

ORIGINAL

IN THE SUPREME COURT OF FLORIDA
CASE NO. 95,954

FILED
DEBBIE CAUSSEAU

JUL 12 1999

JEFFREY CANNELLA and
JOANNE CANNELLA

Plaintiffs/Petitioners,

vs.

AUTO-OWNERS INSURANCE COMPANY

Defendant/Respondent.

CLERK, SUPREME COURT
By BARR

PETITIONERS' BRIEF ON JURISDICTION

**PETITION FOR REVIEW OF A DECISION OF THE
SECOND DISTRICT COURT OF APPEAL
CASE NO. 98-01663**

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioners hereby certify that the type size and style of Petitioners' Brief On
Jurisdiction is Times New Roman 14pt.

TABLE OF CONTENTS

Table of Citations	ii
Statement of the Case and of the Facts	1
Summary of Argument.	4
Argument.	5
Conclusion	8
Certificate of Service.	8

TABLE OF CITATIONS

Liszka v. Silverado Steak & Seafood Co., Inc.,
703 So.2d 1226 (Fla. 5th DCA 1998) 4-8

Polk County Rand Investments, Inc. v.
State of Florida Department of Legal Affairs,
666 So.2d 279 (Fla. 2d DCA 1996) 4-8

Stoeffler v. Castagliola,
629 So. 2d 196, (Fla. 2d DCA 1993) 4-8

Wong v. Gonzalez & Kennedy, Inc.,
719 So.2d 937 (Fla. 4th DCA 1998),
review granted, 727 So.2d 905 (Fla. 1999). 4-8

STATUTES

48.101, Fla. Stat. (1991). 4-7

FLORIDA CONSTITUTION

Article V, Section 3(b)(3), Florida Constitution. 5,8

STATEMENT OF THE CASE AND FACTS

Petitioners, Jeffrey Cannella and Joanne Cannella appeal the decision of the Second District Court of Appeal rendered June 4, 1999, which reversed a partial final judgment entered against Respondent, Auto-Owners Insurance Company.

The procedural history of this case extends back nearly ten years and involves two separate lawsuits. The underlying lawsuit involved a claim by the Cannellas for bodily injuries incurred as a result of the negligence of Mock Plumbing Contractor, Inc., which was insured by Auto-Owners (R. 550-553).

Service of process was effectuated against Monica Mock, the registered agent for Mock Plumbing (R. 554), who was also its president and sole shareholder (R. 524-526). At the time service of process was effectuated, Mock Plumbing Contractor, Inc. was a dissolved Florida corporation (R. 322-326). No legal defense was tendered by Mock Plumbing, and after the conclusion of a non-jury trial on damages, a default judgment was entered in favor of the Cannellas.

Thereafter, Mock Plumbing assigned its rights to any claims it had against Auto-Owners, to the Cannellas. The Cannellas then filed a lawsuit against Auto-Owners and its claims adjuster for breach of contract for failure to provide a legal defense, negligence as to the claims adjuster, and breach of contract, for which the Cannellas claimed status as third-party beneficiaries of the insurance contract (R. 17-25). The

third-party beneficiary claim is the only count pertinent to this appeal. In that claim, the Cannellas alleged that after obtaining the default judgment against Mock Plumbing, Auto-Owners breached its contract of insurance by failing to pay the prior default judgment up to the amount of its policy limits.

Auto-Owners answered the complaint, denying that it was in breach, and asserted various affirmative defenses (R. 115-118). Thereafter, Auto-Owners moved to set aside the Mock Plumbing default judgment on several grounds, including that the judgment was void, voidable or otherwise unenforceable (R. 232-233). Auto-Owners argued that because Mock Plumbing was a dissolved corporation, service of process must be made on one or more of the directors of the corporation as trustee, in accordance with Section 48.101, Florida Statute (1991), and that service upon the registered agent was invalid.

In response, the Cannellas successfully argued that Mock Plumbing had no directors at the time service was made upon the registered agent, and therefore it was impossible to comply with Section 48.101, Florida Statutes (1991), and they had no alternative but to serve the registered agent. The trial court agreed, and Auto-Owners' motions were denied. Ultimately, the Cannellas obtained a partial final judgment against Auto-Owners on the third-party beneficiary count, and damages were awarded up to the policy limits (R. 375).

Upon review, the Second District Court of Appeal relied upon its prior decisions in 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), and held that pursuant to Section 48.101, Florida Statute (1991), service of process on a dissolved corporation must be made on one or more directors of the corporation as trustee.

Finding that service of process was improperly made upon the registered agent for Mock Plumbing, the court held that the default judgment was thereby void, and reversed the partial final judgment against Auto-Owners.

SUMMARY OF ARGUMENT

In the case under review, the Second District Court of Appeal held that pursuant to Section 48.101, Florida Statute (1991), service of process on a dissolved corporation must be made on one or more directors of the corporation as trustee, and that service of process upon the registered agent thereof is invalid. This decision expressly and directly conflicts with the decisions of the Fifth District Court of Appeal in Liszka v. Silverado Steak & Seafood Co., 703 So.2d 1226 (Fla. 5th DCA 1998), and the Fourth District Court of Appeal in Wong v. Gonzalez & Kennedy, Inc., 719 So.2d 937 (Fla. 4th DCA 1998), review granted, 727 So.2d 905 (Fla. 1999) on the same question of law.

Liszka and Wong both held that with the 1989 overhaul of Chapter 607, Laws of Florida, the necessity of providing for service of process on the directors as trustees was abrogated, and process on a dissolved corporation may properly be made on the registered agent thereof.

ARGUMENT

The applicable standard for conflict jurisdiction per Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(iv), is that the district court decision must expressly and directly conflict with the decision of another district court on the same question of law. Herein the standard is clearly met.

In the decision under review, the Second District Court of Appeal specifically relied upon its prior decisions in 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), in holding that pursuant to Section 48.101, Florida Statute (1991), service of process on a dissolved corporation must be made on one or more directors of the corporation as trustee, and cannot be made upon the registered agent.

Fifth District Court of Appeal in Liszka v. Silverado Steak & Seafood Co., 703 So.2d 1226 (Fla. 5th DCA 1998) reached a contrary conclusion, and announced a rule of law in direct conflict with Stoeffler and Polk County. The Liszka court held that with the 1989 overhaul of Chapter 607, Laws of Florida, the necessity of providing for service of process on the directors as trustees was abrogated, and process on a dissolved corporation may properly be made on the registered agent thereof.

In so holding, The Fifth District Court of Appeal specifically stated

[w]e recognize and certify conflict with Polk County Rand Investments, Inc. v. State Department of Legal Affairs, 666 So.2d 279 (Fla. 2d DCA 1996) (service on former registered agent of dissolved corporation is invalid; process must be served on one or more of the directors as trustees) and Stoeffler v. Castagliola, 629 So.2d 196 Fla. 2d DCA 1993) (holding that because section 48.101 is the specific statute governing process on a dissolved corporation, service must be made on one or more of the directors and may not be made on the registered agent), rev. denied, 639 So.2d 976 (Fla. 1994)

Shortly after the Liszka decision, the Fourth District Court of Appeal in Wong v. Gonzalez & Kennedy, 719 So.2d 937(Fla. 4th DCA 1998), rev. granted, 727 So.2d 905 (Fla. 1999) also rejected the rationale in Stoeffler and Polk County, and adopted the holding of the Liszka court. As did the Fifth District in Liszka, the Fourth District also certified conflict with Stoeffler and Polk County.

Based upon this certification of conflict, this court has acknowledged jurisdiction and has agreed to review the Fifth District's decision in Wong, thereby ultimately resolving the currently conflicting rules of law as to the acceptable methods of effectuating service of process against dissolved corporations.

In the case under review, the Second District Court of Appeal stated:

Interpreting the same statutory provision applicable to the present case, section 48.101, Florida Statutes (1991), this court has held that service of process on a dissolved

corporation must be made on one or more directors of the corporation as trustee. See Stoeffler v. Castagliola, 629 So. 2d 196, (Fla. 2d DCA 1993); Polk County Rand Investments, Inc. v. State of Florida Department of Legal Affairs, 666 So.2d 279 (Fla. 2d DCA 1996). Our sister courts, however, have disagreed with this court's interpretation of the statute. See Liszka v. Silverado Steak & Seafood Co., 703 So.2d 1226 (Fla. 5th DCA 1998); Wong v. Gonzalez & Kennedy, Inc., 719 So.2d 937 (Fla. 4th DCA 1998), review granted, 727 So.2d 905 (Fla. 1999). Pursuant to this court's precedent, service of process was improperly made upon the registered agent of the dissolved corporation in the present case, rendering the judgment void. See Polk County, 666 So.2d at 280.

Without question, the entire basis of the Second District's holding is its prior decisions in Stoeffler and Polk County. Inasmuch as the Fourth and Fifth District Courts of Appeal have both certified conflict with Stoeffler and Polk County, and the Second District in rendering its decision in the case under review expressly acknowledged this conflict, clearly the decision in the case at bar expressly and directly conflicts with the decisions of the Fifth District in Liszka and the Fourth District in Wong on the same question of law, and this court has jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution.


Whereas this court has agreed to review Wong, which was decided on the identical issue of law as in the case at bar, so too should this court agree to review the decision of the Second District Court of Appeal in the case sub judice.

CONCLUSION

The basis of the Second District Court of Appeals' decision in the case under review lies solely in its previous decisions in Stoeffler and Polk County. The Fifth District in Liszka certified conflict with Stoeffler and Polk County, as has the Fourth District in Wong. This court has accepted jurisdiction based upon this conflict, and has agreed to review Wong, which was decided on the identical issue of law as in the instant case. The standard for conflict jurisdiction per Article V, Section 3(b)(3) of the Florida Constitution has been met, and this court has jurisdiction to review the case sub judice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to A. Wade James, Esq., 216 Mirror Lake Drive, St. Petersburg, Fl., 33701, and to C. Wade Yeakle, Esq., 7113 1st Ave. No., St. Petersburg, Fl., 33707, this th8 day of July, 1999.


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APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

AUTO-OWNERS INSURANCE)
COMPANY,)
)
Appellant,)
)
v.)
)
JEFFREY CANNELLA and)
JOANNE CANNELLA,)
)
Appellees.)
_____)

Case No. 98-01663

Opinion filed June 4, 1999.

Appeal from the Circuit Court for Pinellas
County; Owen S. Allbritton, Bob Barker, and
Catherine M. Harlan, Judges.

A. Wade James, St. Petersburg, for
Appellant.

Roy C. Skelton, Clearwater, for Appellees.

SALCINES, Judge.

Auto-Owners Insurance Company appeals the partial final judgment
awarding money damages in favor of Jeffrey Cannella and Joanne Cannella. This court

not been perfected, and that the judgment was, thus, void, voidable, or otherwise unenforceable. Auto-Owners' motions were denied, the Cannellas successfully obtained a partial final judgment against Auto-Owners on the third count, and damages were imposed up to the policy limits.

A judgment entered without valid service is void for lack of personal jurisdiction and can be collaterally challenged. See Great American Ins. Co. v. Bevis, 652 So. 2d 382 (Fla. 2d DCA 1995). Interpreting the same statutory provision applicable to the present case, section 48.101, Florida Statutes (1991), this court has held that service of process on a dissolved corporation must be made on one or more directors of the corporation as trustee. See Stoeffler v. Castagliola, 629 So. 2d 196 (Fla. 2d DCA 1993); Polk County Rand Invs., Inc. v. State Dep't of Legal Affairs, 666 So. 2d 279 (Fla. 2d DCA 1996). Our sister districts, however, have disagreed with this court's interpretation of the statute. See Liszka v. Silverado Steak & Seafood Co., 703 So. 2d 1226 (Fla. 5th DCA 1998); Wong v. Gonzalez & Kennedy, Inc., 719 So. 2d 937 (Fla. 4th DCA 1998), review granted, 727 So. 2d 905 (Fla. 1999). Pursuant to this court's precedent, service of process was improperly made upon the registered agent of the dissolved corporation in the present case, thereby rendering the judgment void. See Polk County, 666 So. 2d at 280. Consequently, the trial court erred when it refused to set aside the default judgment and entered a partial final judgment in misplaced reliance upon that prior void judgment.

Reversed and remanded for further proceedings.

FULMER, A.C.J., and NORTHCUTT, J., Concur.