IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

JEFFREY CANNELLA and JOANNE CANNELLA,

Petitioners,

vs. Case No. 95,954

AUTO-OWNERS INSURANCE COMPANY,

Respondent.
____/

ON CERTIFIED CONFLICT REVIEW OF A DECISION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

RESPONDENT'S BRIEF

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Respondent hereby certifies that the type size and style of the Respondent's Brief is Times New Roman 14pt.

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<u>MISCELLANEOUS</u>

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STATEMENT OF THE CASE AND FACTS

The Respondent, AUTO-OWNERS INSURANCE COMPANY, Appellant at the Second DCA and Defendant at trial, will be referred to as "AUTO-OWNERS" herein, and the Petitioners, JEFFREY CANNELLA and JOANNE CANNELLA (husband and wife and Appellees below), will be referred to collectively as the CANNELLAS," unless additional specificity is required for the sake of clarity. AUTO-OWNERS' insured, Mock Plumbing Contractor, Inc., will be referred to as "Mock Plumbing."

A. STATEMENT OF THE CASE

Petitioners' Statement of the Case and Facts require certain supplementation for this Court to have a fair understanding the facts and chronology of this case.

1. Nature of the Order on Appeal:

The Petitioners sought review of the Second District Court of Appeal Opinion based on conflict jurisdiction. The Second District Court of Appeal reversed a Partial Summary Judgment in favor of the Petitioners on Count III of their Amended Complaint for breach of contract. Respondent had originally appealed the trial court order granting Partial Summary Judgment based on the trial court's error on the following:

a. The prior Judgment against Mock Plumbing was entered without jurisdiction over Mock Plumbing and was therefore void.

b. Actual issues remain on whether Mock Plumbing's fundamental rights to due process notice were violated.

c. Whether Petitioners were entitled to a bench trial after requesting a trial by jury and whether such a Judgment was void.

d. Whether Auto-Owners was entitled to assert coverage defenses under the circumstances against Petitioners' claim for payment under the AUTO-OWNERS' policy.

The Second District Court of Appeal's opinion addressed only the service of process issue finding that service was not made as required by Florida Statute 48.101 (1991), and that the Default Judgment entered on behalf of Petitioners against Mock Plumbing on June 20, 1995, was thereby void.

2. History of the Case:

The facts and history of this case are somewhat convoluted as they transpired over the course of two separate lawsuits -- the first suit was a personal injury lawsuit that the CANNELLAS brought against Mock Plumbing for personal injuries allegedly sustained by Jeffrey Cannella while on the premises owned by a third party. The second lawsuit (the case ***sub judice***) was brought by the CANNELLAS against AUTO-OWNERS after the CANNELLAS had obtained a Default Judgment against

Mock Plumbing in that prior action and then sought payment from AUTO-OWNERS thereon.

The instant case was initiated when the CANNELLAS filed suit against AUTO-OWNERS and its Claims Adjuster, Kurt Fraass, for breach of contract, asserting that they, the CANNELLAS, were assignees of any claims Mock Plumbing had against its insurer arising out of AUTO-OWNERS refusal to pay the Judgment entered against Mock Plumbing in that earlier lawsuit. [R. 1-4]. The CANNELLAS later amended their Complaint to add three additional causes of action, specifically, breach of third party beneficiary contract; negligence; and bad faith. [R. 17-25]. The Opinion rendered by the Second District Court of Appeal on Count III of the Amended Complaint resolves the other claims as well.

The CANNELLAS, in Count III of their Complaint, allege that they were third party beneficiaries of an insurance policy AUTO-OWNERS had issued to its insured, Mock Plumbing. [R. 20-21]. The CANNELLAS were claiming in Count III, that after obtaining a Default Judgment against Mock Plumbing in excess of AUTO-OWNERS' $500,000.00 policy limits, AUTO-OWNERS had supposedly breached its policy of insurance by not paying off that prior Default Judgment up to the limits of its policy. [R. 20-21]. In its Answer to the CANNELLAS First Amended Complaint, AUTO-OWNERS denied that it was in breach of contract, and stated, among other things,

that it had various coverage defenses available to it under the subject policy. [R. 115-118]. These coverage defenses were based on the insured's "prejudicial delayed notice of claim" and its "failure to cooperate" with AUTO-OWNERS in the investigation and defense of the CANNELLAS' claim. [R. 117, 118]. Thereafter, AUTO-OWNERS moved to set aside the earlier Default Judgment the CANNELLAS had obtained against its insured, on the grounds that it had been entered by the Court without jurisdiction over Mock Plumbing, and was otherwise void and unenforceable. [R. 232, 233]. The CANNELLAS then moved for Summary Judgment on Count III, [R. 241, 242], and a hearing was held before the Court on that Motion, as well as on AUTO-OWNERS' Motion to Set Aside the earlier Judgment against its insured. [R. 388-445]. Due to the length of the arguments presented to the Court on AUTO-OWNERS' Motion to Set Aside the Default Judgment, there was insufficient time for the parties to specifically address the CANNELLAS' Summary Judgment Motion. [R. 388-445]. However, on December 23, 1996, the Circuit Court entered an Order Denying AUTO-OWNERS' Motion to Set Aside Default Judgment and granting the CANNELLAS' Motion for Summary Judgment on their third party breach of contact claim against AUTO-OWNERS. [R. 341, 342].

Thereafter, the Circuit Court entered an Amended Order Granting Summary Judgment against AUTO-OWNERS and directing it to pay the full amount of the prior

Judgment entered against Mock Plumbing (or up to the limits of its policy). [R. 375]. On March 30, 1998, the Circuit Court proceeded to enter a Partial Final Judgment against AUTO-OWNERS on Count III predicated on its earlier Summary Judgment Order. [R. 534]. The Second District Court of Appeal reversed the trial court holding that Florida Statute 48.101 (1991) and the prior appellate decisions of Stoeffler v. Castagliola, 629 So. 2d 196 (Fla. 2d DCA 1993), and Polk County Rand Investments, Inc. v. State of Florida Department of Legal Affairs, 666 So. 2d 279 (Fla. 2d DCA 1996), governed the issue on service of process on a dissolved corporation.

B. STATEMENT OF THE FACTS

Material to this appeal are the facts relating to that earlier Judgment entered against Mock Plumbing (AUTO-OWNERS' insured) in Case No. 92-1100-23, since the legal validity and enforceability of that prior Judgment is being collaterally challenged in the case ***sub judice***. Prior to granting Summary Judgment, the Circuit Court had agreed to take *judicial notice* of the file materials contained in that prior action (Case No. 92-1100-23). [R. 443-445]. Thus, the material facts of record at the time of the 11/21/96 hearing on the CANNELLAS' Motion for Partial Summary Judgment are as follows:

On October 23, 1989, Jeffrey Cannella sustained an injury, allegedly due to Mock Plumbing's negligence in performing certain plumbing repairs on property owned by Alderman Plaza/Sutton Group. [R. 550-553]. AUTO-OWNERS was not informed by

anyone of this particular incident, and no claim was ever submitted to it at that time. [R. 121-152]. Thereafter, on December 4, 1990 (over a year later), Mock Plumbing, and its principal agent, Theodore Mock, filed for bankruptcy protection. [R. 277-321]. During the pendency of this bankruptcy proceeding, the State of Florida involuntarily dissolved Mock Plumbing on October 11, 1991, for failing to file annual reports [R. 227, 326], and Mock Plumbing has never been reinstated by the Secretary of State. According to Mock Plumbing's 1990 annual report, Monica Mock was the corporation's president and registered agent. [R. 324, 326]. No directors for the corporation were ever identified or named in that annual report. [R. 324].

After the bankruptcy proceedings against Mock Plumbing terminated on or about October 24, 1991 [R. 278], the CANNELLAS amended their Complaint in Case No. 92-1100-23 to name Mock Plumbing as an additional defendant in the negligence action they had already instituted against the property owner, Alderman Plaza/Sutton Group. [R. 550-553]. Monica Mock was served with the Complaint on June 3, 1992, as Mock Plumbing's registered agent, and service was made on her at 1443 14th Street, Palm Harbor, Florida. [R. 554-555]. Monica Mock testified in her deposition (taken in the case *sub judice*) that, although she was listed as Mock Plumbing's president and registered agent, that title was on paper only, as she never had anything to do with actually running the company, and never attended any directors' meetings or the like. [R. 367-368].

On June 30, 1992, the CANNELLAS moved for a default against Mock Plumbing for failing to plead or otherwise answer the Complaint [R. 556], and a Default was entered by the Clerk of Court on July 6, 1992. [R. 557]. Neither Mock Plumbing, nor AUTO-OWNERS were provided with copies of either the Motion for Default, or the Default actually entered by the clerk. [R. 556-557]. Thereafter, on September 9, 1992, the CANNELLAS attempted (unsuccessfully), to serve a subpoena for deposition on Monica Mock at that same 1443 14th Street, Palm Harbor address. [R. 558-560]. They were informed (via the process server's non service affidavit) that Monica Mock was no longer at that Palm Harbor address, which was apparently then being occupied by new tenants. [R. 560]. Over four months later, on January 27, 1993, the CANNELLAS' attorney, Roy Skelton, wrote a "Dear Sir" letter to AUTO-OWNERS, advising AUTO-OWNERS for the first time that a claim was pending against its insured, and further advising that a Default had already been entered against Mock Plumbing in Case No. 92-1100-23. [R. 30]. AUTO-OWNERS' insured had never notified AUTO-OWNERS of either the incident, or the CANNELLAS' claim. [R. 121-152].

In response to Mr. Skelton's 1/27/93 letter, AUTO-OWNERS', through its claims adjuster, Kurt Fraass, asked Mr. Skelton to forward copies of any and all correspondence pertaining to the CANNELLAS' claim, including a copy of the Default that had previously been entered against Mock Plumbing. [R. 31]. In response, Mr. Skelton wrote

back on March 12, 1993, advising Kurt Fraass that he had already forwarded a copy of the complaint, and that the clerk did not provide parties with copies of the default as it was simply placed in the court file. [R. 147]. Kurt Fraass testified unequivocally in his deposition that at no time had he ever received a copy of the complaint referred to in Mr. Skelton's letter. [R. 129-130, 137]. He further testified that he had unsuccessfully attempted to contact Mock Plumbing after receiving Mr. Skelton's initial 1/27/93 letter, and that he eventually sent Mock Plumbing a "Reservation of Rights" letter by certified mail, dated February 23, 1993, regarding the claim. [R. 128-129, 134-137]. This Reservation of Rights letter informed Mock Plumbing that AUTO-OWNERS was reserving its right to raise various coverage defenses under the insurance policy based on Mock Plumbing's failure to timely notify it of the claim, and its failure to cooperate with AUTO-OWNERS in the investigation, settlement and defense of the claim. [R. 148]. AUTO-OWNERS thereafter sent a follow-up letter to Mock Plumbing, but no one from Mock Plumbing ever responded, either to the initial Reservation of Rights letter, or to the follow-up letter, despite Kurt Fraass' repeated attempts to communicate with its insured. [R. 132-137].

Thereafter, the CANNELLAS filed a notice of hearing and a Motion for Partial Summary Judgment against Mock Plumbing, neither of which were served on Mock Plumbing (or provided to AUTO-OWNERS). [R. 561-562]. Then, on June 1, 1993, the

Circuit Court entered a Partial Summary Judgment against Mock Plumbing on the issue of liability, advising the parties that a ***jury*** trial would be scheduled upon proper notice on the issue of damages. [R. 563-564]. This Summary Judgment order stated that a copy was being sent to Mock Plumbing, ostensibly at that same defunct Palm Harbor address. [R. 564]. However, no copy of the order was ever sent to AUTO-OWNERS by anyone. [R. 121-152, 564].

On December 2, 1993, the CANNELLAS settled their personal injury claim against the property owner for the sum of $40,000, and, over a year later, Judge Harlan entered an amended order scheduling the CANNELLAS' case against Mock Plumbing for a ***jury*** trial the week of February 20, 1995. [R. 566-567]. A copy of this order was apparently mailed to Mock Plumbing, c/o Monica Mock at that same defunct 1443 14th Street, Palm Harbor address, and it was subsequently returned undelivered. [R. 567-570]. Thereafter, on January 4, 1995, the Circuit Court issued a Second Amended Notice of Trial, scheduling the matter for a ***jury*** trial the week of February 20, 1995. [R. 571-572]. The certificate of service on this particular Notice of Trial order similarly indicated that a copy was being sent to Mock Plumbing's registered agent at that same defunct Palm Harbor address. [R. 572]. Again, neither of these orders scheduling the matter for trial was ever provided to AUTO-OWNERS.

No jury trial was EVER commenced on the scheduled date, and six months later, on June 1, 1995, the Circuit Court inexplicably entered an Order Setting Action for ***Non***-Jury Trial, scheduling a bench trial of the matter for June 19, 1995 -- only eighteen days later. [R. 573]. The certificate of service on that particular order stated that a copy was sent to Monica Mock as Mock Plumbing's registered agent, ostensibly at the same defunct Palm Harbor address. [R. 573]. Monica Mock testified in deposition that she did not recall ever receiving any notice of the non-jury trial scheduled for June 19, 1995. [R. 368-371]. Similarly, AUTO-OWNERS was never provided with copies of any of the aforementioned Notice of Trial orders.

On June 20, 1995, after a ***non***-jury trial (that Mock Plumbing neither attended, nor participated in), the Circuit Court entered a Final Judgment against Mock Plumbing in the amount of $669,610.21, plus interest. [R. 24]. That judgment was in excess of AUTO-OWNERS' $500,000.00 policy limits. [R. 112-113,119]. Thereafter, on November 15, 1995, Mock Plumbing assigned to the CANNELLAS any claims it may have against its insurer, AUTO-OWNERS, in return for a release from all liability of Theodore Mock, Monica Mock, and Katherine Mock. [R. 23]. Subsequent to executing this particular assignment, Mock Plumbing, through its attorney Michael S. Rywant, filed a Motion to Vacate the Default and Default Judgment entered in Case No. 92-1100-23. [R.574-576]. This Motion to Vacate, however, was summarily stricken by the court [R. 582], in

response to the CANNELLAS' Motion to Strike [R. 577-581], which was predicated on Section 607.1622(8) of the Florida Statutes, which bars a corporation which has failed to file an annual report from defending any action in any court. Thereafter, the CANNELLAS' filed the instant action against AUTO-OWNERS and its adjuster, Kurt Fraass, alleging breach of contract, negligence, and bad faith in the handling of the CANNELLAS' claim against Mock Plumbing. [R. 17-25].

SUMMARY OF ARGUMENT

The Second District Court of Appeal properly found that AUTO-OWNERS was not bound by a void Default Judgment entered against Mock Plumbing in favor of CANNELLA.

A review of the facts of this case are deeply disturbing. In 1992, Petitioners served the registered agent of a dissolved corporation with process. The dissolved corporation, Mock Plumbing, was in financial disarray, newly discharged from bankruptcy and had no assets. The Petitioners, without notice to Mock Plumbing, moved the Circuit Court for a Default Judgment in violation of Florida Rule of Civil Procedure 1.080(a). Mock Plumbing never received any notice of any of the proceedings including notice of trial or a hearing on damages. The CANNELLAS scheduled and had heard the damages on the case, non-jury, in spite of originally demanding a jury trial, contrary to clear legal authority prohibiting such. See, Curbelo v. Ulman, 571 So. 2d 443 (Fla. 1990) (Mock Plumbing never waived its right to a jury trial, did not attend and did not participate at trial).

Other than a single "Dear Sir" letter from attorney Skelton on January 27, 1993, after a Default had been entered against its insured Mock Plumbing, no contact or notice of any type was made by the CANNELLAS or their attorney with AUTO-OWNERS. From the date of the improper service on Mock Plumbing until the date upon which

Petitioners sought to enforce their Judgment against AUTO-OWNERS, neither Mock Plumbing nor AUTO-OWNERS received any notice of any proceeding, trial or hearing. It almost appears that there was a deliberate attempt to shield the litigation from any party who would have the ability or interest to have the matters being litigated heard on the merits.

The Petitioners now seek to have this Court validate their violation of the plain language of § 48.101 (1991) of the Florida Statutes. They request this Court to approve their blatant disregard of the unequivocal appellate interpretations of that statute in 1993 and 1996 by the Second District Court of Appeal, the mandatory appellate authority for their District, and the only appellate authority at the time the Petitioners received their Judgment.

If this Court allows the Petitioners to enforce a Judgment obtained by serving a dissolved corporation by service on the registered agent as suggested by Liszka v. Silverado Steak & Seafood Co., Inc., 703 So. 2d 1226 (Fla. 5th DCA 1998), and Wong v. Gonzalez & Kennedy, Inc, 719 So. 2d 937 (Fla. 4th DCA 1998), this Court will not only overrule the cases of Stoeffler and Polk County Rand Investments, but it will also abolish the long-standing principles of statutory construction embraced by this Court in Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249 (Fla. 1987) (the foundation of the reasoning of the Second District Court of Appeal in Stoeffler).

The Petitioners' argument that a 1997 amendment to § 48.101 Fla. Stat. retroactively validates the original improper service, would unfairly breathe new life into an otherwise void Judgment and result in a prohibited change of existing rights and obligations. Reinstating a large Default Judgment that under properly decided authority existing at the time, should have never been entered in the first place, constitutes the retroactive removal of "vested rights" of the Respondent.

Finally, Petitioners' claim that they are somehow denied access to the Courts, ignores the very salient facts that they have already brought claims for these very injuries against other parties, and that they elected not to pursue other individuals such as Ted Mock, or the active individuals of the corporation prior to its dissolution. Far from being deprived from access to Court, Petitioners merely needed to follow the rules set out under Florida Statutes, case law, and the Florida Rules of Civil Procedure in which to properly proceed under the circumstances.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL CORRECTLY HELD THAT SERVICE OF PROCESS WAS IMPROPERLY MADE UPON THE REGISTERED AGENT OF A DISSOLVED CORPORATION THEREBY RENDERING THE JUDGMENT VOID.

Under the facts of this case, at the time the Circuit Court entered Judgment in excess of $669,000.00 against Mock Plumbing in the earlier lawsuit, the Court did not have jurisdiction over Mock Plumbing. Service of process had never been perfected against Mock Plumbing in accordance with Florida law, specifically, § 48.101 of the Florida Statutes. Indeed, when the CANNELLAS amended their Complaint in May of 1992 to include Mock Plumbing as an additional Defendant, the corporation was no longer an active, viable, corporate entity, having been dissolved by the Secretary of State some seven months earlier on October 11, 1991. This fact is not in dispute. Nor is it disputed that Mock Plumbing has never been reinstated by the Secretary of State.

Mock Plumbing's involuntary dissolution came shortly on the heels of a year-long bankruptcy proceeding involving both Mock Plumbing and its principal, Theodore Mock. These bankruptcy proceedings left Mock Plumbing essentially bereft of any funds and lacking any distributable assets with which to pay creditors, as indicated in the Bankruptcy Trustee's Report of No Distribution, dated August 7, 1991. [R. 281].

The record also shows that Monica Mock was served in her capacity as resident agent of the corporation, and not as a director or trustee. The foregoing uncontested facts clearly show that, in addition to being administratively dissolved at the time CANNELLAS attempted service of process on Mock Plumbing's registered agent, the corporation was defunct and devoid of any assets. As a dissolved corporation, service of process was required to be made on one or more directors of Mock Plumbing as trustee, pursuant to § 48.101 of the Florida Statutes which governs process on dissolved corporations.

Section 48.101 (which contains the heading "service on dissolved corporations"), provides in its entirety the following:

> Process against the directors of any corporation which is dissolved as trustees of the dissolved corporation **shall be served on one or more of the directors of the dissolved corporation as trustees** thereof and binds all the directors of the dissolved corporation as trustees thereof.

§ 48.101 Fla. Stat. (1991)(emphasis added).

It is important to point out what § 48.101 does not say. Specifically it does not say that service on a dissolved corporation can be accomplished by serving the corporation's registered agent. Nor does it say that service can be accomplished by serving the corporation's president . . . or vice president . . . or secretary . . . or treasurer . . . or business manager, or for that matter, the employee who fixes the copy machine whenever

it breaks down. No, § 48.101 requires service of process on one or more of the directors of the dissolved corporation as trustee.

In Stoeffler v. Castagliola, 629 So. 2d 196 (Fla. 2d DCA 1993), the Second District Court of Appeal held that § 48.101, and not Chapter 607, controls the manner of service on a dissolved corporation. 629 So. 2d at 198. Under § 48.101, a party seeking to serve a dissolved corporation must do so in a specific manner -- by serving a director of the corporation as trustee. Id. A dissolved corporation must be served in this way despite the fact that, pursuant to § 607.1405(2), corporate dissolution does not otherwise terminate the registered agent's authority. Id. See § 607.1405, Fla. Stat. 1991).

The Plaintiff in Stoeffler had served process on the dissolved defendant corporation's registered agent. On appeal however, the Stoeffler Court held that service on the registered agent of the dissolved corporation was improper and did not constitute valid service. The Second District Court of Appeal reached that conclusion after first reviewing the relevant statutory provisions, including Sections 48.101 and 607.1405 of the Florida Statutes. As the Stoeffler Court noted, § 48.101 is a ***specific*** statute which governs the method by which process is to be served on a dissolved corporation. 629 So. 2d at 198. As such, § 48.101, not § 607.1405 controls the manner of service on a dissolved corporation. Id. Thus, even though Section 607.1405 states that a dissolved corporation does not terminate the authority of a corporation's registered agent, Section

48.101 still controls the precise manner in which service of process is to be accomplished on a dissolved corporation. As the Second District Court of Appeal noted in Stoeffler, Chapter 607 is wholly silent on the subject of how a dissolved corporation is to be served with process. Consequently, even though Section 607.1405(2) provides that dissolution does not de-authorize a corporation's registered agent, the registered agent is still not the proper party to be served with suit papers against the dissolved corporation.

The Second District Court of Appeal, in Polk County Rand Investments, Inc. v. State Dept. of Legal Affairs, 666 So. 2d 279 (Fla. 2d DCA 1996), reaffirmed and reiterated its prior holding in Stoeffler. In Polk County the Department of Legal Affairs had attempted to serve a dissolved corporation by serving its previous registered agent. 666 So. 2d at 279. The corporate defendant had been involuntarily dissolved by the State of Florida for failing to maintain a registered agent and registered office. Citing its previous decision in Stoeffler, the Polk County Court held that the plaintiff's failure to comply with Section 48.101 of the Florida Statutes, requiring service on the directors of the dissolved corporation ***as trustee,*** rendered service invalid, and any judgment based on such service was ***void***. Id. at 280. The Court further noted in its Polk County opinion that it was aware that under Section 607.1405(2)(g), corporate dissolution does not terminate the registered agent's authority. Id. Notwithstanding this fact, the Court went on once again to conclude that Section 48.101, being a specific statute governing service

on dissolved corporations, controls the method of service and "provides the only method by which process can be personally served on a dissolved corporation." Id.

Both Stoeffler and Polk County evidence the Second District's continuing view that, until the Legislature repeals Section 48.101, strict adherence with the dictates of Section 48.101 is required in order to effectuate service of process on a dissolved corporation. Hence, the concept of "harmless error" does not apply when it comes to these types of service of process irregularities. See, e.g., Great American Insurance Co. v. Bevis, 652 So. 2d 382, 383 (Fla. 2d DCA 1995); and Logan v. Mora, 555 So. 2d 1267 (Fla. 3d DCA 1989).

It would seem that the Petitioners, practicing within the jurisdiction of the Second District Court of Appeal, would have ample guidance as to how to serve process on a dissolved corporation. Nevertheless, Petitioners never attempted to go back and serve Monica Mock or Ted Mock individually, or determine who was acting in the capacity of a director of Mock Plumbing or who may have been deemed to assume the responsibilities of a director pursuant to the articles of incorporation. See, Fla. Stat. 607.0801 (1991).

AUTO-OWNERS contends that the fact that a dissolved corporation can sue and be sued in its corporate name (pursuant to Section 697.1405 Florida Statutes, as amended in 1990), does not obviate the statutory requirement to serve process on the directors of

the dissolved corporation in accordance with Section 48.101. Simply serving the corporation's registered agent is insufficient. Moreover, even though a dissolved corporation can still be named as a defendant in a lawsuit under its corporate name, it is still incapable of being served with process in the lawsuit, except through some person or entity expressly authorized by statute to receive the process on behalf of the corporation. This intuitively makes sense, because a corporation is a fictitious entity created by statute and personal service of process on it is a theoretical impossibility. Thus, the corporation can only be served by effectuating service on those designated persons or parties expressly authorized by statute to receive service of process on behalf of the corporation. See, Cam-La, Inc. v. Fixel, 632 So. 2d 1067, 1069 (Fla. 3d DCA 1994) (corporation is fictitious entity and there can be no personal service on it).

Consequently, when service is attempted on a corporate defendant, the proper method of service depends on the status of the corporation at the time the process is being served. In other words, is the corporation active or dissolved? If it is dissolved, and no longer engaged in ongoing business activities, then service must be made on one or more directors of the corporation as trustee. Therefore, the status of the corporation is pivotal, since the statutes governing service of process treat active and dissolved corporations differently.

The legislative rationale for providing different methods of service on corporations (depending on whether they are ongoing and viable, or defunct and dissolved), is obvious. Service of process statutes are intended to satisfy the underlying due process goals inherent in all service of process statutes, i.e., to establish jurisdiction over the defendant and to notify the defendant of the nature of the claims against it. As the Fifth District Court of Appeal noted in Abbate v. Provident National Bank, 631 So. 2d 312 (Fla. 5th DCA 1994), the purpose of service of process is to advise the defendant that an action has been commenced and to warn the defendant of the need to appear and defend at a certain time and at a certain place. 631 So. 2d 313. Statutes regarding service of process are thus to be strictly construed to assure that the defendant receives proper notice of the proceedings. Consequently, the concept of "harmless error" does not apply and will not excuse service irregularities that exist. Id. at 313-315.

The underlying rationale for Section 48.101 clearly serves an important public policy. Since a dissolved corporation is, ***by its very nature***, more likely to be in a state of flux and corporate disarray (with officers and employees scattering to the four winds in search of more viable employment opportunities), it is entirely possible and indeed likely that the Legislature deemed it necessary to require process to be served on the directors of the dissolved corporation, as opposed to its officers, agents or lower-level employees -- persons who may have already abandoned ship in search of greener pastures.

By requiring service on the dissolved corporation's directors (the highest echelon of corporate decision-making authority), the corporate defendant's due process of notice and opportunity to be heard will be best protected.

The importance of "notice" in the context of due process cannot be over-emphasized. As the United States Supreme Court has noted, the parties whose rights are to be affected have a right to be heard; and in order to enjoy that right to be heard, they must first be notified of the proceedings against them. Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556, 569 (1972). To protect such due process interest, strict compliance with service of process statutes is understandably required. See, e.g., Great American Insurance Co. v. Bevis, supra; and Logan v. Mora, 555 So. 2d 1267 (Fla. 3d DCA 1989).

Contrary to the Petitioners' argument and the Fifth DCA's reasoning in Liszka v. Silverado Steak & Seafood Co., Inc., 703 So. 2d 1226 (Fla. 5th DCA 1998), the 1990 amendments to Chapter 607 did not change the legislatively-established method of service on a dissolved corporation. Indeed it is a fundamental principle of statutory construction that the Legislature is presumed to know the state of the existing law at the time it enacts a statute, and statutes should be construed in such a way that they are harmonious with existing law. See, Hollar v. International Bankers Ins. Co., 572 So. 2d 937 (Fla. 3d DCA 1990). Consequently, the changes the Legislature made to Chapter

607 back in 1990 must be harmonized with existing law, including Section 48.101, which governs service of process on dissolved corporations.

Clearly, if the Legislature had intended to change established law relative to the proper method of effectuating service of process on a dissolved corporation, it was incumbent upon it to make such a change in clear, unequivocal terms. This, the Legislature did not do, as nowhere in Chapter 607, as amended, is there any provision specifying how service is to be effectuated on a dissolved corporation. Consequently, as the Second District Court of Appeal noted in both Stoeffler and Polk County, supra (cases which, incidentally, were decided ***after*** the 1990 amendments to Chapter 607), Section 48.101 still controls the manner of service on a dissolved corporation.

In 1998, five years after the Second District's decision in Stoeffler (Petitioners' mandatory authority) had established the method of service required to effect personal jurisdiction on a dissolved corporation, the Fifth District Court of Appeal came to a contrary conclusion in Liszka v. Silverado Steak & Seafood Co., Inc., 703 So. 2d 1226 (Fla. 5th DCA 1998). The Fifth DCA certified Liszka as being in direct conflict with Stoeffler and Polk County. The Court's reasoning in Liszka leads to the inescapable conclusion that the Fifth DCA believed that the 1989 Legislature intended to repeal the exclusivity of § 48.101. The Liszka decision runs foul of the existing authority from this

Court that disfavors repeal by implication and requires courts, when faced with potentially conflicting statutory provisions, to try to give meaning to both. See, Kelly, supra.

Under the Corporations Act amendments, although dissolution of a corporation continued the general authority of the registered agent of a corporation, that general authority, which includes acceptance of service of process, must yield to the more specific Legislative provision that was not repealed within the same legislation or shortly thereafter. The Liszka Court erred in judicially repealing § 48.101 when the Legislature had not done so.

It is important to note that Liszka is factually distinguishable from the instant action, which may be more responsible for the Court's decision than its disagreement with two separate panels of the Second District.

In Liszka, notice was provided not only to the corporation's registered agent, but also to the corporation's attorney. Ten days after service upon the registered agent, the corporation, apparently through counsel, filed a suggestion of bankruptcy in the court. The plaintiff then sought and obtained an order from the bankruptcy court lifting the stay and allowing it to proceed in its civil action. Neither the corporation nor the bankruptcy trustee opposed the motion to lift the stay. 703 So. 2d 1227. The corporation, through its counsel and its bankruptcy trustee, were put on notice as to the pendency of the action and both its counsel and registered agent were served with various motions and notices,

including the motion for default, the accompanying hearing notice, and notice of the damages trial.

In the case *sub judice*, the facts are startlingly different. The record reflects that the individual served, Monica Mock, although listed in documents filed with the Department of State as registered agent, never attended any directors' meetings or acted in any capacity as a director of the corporation. There is no evidence that the real parties in interest were ever put on notice as to the pendency of the action, the time/place of various motions, including the Motion for Default, or the time/place of the trial on damages. It is undisputed that at the time of service, and at the time which Petitioners received their Judgment, the controlling Second District authority clearly held that service itself was ineffective, and the Judgment entered thereon was void.

Even though the Liszka Court came to a different conclusion than the Courts in Stoeffler and Polk County, it did so under a different factual circumstance and failed to abide by the specific presumptions against an implied statutory repeal set forth in Kelly, and the other rules of statutory construction discussed in Stoeffler.

The Second District Court of Appeal made a detailed analysis of the conflict between § 48.101 and Chapter 607 in Stoeffler and stated:

> Chapter 607 does address specifically how process should be made on a dissolved corporation; whereas, section 48.101 does provide for that occurrence. Because Section 48.101 is the specific statute governing

> process, it controls the method to be utilized to serve a dissolved corporation.

629 at 198 (citing Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249, 251 (Fla. 1987). (The Stoeffler's Court citation to this Kelly decision reflects its acceptance of the general rule that specific statutory language controls general language in its general consideration and rejection of the argument that a 1989 amendment to the Corporations Act repealed, by implication, the specific statutory provisions relating to service of process on a dissolved corporate entity).

In Kelly, this Court rejected a Florida Department of Labor and Employment Security order holding that the particular statutory provision was repealed by implication. As the Court stated:

> On the merits of this initial question, we also agree with the Second District that Section 447.04(1)(a) cannot be construed as implicitly repealed by the revision made to Section 455.10 in 1979. It is well settled in Florida that courts will disfavor construing a statute as repealed by implication unless that is the only reasonable construction . . . The court's obligation is to adopt an interpretation that harmonizes the two related, if conflicted, statutes while giving effect to both, since the Legislature is presumed to pass subsequent enactments with full awareness of all prior enactments with an intent that they remain in force . . .
>
> Moreover a statute . . . covering a specific subject, is controlling over a statute . . . that applies to a general class of subjects; in effect the specific statute operates as an exception to the general . . . we therefore approve the analysis and conclusion of the District Court in construing the statutes in question to give effect to both. 516 So. 2d at 250-51.

Although this Court noted that this presumption can be defeated by plain evidence of a contrary Legislative intent, there is nothing in the 1989 Corporation Act amendments that suggest that the Legislature intended to repeal the service statute or change the proper method of service. Indeed, the fact that the Legislature did not seek to clarify the statute for over seven years raises a presumption that the 1989 Legislature did not intend to repeal the statute by implication.

The Fourth DCA in Wong v. Gonzalez & Kennedy, Inc., 719 So. 2d 937 (Fla. 4th DCA 1998), has recently agreed with the holding of the Fifth DCA in Liszka, but relied on the 1997 amendment to § 48.101 as a basis for its decision.

The Petitioners attempt to persuade this Court to adopt the Fourth DCA's holding in Wong, that the 1997 amendment to Section 48.101 (regarding service of process on a dissolved corporation), should be applied retroactively to somehow validate the void and improper service previously attempted on Mock Plumbing, and thus breathe new life into the void Judgment that resulted from such invalid service -- much like Lazarus rising from the dead. This argument is totally unavailing under the facts of this case. When the CANNELLAS attempted service of process on the dissolved Mock Plumbing, Florida statutory law, specifically § 48.101, required service of process on a director as trustee in order to establish jurisdiction over a dissolved corporation. Section 48.101 Fla. Stat. (1991). The mandatory appellate authority for this district, the Second District Court of

Appeal in Stoeffler v. Castagliola, 629 So. 2d 196 (Fla. 2d DCA 1993), confirmed as much, and by the time of the hearing on CANNELLAS' Motion for Summary Judgment on November 21, 1996, the Second District Court of Appeal had also decided Polk County Rand Investments, Inc. v. State Dept. of Legal Affairs, 666 So. 2d 279 (Fla. 2d DCA 1996). That latter decision followed the Second District Court of Appeal's previous holding in Stoeffler and reiterated that the 1996 Legislative amendment to Chapter 607 did not statutorily change the manner of service on a dissolved corporation. Polk County, 666 So. 2d at 280-281. According to the Court in Polk County, service on the registered agent of a dissolved corporation as opposed to service on directors as trustees -- does not confer jurisdiction over the dissolved corporation, in that any such service erroneously made on the registered agent is void. Id.

It is manifestly clear that, because Mock Plumbing was not served in strict accordance with § 48.101, the Circuit Court never obtained proper jurisdiction over Mock Plumbing at the outset, and hence the money judgment subsequently rendered against Mock Plumbing in June of 1995 was void ***ab initio*** under the authority controlling in the Second District. Importantly, by both statutory law and controlling case law interpreting such statutory law, the attempted service on Mock Plumbing was void . . . and any Judgment predicated thereon was likewise void. To apply § 48.101, as amended after the fact -- in 1997, to retroactively "validate" previously void service and thereby confer

jurisdiction that would not otherwise exist, would substantially interfere with Mock Plumbing's (and by extension AUTO-OWNERS') vested rights and immunities.

As the Second District Court of Appeal noted in State Dept. of Transportation v. Cone Brothers Contracting Co., 364 So. 2d 482 (Fla. 2d DCA 1978), a statute -- even one which is supposedly remedial or curative in nature -- cannot be applied retroactively to matters involving jurisdiction, or to matters which affect vested substantive rights. 364 So. 2d 486. This Court has held that changes in the Long Arm Statute conferring jurisdiction cannot be applied retroactively. See, Fireboard Corp. v. Kerness, 625 So. 2d 457 (Fla. 1993). In addition, this situation is highly analogous to the situation involving a claim that has already been barred by a statute of limitations. This Court held that amendments which lengthen the statute of limitations or the period of repose cannot be applied retroactively to breathe new life into a claim that has already been barred by the passage of time. See, Wiley v. Roof, 641 So. 2d 66 (Fla. 1994). As this Court noted in Wiley:

> Regardless of whether the statute of limitations pertains to a right or a remedy, retroactively applying a new statute of limitations robs both the plaintiff and defendants of the reliability and predictability of the law. 641 So. 2d at 68.

This Court went on to note that once a defense based on the running of a statute of limitations has accrued, it becomes a **protected property interest**; just as the

plaintiff's right to initiate a lawsuit is a valid and protected property interest. Id. Thus, once an action is time-barred, the defendant has a protective property right to be free of the claim and the Legislature cannot retroactively resurrect a time-barred claim. Id. AUTO-OWNERS contends that Mock Plumbing (and by extension AUTO-OWNERS), had a similar protected property right not to have a void Judgment suddenly "resurrected" and enforced against them.

Petitioners have attempted to characterize the 1997 amendment to § 48.101 as being merely a "clarification" of the Legislature's previous intent in making substantive changes to Chapter 607 back in 1990. This argument is unpersuasive for several reasons, not the least of which is the fact that the 1990 amendments were made to Chapter 607 of the Florida Statutes (which governs corporations), whereas the 1997 amendment, which Petitioners are now attempting to apply retroactively, pertains to § 48.101 -- an entirely different chapter of the statutes. Secondly, the amount of time that elapsed between the passage of the 1990 amendment to Chapter 607 . . . and the passage of the 1997 amendments to § 48.101 . . . preclude such amendment from being considered merely a "clarification" of previous Legislative intent.

In State Farm Mutual Auto Ins. Co. v. Laforet, 658 So. 2d 55 (Fla. 1995), this Court held that it would be "absurd" to characterize as "clarifying legislation," amendments that were made to previous enactments regarding bad faith claims against

automobile insurers, where such amendments were enacted more than ten years after the original Legislative enactments; the membership of the Legislature had substantially changed over the intervening years; and where the purported "clarifying" amendments were not enacted soon after a controversy regarding the correct interpretation of the statute arose. 658 So. 2d at 62. According to the Supreme Court, even if the Legislature itself had characterized the amendment as being remedial or clarifying in nature, it would not be considered a mere "clarification" of the Legislature's "original intent" under the circumstance. Id. In short, the 1997 amendments to § 48.101 (which had not changed for thirty years), cannot be retroactively applied to validate a void judgment rendered without jurisdiction over the defendant.

II. THE SECOND DISTRICT COURT OF APPEAL WAS CORRECT IN ALLOWING AUTO-OWNERS TO OBJECT TO THE PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF THE INVALIDITY OF THE UNDERLYING JUDGMENT.

Petitioners, tacitly acknowledging that service upon Mock Plumbing was improperly performed, request this Court to reverse the Second District Court of Appeal by arguing that AUTO-OWNERS, in essence, has no standing to attack the validity of the Judgment entered against Mock Plumbing. Contrary to the argument set forth by the Petitioners, and because AUTO-OWNERS stands to be directly impacted by that prior Judgment, it has standing to collaterally challenge its validity, either by way of separate action, or by way of a defense. See, e.g., Great American Ins. Co. v. Bevis, 652 So. 2d 382 (Fla. 2d DCA 1995) (insurer has standing to collaterally attack final judgment where service of process on insured was invalid); and Blatch v. Wesley, 238 So. 2d 308 (Fla. 3d DCA 1970) (insurer as garnishee has standing to attack validity of underlying judgment).

A judgment that has been entered without valid service is void for lack of personal jurisdiction, and as such, may be collaterally attacked at any time. 652 So. 2d 383. This ruling is consistent with established Florida law. See, e.g., Gay v. McCaughan, 105 So. 2d 771 (Fla. 1958); Tucker v. Dianne, 389 So. 2d 683 (Fla. 5th DCA 1980); Del Conte

Enterprises, Inc. v. Thomas Publishing Co., 711 So. 2d 1268 (Fla. 3d DCA 1998); and Overholser v. Overstreet, 383 So. 2d 958 (Fla. 3d DCA 1980).

Public policy requires that void judgments not be given any force or effect regardless of how much time has lapsed since their entry. As the Supreme Court of Florida noted in Gay v. McCaughan:

> Any competent court may at any time adjudicate the invalidity of an order or decree which is void for lack of jurisdiction of the parties or subject matter. 105 So. 2d at 773.

The Petitioners argue that where the defendant has actual notice of the proceeding, a judgment is merely voidable, not void. Cases which have addressed this issue, however, have typically involved situations where the proper person sought to be served has in fact been served with process, but where there are irregularities or defects in the summons or return of service which makes the service voidable -- such as where the return fails to note the date and hour of service or has other discrepancies apparent on its face. Under these situations, the proper parties actually received "notice" of the proceedings and the service irregularities simply render the service voidable as opposed to void. However, the "defendant" in this case was not an individual person, but a dissolved corporation, which can only be served by strict compliance with § 48.101 of the Florida Statutes, which requires service on a director of the dissolved corporation as trustee. The Second District Court of Appeal in the Polk County decision held where

there was improper service on the former registered agent of a dissolved corporation, rather than the directors as trustees of the corporation, that

> . . . the judgment against the appellant was **void** at the time it was entered, remained void . . .

Monica Mock testified in her deposition, that despite her paperwork title, she had absolutely no personal involvement with the running of her father's plumbing business. [R. 367-368]. Consequently, she could not have been acting in the role of a "director" of the dissolved corporation at the time service was attempted. In their Initial Brief, the Petitioners have quoted from certain isolated portions of Ted Mock's deposition; however, that deposition transcript was not filed of record at the time the Circuit Court entertained Petitioners' Motion for Summary Judgment. Moreover, Ted Mock's deposition testimony is extremely equivocal and very unclear as to when, if ever, he obtained knowledge of the lawsuit against the dissolved corporation prior to a Judgment being entered.

III. PETITIONERS' RIGHT OF ACCESS TO THE COURTS IS NOT VIOLATED BY THE SECOND DISTRICT COURT OF APPEAL'S DECISION.

Appellees have additionally argued that requiring service of process on a director of Mock Plumbing violates their right of access to the Court, ostensibly because Mock Plumbing had no directors listed on their incorporation documents filed with the Department of State. It is ironic that the Petitioners, after effecting improper service on

a dissolved corporation, failing to give proper notice to either Mock Plumbing or AUTO-OWNERS of the hearings and proceedings leading up to a Default Judgment, and having the final money damages entered in a non-jury trial after requesting a jury trial, should claim to be denied their right of access to Court and due process. It would appear from looking at the facts that the CANNELLAS did everything in their power to avoid having this issue tried on the merits and in an adversarial proceeding. They now claim that they are being denied access to the Courts.

Their argument ignores the fact that corporate records on file with the Department of State are not necessarily conclusive on the issue of who the proper party is to be served with process on the corporation. See, Holiday Ranch, Inc. v. Roudabush, 171 So. 2d 558 (Fla. 2d DCA 1965). As the Second District Court of Appeal noted in Holiday Ranch, the plaintiff in that case was not justified in relying solely on the certificate of the Secretary of State which had listed a certain individual as being president when in fact that individual was not involved with the corporation at the time service was attempted. 171 So. 2d 561.

Moreover, the Petitioners had an alternative avenue of inquiry available to them to determine who was actually acting in the role of a "director" and "trustee" of the corporation at the time of its dissolution. Rule 1.070(j) of the Rules of Civil Procedure provide that service of initial process and the initial pleading is to be made within 120

days of filing the initial pleading. Fla. R. Civ. P. 1.070(j). Consequently, the CANNELLAS could have filed their initial action and then served Monica Mock with a subpoena for deposition under Rule 1.310(a) in order to obtain the names and addresses of individuals who, although perhaps not specifically designated as directors per se, were acting in a decision-making capacity on behalf of the corporation and who had control over the corporation in a real sense. Had they done so, they could have obtained the necessary factual information to allow them to serve the appropriate corporate "director" with process within 120 days -- specifically the person (or persons) who had ultimate decision-making authority relative to the corporation, although not specifically designated as a "director" on paper. That director-like person was certainly not Monica Mock, who had no real involvement with the corporation.

In addition, Florida Statute 607.1405(5) states:

> The circuit court may appoint a trustee for any property owned or acquired by the corporation who may engage in any act permitted under subsection (1) if any director or officer of the dissolved corporation is unwilling or unable to serve or cannot be located.

It would appear that should the CANNELLAS have wanted to serve a director as trustee, and been unable to find one, they could have had the Circuit Court appoint someone to act as a director and trustee of the dissolved corporation to effect service.

The Petitioners' argument also ignores the fact that the Petitioners could have brought the same action against Ted Mock individually as the active participant of the alleged negligent act which JEFFREY CANNELLA claims resulted in his initial injury. The Petitioners also omit the fact that they sued the property owners of the location of Mr. CANNELLA's alleged fall seeking redress for his injuries.

CONCLUSION

Under the circumstances Respondent respectfully requests this Court resolve the certified conflict herein by affirming the decision reached in this action by the Second District Court of Appeal.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served, via U.S. Mail, upon Roy C. Skelton, Esq., 20850 U.S. Hwy. 19 N., Ste. 208, Clearwater, FL 34621 (Attorney for Petitioners); and to JEFFREY W. PEARSON, ESQ., 1519 Dale Mabry Hwy., Ste. 100, Lutz, FL 33549 (Attorney for Intervenors), on this _____ day of November, 1999.

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