IN THE SUPREME COURT OF THE STATE OF FLORIDA

BECKY S. TORREY, etc.
Personal Representative of the Estate
of HELEN ROSE WOODWARD, Deceased,

Plaintiff- Appellant

vs.

LEESBURG REGIONAL MEDICAL
CENTER, et al.

Defendants-Appellee

CASE NO. 95,841

APPELLANT'S INITIAL BRIEF

On Appeal from the
Fifth District Court of Appeal
No. 98-2024

ROGER E. CRAIG & ASSOCIATES

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STATEMENT OF FACTS AND PROCEEDINGS

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Although the Complaint filed in this matter first lists the principal lawyer for Plaintiff, an attorney who is licensed to practice in Florida, the attorney in the employ of the principal attorney who signed the Complaint is not licensed in Florida. (8, 106)

A defendant moved to dismiss on the ground, inter alia that the attorney who signed the Complaint was not licensed to practice in Florida. (26-28)

Prior to the hearing on that motion, a local attorney entered his appearance on behalf of Plaintiff. (T3)

The non-Florida attorney who signed the Complaint filed an affidavit that in the press of business and in the face of the expiration of the medical malpractice statute of limitations, he signed and filed the complaint. (105-106)

The trial court's order dismissing the action without prejudice did not address the fact that the senior partner of the signatory attorney was admitted in Florida and found that local counsel's appearance prior to the hearing on Defendant's motion to dismiss, and, approximately five months prior to the trial court's ruling on that motion was ineffective. (112-113)

Instead, the trial court relying exclusively on Lincoln American Life Ins. Co. v. Parris, 390 So.2d 148 (Fla. 1st DCA 1980) and Fla. R. Jud. Admin. 2.060 (b) concluded that the

signatory attorney's conduct was not the consequence of excusable neglect and that the Complaint was therefore a nullity and would be dismissed, notwithstanding the consequence that dismissal could result in a time bar to refiling. (112-113)

In response to Plaintiff's appeal, the Fifth District perceived the issue differently and explained that the

> " . . . issue in this appeal is whether a complaint filed by an attorney not authorized to practice law in Florida is a nullity and thus not correctable by amendment adding the name of an authorized lawyer, or is it merely an unauthorized filing that is validated upon entry into the case of a lawyer authorized to practice in this state."
>
> Torrey v. Leesburg Regional Medical Center, 736 So. 2d 748 (Fla. 5th DCA 1999).

In answer to that question and citing to prior decisions from the Fifth District, that Court concluded:

"Because we are bound by the precedent of this court, an affirmance of the dismissal is required." (749)

Since the decision of the Fifth District conflicts with the decisions of other district courts of appeal, the resolution of those conflicting decision by this Court is required. This Court has jurisdiction pursuant to Article V, section 3 (b)(3) of the Florida Constitution.

ISSUES PRESENTED

Is a Complaint signed by other than an attorney licensed to practice in Florida:

1. A nullity not amenable to remediation as decided by the Fifth District in the instant case;

2. A nullity unless the product of excusable neglect as decided by the First District in Lincoln American Life Ins. Co. v. Parris, 390 So. 2d 148 (1980);

3. Defective but not a nullity, and saved by amendment adding an authorized attorney's signature. Szteinbaum v. Kaes Inversiones y Valores, 476 So. 2d 247 (Fla. 3d DCA 1985).

Appellant contends that the Szteinbaum decision represents the better rule.

SUMMARY OF ARGUMENT

This Court has jurisdiction because of the divergent opinions of the District Courts of Appeal which have considered the legal status of a complaint signed by other than an attorney licensed to practice in Florida.

The position of the First District that such a filing is a "nullity", but not if there is excusable neglect" is totally illogical. If a pleading is a nullity, it perforce may not be amended.

The position of the Fifth and Second District that such a filing is an absolute nullity flies in the teeth of the strong policy of the State that cases should be tried on the merits and, apart from precedent, has neither legal nor philosophical support.

The position of the Third District, that such a filing is merely defective and can be saved by corrective amendment comports with Florida's strong policy of resolving law suits on their merits.

The same comprehension by the Chief Justice of this Court of the impact of computer science on the preparation of appellate briefs is equally applicable to the ability of lawyers from other states to gain access to the law of the State of Florida. With current computer access to Florida law as available to lawyers from other states as it is to Florida lawyers, the welfare of the client is not a valid consideration.

Instead, the patent goal is protectionism - a "closed shop" for Florida lawyers.

ARGUMENT

First, because of the apparent and acknowledged conflict among the District Courts of Appeal that have considered the issue central to this case, this Court's instruction on that issue is essential.

Presently, there are three distinct rulings as to the effect of a Complaint filed by an attorney not licensed to practice in Florida.

The instant case stands for the position that such a filing is a nullity. That is the position of the Fifth District.

The First District takes the position that such a filing is a nullity in the absence of excusable neglect.

The Third District takes the position that such a filing is defective but not a nullity and can be corrected.

The three positions cannot be reconciled.

Nor is the issue likely to go away. It is the

responsibility of the legal community to advise the client community as to the probable consequences of its conduct. That is presently impossible as to the instant issue.

Second, among the three conflicting decisions of the courts of appeal, the decision of the Third District in Szteinbaum v. Kaes Inversiones y Valores, 476 So. 2d 247 (Fla. 3d DCA 1985) is the better position.

In that regard, the decision of the First District in Lincoln American Life Ins. Co. v. Parris, 390 So. 2d 148 (1980) is logically indefensible. That decision finds the unauthorized filing a nullity in the absence of excusable neglect.

A "nullity" is "Nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no force or effect." Black's Law Dictionary, 6th Ed, 1991, p. 1067.

If the act of filing a complaint not signed by a Florida lawyer in a Florida court is a nullity, there is no act of legal legerdemain that can resuscitate it.

The very concept is an invitation to arbitrary adjudication. Such a stand calls upon the trial court to measure the quality and quantity of the sin, apparently without regard to the prejudice to the opposing party.

The concept creates more questions that it answers, gives no guidance to the legal community and insures case-by-case litigation.

On the other hand, the decision of the Fifth District in

the instant case, devoid of any other merit, certainly draws a bright line. A complaint filed in Florida by other than Florida counsel is without legal significance, without regard to the absence of prejudice to the defendant or the harshness of that result to the plaintiff.

Here, of course, the harsh result is that Plaintiff's action would apparently be barred by the applicable statute of limitations. (105-106)

In this case, the reasoning of the Fifth District is succently summarized in its statement that "because we are bound by the precedence of this court, an affirmance of the dismissal is required." (749)

Specifically, the Court referred to the fact that it had previously cited with approval Nicholson Supply Co. v. First Federal Sav. Loan Assn. of Hardee County, 184 So. 2d 438 (Fla. 2d DCA 1966) in support of its conclusion.

By contrast, the decision of the Third District in Szteinbaum expressly rejecting the precedent relied on by the Fifth District, is thoughtful and persuasive.

Explaining its conclusion that Nicholson was wrongly decided, the Szteinbaum court said (at 249):

> "As this court declared in Puga v. Suave Shoe Corp. 417 So. 2d 678, 679 (Fla. 3d DCA 1981 (en banc), public policy dictates that, whenever possible, cases "should be determined on their merits, instead of upon irrelevant technicalities." Thus, dismissal of the amended complaint in the present case in derogation of this "welcome policy," Puga v. Suave Shoe Corp.,

> 417 So.2d at 679, is warranted only if it can be said that treating the defect of the initial complaint as incurable will somehow substantially advance some other more compelling public policy."

The Szteinbaum court carefully analyzed Nicholson and its precedents, characterizing the very result that its application had in the case at bar as "draconian" (349, F.N. 3).

The court also rejected the suggestion of the Fifth District in this case that the result reached was somehow required by Florida Rule of Judicial Administration 2.060 observing that:

> "The fact that the rules permit such errant pleadings to stand demonstrates that the holding of Nicholson that such an improper pleading should be stricken as a nullity necessarily is bottomed on the common law proscription against corporations representing themselves pro se rather than any governing rule or statute." (349 F.N. 4)

Szteinbaum also carefully weighed its duty to protect the public from incompetent, unethical or irresponsible representation, and found the policy considerations of the Nicholson rule in that regard, subordinate to the policy that cases should be decided on their merits. (249-250)

Szteinbaum concludes that "the decision of whether to dismiss a complaint without leave to amend" should be controlled by consideration of the fault and diligence of plaintiff and the prejudice to the defendant. (352)

Because the appellate court in the instant case deemed the complaint a nullity, none of the issues suggested by

Szteinbaum were considered.

Finally, it borders on hypocrisy to argue that declaring the filing of a complaint by a non-lawyer a nullity is designed to protect the client.

To steal a phrase from the first page of the Administrative Order of the Chief Justice of this Court issued July 13, 1998, "While this requirement may have made eminent sense in the early days of the computerization . . . " it is clearly no longer valid.

Today an on-line attorney in Alaska has the same access to Florida law as does a practitioner in Tallahassee.

Not too many years ago, any state in which it was desirable to establish a law practice because of economic opportunity or because it was an attractive venue for semi-retirement had a non-resident bar examination. That too, was simple protectionism.

Indeed, the concept inherent in the rule of law adopted in the case at bar was critized in the most recent edition of the American Bar Journal, "New Push for Going Mobile", Debra Baker (18 ABA Journal 18, July 1999).

"A French advocat can represent clients in German courts, yet New York lawyers can't cross the Hudson River to give advise on the issuance of government bonds in New Jersey without risking jail time."

The article quotes professor Stephen Gillers of New York

University Law School as observing that "Lawyers are coming to see that the exclusionary rules that have protected lawyers for so long are becoming counter-productive."

CONCLUSION

Appellant urges that this Court adopt the Szteinbaum position on the issue of the status of an unauthorized complaint, rejecting the Nicholson view that such a filing is a nullity.

Appellant asks that this case be remanded to the trial court with instructions that the motion to dismiss Plaintiff's complaint be resolved in accordance with the standards enunciated in Szteinbaum v. Kaes Inversiones y Valores, 476 So. 2d 247 (Fla. 3d DCA 1985).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by regular U.S. Mail to WILLIAM J. McHENRY, ESQUIRE, 19390 West Ten Mile Road, Southfield, Michigan 48075; G. FRANKLIN BISHOP, III, ESQUIRE, Johnson, Bussey & Baughan, P.A., Post Office Box 531086, Orlando, Florida 32853-1086; RAFEAL E. MARTINEZ, ESQUIRE/JEFFERY BADGLEY, ESQUIRE, Sanders, McEwan, Martinez, Luff & Dukes, P.A., P.O. Box 753, Orlando, Florida 32802-0753 and LARRY D. HALL, ESQUIRE/WILLIAM W. LARGE, ESQJUIRE, Adams, Hill, Reis, Adams, Hall & Schieffelin, 1417 E. Concord Street, Orlando, Florida 32803 this 16th day of July, 1999.

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