue) while taking advantage (procedurally or strategically) of the defense's claims and requests for affirmative relief. It is this type of result which demonstrates the erroneous reasoning of *Whatmore*.

The Second District's *Hubbard* decision is correct and should be approved. That decision, which recognizes that a challenge to personal jurisdiction can be waived, is consistent with Fla.R.Civ.P. 1.140(b) and decisions from this Court and other district courts. It is also a logical and reasonable interpretation and application of Fla.R.Civ.P. 1.140(b) and avoids the anomaly which could result under *Whatmore*.

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ARGUMENT

A defendant who timely asserts a personal jurisdictional challenge waives that challenge when the defendant invokes and recognizes the trial court's jurisdiction by requesting its own affirmative relief under Fla.R.Civ.P. 1.540(b).

In Rorick v. *Stilwell,* 133 So. 609 (Fla. 1931), this Court recognized the salutary nature of a rule permitting construction of a defendant's conduct as waiving jurisdictional defects. In *Rorick,* this Court opined that "the rule ought to be rigidly applied in every case when the acts of the party can be fairly construed into a waiver, ..." *Id.* at 615. Discounting efforts to avoid the result of the rule, the Court said:

> [i]f, however, the defendant does take some step in the proceeding which amounts in law to a submission to the court's jurisdiction, the fact that the defendant insists that he never so intended or that he does not admit the jurisdiction of the court over his person, or that he only appears specially and not generally, is insufficient to preclude the court from considering and holding that he defendant has entered a general appearance in contemplation of law, whatever the defendant may choose to denominate his act.

Id. This principle was reaffirmed eight years later in *Sternberg* v. *Sternberg,* 190 So. 486 (Fla. 1939) and applied twenty-six years later in Marshall v. *Bacon,* 97 So.2d 252 (Fla. 1957).

The waiver rule articulated in *Rorick* and applied in *Sternberg* and *Marshall* was not altered by the adoption of Fla.R.Civ.P. 1.140 in 1967. While the rule permits an attack on the court's personal jurisdiction to be joined with other defenses and objections, it does not permit a defendant to appear, request affirmative relief,

and later repudiate it by attacking the court's jurisdiction over him. Indeed, "affirmative relief is not an objection or defense, as contemplated by [Rule 1.1401 . .." Wright & Miller, Fed. *Practice & Pro.,* Civil 2nd § 1362. In substance, Fla.R.Civ.P. 1.140(b) simply abolishes the prior concept of limited, special or general appearances, and permits a defendant to defend a claim while protecting against a judgment *in personam* if the court does not have personal jurisdiction. The rule, however, does not mean that a personal jurisdictional challenge is not subject to waiver.

The Second District's decision in Hubbard is consistent with this Court's *Rorick, Sternberg,* and *Marshall* decisions, and is a correct interpretation and application of Fla.R.Civ.P. 1.140. In *Hubbard,* the plaintiffs sought long-arm jurisdiction. Defendant Hubbard timely moved to quash service and to dismiss, challenging the court's *in personam* jurisdiction. Hubbard later requested a change of venue. On Hubbard's appeal, the Second District acknowledged that "[a] defendant who timely asserts a challenge to the court's jurisdiction over the person of the defendant is not prejudiced by participation in the trial of the suit and defending the matter thereafter on the merits." *Id.* at 1193. But it also observed that "a timely objection to personal jurisdictional may nevertheless be waived. In jurisdictions which follow the rule that a defense on the merits is not a waiver, *the courts have long held that a defendant who goes beyond matters of defense and seeks affirmative relief waives a previously asserted objection to the personal jurisdiction of the court.*" *Id.* The court concluded,

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therefore, 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." *Id.* As the Second District court viewed a motion for change of venue, a venue motion "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 Fourth District's decision in *Cummings v. Palm Beach Marble & Tile, Inc.*, 497 So.2d 711 (4th DCA 1986) is also consistent with *Rorick,* Sternberg, and *Marshall.* In that case, Palm Beach Marble brought an action against a number of defendants, including R. S. Black, Inc., and Alan Cummings. Black filed a cross-claim against Cummings. Cummings, in turn, filed a cross claim against Black. Cummings also challenged the sufficiency of Palm Beach's service of process and moved to quash that service. The trial court denied those motions. The Fourth District affirmed based on its conclusion that Cummings invoked the jurisdiction of the trial court by filing his cross-claim asking for affirmative relief. The court observed that had he not done so, he "could have maintained his defensive posture and required Black to serve him with a summons to obtain jurisdiction over Cummings regarding Black's cross-claim. By filing his own cross-claim Cummings waived that right." *Id.*

Bay *City Management, Inc. v. Henderson,* 531 So.2d 1013 (Fla. 1st DCA 1988) is also instructive. In that case, defaults were entered against the defendants. A year later, the defendants

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appeared specially to move pursuant to Fla.R.Civ.P. 1.140(b) to set aside the defaults. In their motion, they "reserved the right to assert that the trial court lacked *in personam* jurisdiction over them because of insufficiency of service of process." They later amended their motion to challenge the trial court's jurisdiction. The trial court refused to set aside the defaults. On the defendants' appeal, Chief Judge Larry G. Smith concluded that the defendants submitted themselves to the jurisdiction of the court by filing their motion to set aside the defaults, without specifically setting forth the jurisdictional defenses. The court reversed the trial court's denial of the motion to set aside the defaults, and ordered the defendants to file answers and defenses to the complaint.[a] The First District's 1988 decision was based, in part, on this Court's 1931 *Rorick* decision.

There is a host of Florida and federal authority supporting Babcock's argument that a defendant may waive an otherwise timely asserted challenge to personal jurisdiction. *See Consolidated Aluminum Corp.* v. Weinroth, 422 So.2d 330, 331 (Fla. 5th DCA 1982) ("Appellant's motion to vacate the default, with its tendered answer, was not in opposition to the court's jurisdiction over it, but was in recognition of that jurisdiction"); *First Wisconsin Nat. Bank of Milwaukee v. Donian*, 343 So.2d 943, 945 (Fla. 2nd DCA 1977) ("those who participate in litigation by moving the court to grant requests materially beneficial to them, have submitted themselves

[a] Judge Zehmer dissented, in part, because he believed the appeal could have been resolved without addressing the waiver issue.

to the court's jurisdiction"); *Shurden v. Thomas,* 134 So.2d 876, 878 (Fla. 1st DCA 1961) ("Save where the court is completely without jurisdiction of the subject matter, a party will be estopped to question the court's jurisdiction if he invokes it, as by instituting an action or filing a counter claim or bringing a cross action, or if he requests or consents that a particular court take jurisdiction, or accepts benefits resulting from the court's exercise of jurisdiction"). See also, *Continental* Bank, N.A. *v.* Meyer, 10 F.3d 1293, 1296 (7th Cir. 1993) (Rule 12 defenses can be waived by conduct); General Contracting *& Trading Co. v. Interpole, Inc.,* 940 F.2d 20 (1st Cir. 1991) (personal jurisdiction challenge may be waived by implication by conduct); *Hemba v. Freeport McMoran Energy Partners, Ltd. v. Freeport Sulphur Co., 811* F.2d 276, 281 (5th Cir. 1987) (jurisdictional challenge can be waived by conduct); *Trustees of Central Laborers' Welfare Fund v. Lowery, 924* F.2d 731 (7th Cir. 1991) (jurisdictional challenge can be waived even without filing an answer or motion).

The Third District's *Whatmore* decision is inconsistent with the principals enunciated *in Rorick, Sternberg, Marshall, Hubbard, Cummings* and *Bay City Management,* and with Fla.R.Civ.P. 1.140(b). While those cases and the rule foster the salutary result of permitting a party to <u>defend</u> itself while simultaneously challenging the trial court's jurisdiction, those cases and the rule also recognize that any conduct <u>invoking and recosnizing</u> the trial court's jurisdiction is inconsistent with such a challenge, and operates as a waiver.

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The fallacy of the *Whatmore* decision's reasoning and result are demonstrated by this very case. For the trial court to grant Whatmore's Fla.R.Civ.P. 1.540 (b) motion for relief from judgments, the trial court would have had to have personal jurisdiction over him.[3] Whatmore's motion to dismiss essentially conceded the trial court had jurisdiction over him for the purposes of his Fla.R.Civ.P. 1.540(b) motion, and he was willing to recognize the trial court's personal jurisdiction so long as his motion was granted. Had the motion been granted, Whatmore would have taken his victory and walked out of Florida. Then, any claims that Babcock might assert on those judgments in the future would have been deemed precluded by *res judicata.* Certainly, Babcock would not have succeed in a subsequent case by arguing that the first court did not have jurisdiction to enter the order relieving Whatmore from the judgments. Under this scenario, there can be no serious argument that Whatmore would have had to admit and recognize the trial court's personal jurisdiction. Why, then should the law permit Whatmore to challenge jurisdiction if his Fla.R.Civ.P. 1.540(b) motion were denied? It should not. It follows, therefore, that having once invoked the trial court's jurisdiction by his Fla.R.Civ.P. 1.540(b) motion, he cannot later be permitted to deny that same jurisdiction to avoid Babcock's claims. *See Rorick, Hubbard, Shurden* and Fla.R.Civ.P. 1.140(b).

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[3] There can be no serious argument that Fla.R.Civ.P. 1.540(b) motion is anything but a request for affirmative relief in that it requests a court to "relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding...."

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The Second District's reasoning and rationale in its *Hubbard* decision are consistent with *Rorick, Sternberg, Marshall* and with Fla. R. Civ. P. *1.140* (b). The *Cummings, Bay City Management, Shurden, Consolidated Aluminum,* and *Donian* decisions properly interpret and apply Fla.R.Civ.P. 1.140(b). Collectively, these decisions and Fla.R.Civ.P. 1.140(b) avoid anomalous results which could be fostered by *Whatmore*.

CONCLUSION

The Third District's decision in *Whatmore* should be quashed. *Hubbard's* holding that a request for affirmative relief waives a timely asserted jurisdictional challenge should be approved. Even if this Court is not inclined to adopt Babcock's arguments on a full-scale basis, based on the particular procedural posture of this case, at a minimum the Third District's *Whatmore* decision should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Wendrik G. Milne, Esq., Aballi Milne Kalil & Garrigo, P.A., 1980 SunTrust International Center, One Southeast Third Avenue, Miami, Florida 33131, this 24th day of July, 1997.

Of Counsel

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JCC:jcc/z/jcc/z
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