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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 REPLY BRIEF ON THE MERITS

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TABLE OF AUTHORITIES

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ISSUE

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

ARGUMENT

A defendant waives a personal jurisdiction 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).

Respondent's major premise is that a Rule 1.540(b) motion is defensive, and therefore such a motion does not waive a jurisdictional challenge. A fair examination of the office of a Rule 1.540(b) motion demonstrates that respondent's characterization of its nature is inaccurate. Building on that inaccurate characterization, respondent has constructed an argument which must fail.

Any fair view of the purpose and operation of Rule 1.540(b) compels the conclusion that its office is for affirmative relief. The first purpose of the rule is to permit a court to "relieve a party or a party's legal representative from a final judgment" for particularly stated reasons. Fla.R.Civ.P. 1.540(b). Further demonstrating that a Rule 1.540(b) motion is a request for affirmative relief is the requirement that it be brought within a certain period of time. Fla.R.Civ.P. 1.540(b). A defense, of course, is not subject to time bar.

The second purpose of the rule is to provide "a convenient and orderly method for attacking a final judgment, . . ." *Alexander v. First National Bank of Titusville, 275 So.* 2d 272 (Fla. 4th DCA

1973). A Rule 1.540 motion is not a substitute for appellate review, as respondent attempts to use it in this case, *id.; see Fiber Crete Homes, Inc. v. Division of Administration, 315 So.* 2d 492, 492 (Fla. 4th DCA 1975), since its purpose is to permit correction of "'mistakes' made in the ordinary course of litigation and does not contemplate judicial error." *Pompano Atlantis Condominium Ass'n v. Merlino*, 415 So. 2d 153, 154 (Fla. 4th DCA 1982).

In operation, a Rule 1.540 motion seeking relief from a judgment must "be applied for by a motion filed *in the same proceeding in which the questioned judgment* was *entered." Alexander, 275 So.* 2d at 273, citing *Corrigan v. Corrigan, 184 So.* 2d 664 (Fla. 4th DCA 1966); *Smith-Adam v. Komer, 673 So.* 2d 991, 992 (Fla. 4th DCA 1996) ("Once a judgment becomes final, it can only be modified by a proper independent action or by an authorized motion under Florida Rule of Civil Procedure 1.540"). However, a separate lawsuit can be brought to obtain the same result. Fla.R.Civ.P. 1.540(b) ("This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court"); *Corrigan, supra.* Nowhere does the rule permit a Rule 1.540(b) motion to be asserted as a 'defense" to an action.

The language, purpose, and operation of Rule 1.540 demonstrate that its office is a method for requesting affirmative relief. There is simply nothing "defensive" in its nature. Nowhere does

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the rule permit a Rule 1.540(b) motion to be asserted as a "defense" to an action. Other than the decision under review, respondent has not offered a case from anywhere in the United States, under either federal or state law, holding that this type of motion is "defensive" in nature.

The incongruity of respondent's argument is demonstrated by analyzing the question from a different perspective: Does a plaintiff submit to personal jurisdiction when the plaintiff files an independent action (as recognized under Rule 1.540) to be relieved from a judgment or order? The answer to that question is obviously "yes." In such a case, the plaintiff cannot be heard to challenge exercise of jurisdiction over him. Or, stated another way, in a separate action may a trial court grant relief from a judgment to someone over whom it does not have jurisdiction? Of course the answer to that question also is "no."

The incongruity of respondent's argument is also demonstrated by analyzing the question from the perspective of the defenses with which respondent attempts to cast his Rule 1.540(b) motion. May independent cause of action be brought on claims of lack of jurisdiction over the person or subject matter, improper venue, insufficiency of process, insufficiency of service of process, failure to state a cause of action or failure to join indispensable parties? Of course not. Nor may those "claims" be brought under Fla.R.Civ.P. 1.540(b). In contrast, the bases for relief under Fla.R.Civ.P. 1.540(b) do permit independent causes of action.

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consequently, the resolution of this case is driven by the office of a Rule 1.540(b) motion. Requesting the Court to be relieved from a judgment is a request for affirmative relief which is a submission to personal jurisdiction.

Respondent's argument that denial of due process and payment are defenses does not carry his case. To preserve his jurisdictional challenge, should have filed an answer and asserted them as defenses. Instead, he chose not to answer, but chose to go on the offensive with a Rule 1.540(b) motion. The result of that strategy is a submission to the Court's jurisdiction. *First Wisconsin National Bank v. Milwaukee,* 343 So. 2d 943 (Fla. 2d DCA 1977) (when one moves a court to grant relief materially beneficial to them, they submit themselves to court's jurisdiction).

The cases upon which respondent relies, are simply inapplicable when a Rule 1.540(b) motion is analyzed properly. For example, respondent's reliance on *Banco de Costa Rica v. Rodriguez,* 573 So.2d 833 (Fla. 1991), is misplaced because there, this Court specifically concluded that a defensive motion – a motion to quash an unauthorized notice of taking deposition because of lack of service of process – was not a request for affirmative relief. *Rodriguez* simply does not involve the same (or even a similar) legal issue as here: application for a Rule 1.540(b) motion.

Nor does *Public Gas Co. v. Weatherhead Co., 409* So.2d 1026 (Fla. 1982) advance respondent's argument. Respondent cites this Court's quote of the Third District's decision in that same case, that "the merely filing of an entirely neutral and innocuous piece

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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 and should [not] be given just that effect." Id. at 1027. But the part of the *Weatherhead* decision respondent quotes demonstrates petitioner's point: that a request for relief from judgment is not a neutral or innocuous piece of paper. More telling is that in *Weatherhead,* the neutral and innocuous piece of paper to which this Court referred was a notice of appearance.

Respondent also argues 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." Respondent's Brief, p. 11. That contention, however, is off base for the purposes of this case because it is grounded on an erroneous characterization of a Rule 1.540(b) motion. *Ferrari v. Rubin, 616* So.2d 611 (Fla. 5th DCA 1993), which respondent cites, is inapplicable because that case correctly holds that an appearance is one case cannot confer jurisdiction over a party is a separate independent case.

Nor does *Logan* v. *Mora, 555* So.2d 1267 (Fla. 3d DCA 1989) support respondent's position. *Logan* is not supportive because, in this case, respondent specifically acknowledged the trial court's jurisdiction by requesting a ruling declaring the judgments void, and indicating that he could only challenge the court's jurisdiction should it rule against him, Were *Logan* not therefore

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distinguishable, it has been overruled by implication. *See Odor v. Odor,* 568 So.2d ,988 (Fla. 3d DCA 1990).

To resolve this case, this Court does not have to announce broad and wide-raging policy and rule interpretation. Instead, the decision is narrow: Does the filing of a Rule 1.540(b) motion waive a jurisdictional challenge? It does, in that it is a request for affirmative relief and this Court should say that. By making such a narrow holding, this Court decision would not implicate any claimed "majority decisions" by the District Courts.

CONCLUSION

The Third District's decision below should be quashed. *Hubbard v. Cazares,* 413 So.2d 1192 (Fla. 2nd DCA 1982)'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,

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based on the particular procedural posture of this case, at a minimum the Third District's decision below 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 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 November, 1997.

_____
Of Counsel