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

JEFFREY CANNELLA and	**)**
JOANNE CANNELLLA	**)**
	)
Plaintiffs/Petitioners,	**)**
	)
vs.	**)**
	)
AUTO-OWNERS INSURANCE COMPANY	**)**
	)
Defendant/Respondent.	**)**

_____/

PETITIONERS' REPLY BRIEF ON THE MERITS

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

Roy C. Skelton, Esq.
Attorney for Petitioners
326 N. Belcher Road
Clearwater, Fl. 33765
(727) 791-8810

CERTIFICATE OF TYPE SIZE & STYLE

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

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This court may only affirm the decision of the Second District in this action upon a finding of four things. The failure to make any one of these four findings mandates reversal.

First, despite the Legislature's overhaul of the Corporations Act in 1989, which provided for the following:

1. Repeal of section 607.301, which mandated directors act as trustees of the corporation upon its dissolution, and imposed the duty upon the director/trustees to accept suit on behalf of the dissolved corporation;

2. Continuation of corporate existence after dissolution;

3. Dissolution would not
    a. terminate the authority of the registered agent;
    b. transfer title to the corporation's property;
    c. prevent commencement of a proceeding by or against the corporation in its corporate name;

this court would have to find that prior to its amendment in 1997, section 48.101 provided the exclusive method by which service of process is effectuated against a dissolved corporation.

Notwithstanding the urging of Respondents for this court to make such a finding, as the Fifth District declared in Liszka v. Silverado Steak & Seafood Co., Inc, 703 So.2d 1226 (Fla. 5th DCA 1998), "[T]o continue requiring service of process on the directors, as trustees of the dissolved corporation, as the sole means of serving a

dissolved corporation would be to ignore the legislative amendments of 1989."

In reaching its conclusion, the court stated (703 So.2d at 1227):

> [P]rior to the 1989 overhaul of the corporations chapter by Chapter 89-154, Laws of Florida, there was a reason for requiring service solely on a director as trustee of the dissolved corporation: upon dissolution, title to all property of the corporation was transferred to the directors as statutory trustees for the shareholders and creditors of the dissolved corporation. Section 607.301, Fla. Stat. (1987). The directors, as trustees, had the duty of accepting suit on behalf of the corporation. *See Gould v. Brick*, 358 F.2d 437, 439 (5th Cir. 1966) ("[I]n Florida the statutory trustees take title to corporate property upon the dissolution of the corporation, and are charged with the fiduciary duties imposed upon them by the statutes, with the right to sue and subject to being sued, *Trueman Fertilizer Co. v. Allison*, Fla., 81 So.2d 734."). Because the directors, as trustees, held title to the property of the dissolved corporation and were subject to being sued, it was only logical that the process statute provide the manner in which those directors, as trustees, should be served. Section 48.101 did that.

Now, after the Corporations Act's overhaul, the Fifth District found this reasoning no longer applied (703 So.2d at 1228:)

> In contrast to the procedure under the 1987 version of the law, now a dissolved corporation continues in existence, albeit for a limited purpose, its assets stay in its name, it can sue and be sued in its own name, and most importantly for purposes of this appeal, the authority of its registered agent continues. A registered agent's authority includes the authority to accept service of process for its corporation. Section 48.081(3) and 48.091, Fla. Stat. (1995).

A careful reading of section 48.101, pre-1997 amendment, enforces the logic of

the Fifth District's decision. The statute read as follows:

> 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 of the directors of the dissolved corporation as trustees thereof.

Crucial to a proper interpretation of this section is to recognize to whom the process is being directed against. The statute begins by plainly stating the process is against the directors as trustees. The process is not directed against the corporation itself. Had the legislature intended for the process to be against the corporation itself it would have merely worded the statute to read something like "process against a dissolved corporation (as opposed to process against the directors) shall be served on one or more directors of the dissolved corporation as trustees...."

A brief review of some of the other similar sections within Chapter 48 bear this out. In §48.061-Service on a Partnership, the section states that the process is against the partnership itself. However, service of that process is accomplished by serving one or more of the partners. Similarly, in §48.081-Service on Corporation, process is against the corporation, with service of that process being allowed to be made upon an officer, director or registered agent.

In each of these sections, the legislature clearly delineates who the process is against, and the method to be used to effectuate that process. The same of course is true

for §48.101, where the legislature plainly directed the process against the directors as trustees, and not the corporation itself.

This is not a distinction without a difference. The rationale for having the process be against the directors as trustees, and not against the corporation itself, was explained by the Fifth District in Liszka. Upon dissolution, title to all property of the corporation was transferred to the directors as statutory trustees. These director/trustees had the duty of accepting suit on behalf of the corporation. Because of their capacity as statutory trustees, it was these directors, as opposed to the corporation itself, who the legislature acknowledged were the proper defendants in any litigation involving the corporation.

As stated by the Liszka court, "[B]ecause the directors, as trustees, held title to the property of the dissolved corporation and were subject to being sued, it was only logical that the process statute provide the manner in which those directors, as trustees, should be served."

Of course, following the 1989 amendment to the Corporation's Act, a dissolved corporation continued its corporate existence; title to property was not transferred to the directors upon dissolution, and the provisions mandating directors act as statutory trustees upon dissolution was repealed.

Thus, there is no longer a need for process to be served against the directors as trustees, suit can simply be brought against the corporation in its corporate name. Notice how the legislature worded its 1997 amendment of section 48.101. For those

corporations dissolved before July 1, 1990, process remains against the directors as trustees. However, for corporations dissolved after July 1, 1990, (the effective date of the amendments to the Corporation's Act), process is no longer against the directors as trustees, but rather, it is against the corporation itself.

This being the case, then the provisions of section 48.101(1991) were inapplicable to the case at bar. Mock Plumbing Contractor, Inc.'s registered agent, Monica Mock was served with process on June 3, 1992, (R. 554-555) well after the effective date of the Corporation Act amendments. In addition, suit was brought against Mock Plumbing Contractor, Inc. in its corporate name, and not against the directors as trustees. Therefore, since process was not brought against the directors as trustees, but rather against the corporation itself, the provisions of Fla. Stat. §48.101(1991) simply did not apply. Rather, the provisions of Fla. Stat. §48.081 controlled. Unquestionably, under Fla. Stat. §48.081, which specifically provides that service of process against a corporation may be accomplished by serving its registered agent, Petitioners properly effectuated service of process against Mock Plumbing Contractor, Inc. when it served Monica Mock, its registered agent.

That this was the original intent of the legislature when it revised the Corporations Act in 1989 is evident from the 1997 amendment to Fla. Stat. §48.101 The preamble to Ch. 97-230, Laws of Florida, which contained the amendment of Fla. Stat. §48.101,

states as follows:

> "An act relating to corporations ...amending s. 48.101 FS; clarifying service of process on certain corporations..." (Emphasis added)

The legislature, by this amendment, was merely clarifying what was already existing law. State ex rel. Szabo Food Servs., Inc. of N.C. v. Dickenson, 286 So.2d 529, (Fla. 1973). This was likely in response to the Second District 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), which misapprehended the applicability of Fla. Stat. §48.101 following the revisions to the Corporations Act in 1989.

The Second District in Stoeffler incorrectly interprets the language of Fla. Stat. §48.101 (1991) when it states "[A]s to Stoeffler's attempted service of process on Riden I, section 48.101, Florida Statutes (1991) specifically directs that service of process upon a dissolved corporation "shall" be made upon one or more of the directors as trustees of the dissolved corporation." 629 So.2d at 198.

Contrary to the finding of the Second District, nowhere does Fla. Stat. §48.101 direct that service of process upon a dissolved corporation shall be made upon one or more of the directors as trustees of the dissolved corporation. By its plain language Fla.

Stat. §48.101 only directs that process against the directors of the dissolved corporation be made upon one or more of the directors as trustees.

Finding Fla. Stat. §48.101(1991) inapplicable to the case sub judice, is in complete harmony with established principles of statutory construction. This Court has held that the polestar of statutory construction is the plain meaning of the language in the statute, Acosta v. Richter, 671 So.2d 149 (Fla. 1996).

The plain meaning of Fla. Stat. §48.101, even prior to the 1997 amendment, clearly shows that it was limited in applicability to those actions where the actual parties being sued were the directors in their capacity as trustees. Since the 1989 revisions to the Corporations Act eliminated the provisions mandating directors act as trustees upon dissolution of the corporation, Fla. Stat. §48.101 simply could not apply to an action involving a corporation dissolved after July 1, 1990. Thus, the plain meaning of the statute clearly demonstrates that it was not intended to apply to the case sub judice.

Further, this Court has also held that statutes must be construed in pari materia with other statutes which relate to the same subject matter, McGhee v. Volusia County, 679 So.2d 729 (Fla. 1996). Thus, the Corporation Act, as revised in 1989, must be construed in pari materia with the provisions of Fla. Stat. Ch. §48., which governs service of process. Both Fla. Stat. §48.081(3) and §48.091 provide that a registered agent is authorized to accept service of process on behalf of a corporation. In fact, Fla. Stat.

§48.091 specifically requires a corporation keep one or more registered agents at the registered office for the express purpose accepting service of process on behalf of the corporation. In addition, Fla. Stat. §607.1405(2)(g) and §607.1421(5) provide that dissolution does not terminate the authority of the registered agent.

It is well settled that it is the courts' obligation to adopt an interpretation that harmonizes two related, if conflicting, statutes while giving effect to both, since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force. Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249, (Fla. 1987).

By acknowledging that even prior to its amendment in 1997, Fla. Stat. §48.101, only applied to actions in which process was directed against the directors as trustees, and not in those cases where process was directed against the corporation itself, this Court harmonizes the provisions of Fla. Stat. §48.101 with not only the provisions of Fla. Stat. §607.1405(2)(g) and 607.1421(5), but also with Fla. Stat. §48.081(3) and 48.091. It also gives continued effect to all of these provisions, while at the same time avoiding any conflict.

As noted at the start, this Court may only affirm the decision of the Second District upon a finding of four things. In addition to a finding that service of process in the case at bar could only have been effectuated by serving process against the directors as trustees and not the registered agent, this Court would also need to find the 1997 amendment of

§48.101 inapplicable to the case sub judice.

In order to do so this Court would be required to find that the 1997 amendment of Fla. Stat. §48.101 was neither remedial nor procedural in nature, but rather a substantive change in the law, and thus incapable of operating retrospectively to the case at bar.

Such a finding would however be contrary to established law. By definition, substantive statutes prescribe duties and rights, whereas, procedural statutes, on the other hand, concern the means and methods to apply and enforce those duties and rights, Alamo Rent-A-Car Inc. v. Mancusi, 632 So.2d 1352 (Fla. 1994).

Clearly, even after its amendment in 1997, Fla. Stat. §48.101 remains a procedural statute whose subject matter is limited to the means and methods of effectuating service of process. The 1997 amendment did not establish any new duties or rights, it merely clarified the means and methods to be used to effectuate service of process either against the directors of a dissolved corporation, as trustees thereof, or against the corporation itself, depending upon the date of dissolution. As discussed above, the amendment was nothing more than a restatement of existing law following the revisions to the Corporations Act in 1989.

Respondent's reliance upon the argument that the amendment of Fla. Stat. §48.101 was somehow jurisdictional in nature and thus adversely effected some protected property interest is both convoluted and misplaced. Contrary to the assertions of Respondent,

neither it nor Mock Plumbing had a vested property interest in any particular means or method of effectuating process. This Court already rejected such an argument in Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977) when it stated that no one has a vested interest in any given mode of procedure.

Fla. Stat. §48.101, as amended, was nothing more than a restatement of existing law, and therefore was clearly applicable to the case sub judice. The decision of the Second District should therefore be reversed, and the decisions of the Fourth and Fifth Districts adopted..

The third finding required to affirm the decision of the Second District in the case at bar would be that Mock Plumbing Contractor, Inc. had no notice of the action against so as to make the service of process upon the registered agent void and not merely voidable. This would of course be completely contrary to the statements made by Mock Plumbing Contractor, Inc. in its Motion To Vacate Default (R. 574). The very first ground set forth in the motion was that the company failed to file an answer through mistake, inadvertence or excusable neglect. By its own admission, Mock Plumbing acknowledges it received the process, knew it needed to file an answer but mistakenly or inadvertently forgot to do so.

As was stated by the Second District in Estate of Bobinger v. Deltona Corp., 563 So.2d 739 (Fla. 2d DCA 1990) "[W]hen the appellants claim relief from defaults based

on mistake, inadvertence or excusable neglect, they are essentially putting forth a claim in the nature of an avoidance of the default; thus we can infer that process was received". Id at 747.

It is also well settled that service which is irregular or defective but gives the defendant actual notice of the proceedings against him confers jurisdiction upon the court of the person summoned so that the judgment based upon it is voidable only and not void, and cannot be collaterally attacked. State v. Chillingworth, 171 So. 649 (Fla. 1937); Myrick v. Walters, 666 So.2d 249 (Fla. 2d DCA 1996); Craven v. J.M. Fields, Inc., 226 So.2d 407, 410 (Fla. 4th DCA 1969).

Thus, regardless of whether this Court finds that service of process could only be effectuated in the case sub judice by serving the directors as trustees, notice of the action was unquestionably received by Mock Plumbing, and as such, the judgment against Mock Plumbing was merely voidable and not void. Being merely voidable and not void, under the authority of this Court in Chillingworth, Respondent cannot now collaterally attack the judgment.

Respondent in its brief does not argue that Mock Plumbing did not receive adequate, timely notice of the action against it, but instead engages in an unavailing argument of form over substance, which ignores the object to be accomplished by service of process. The object is to advise the defendant that an action has been commenced against him and warn him that he must appear within a certain time and at a certain place

to make such defense as he has. Gribbel v. Henderson, 151 Fla. 712, 10 So.2d 734 (1942), aff'd, 153 Fla. 397, 14 So.2d 809 (1943) (en banc).

This objective was accomplished in the case at bar. Mock Plumbing admitted it failed to file an answer not because of defective service or a lack of notice, but solely as a result of its own mistake, inadvertence or excusable neglect. This Court's holding in Chillingworth therefore applies. The judgment against Mock Plumbing is not void, and the decision of the Second District should be reversed.

Lastly, in order for this Court to uphold the decision of the Second District, it must also find that the non-existence of any Mock Plumbing directors upon whom Petitioners could have effectuated service of process under Fla. Stat. §48.101 does not result in an unconstitutional violation of the Petitioners' right to access to courts under Article 1, Section 21 of the Florida Constitution.

It must be remembered that the affidavit of Monica Mock, Mock Plumbing's president, sole shareholder, and registered agent states that subsequent to July 8, 1990, Mock Plumbing Contractor, Inc. had no directors (R. 524). Also, the Corporate Annual Report does not list any directors despite the requirement that any such persons be listed (R. 323-324).

Respondent seeks to avoid the obvious consequences of such a constitutional violation by attempting to rewrite both the Corporations Act so as to provide for defacto

directors, and Fla. Stat. §48.101 so as to allow service of process against those persons engaging in "director-like" activities. Respondent, who had heretofore vehemently demanded strict compliance with Fla. Stat. §48.101 now seeks to relax those requirements when it is in its own interests to do so.

Notwithstanding that courts are without power to rewrite statutes, at the time Monica Mock was served with process, Mock Plumbing had filed Chapter 7 liquidation and been adjudicated bankrupt and defunct for over a year. At the time service of process was effectuated there was no one engaging in any "director-like" activities or acting in a decision making capacity. There simply was nothing to direct or decisions to be made.

Failing that, Respondent also argues that Fla. Stat. §607.1405(5) provides for the court appointment of a trustee should there be no officer or director willing to serve. This section is inapplicable because the court may only appoint a trustee for any property owned or acquired by the dissolved corporation. In the case at bar, Mock Plumbing filed Chapter 7 liquidation. There was no corporate property. The Bankruptcy Trustee's Report of No Distribution confirms this. (R. 281)

To mandate that Petitioners could only effectuate service of process by serving the director/trustees of Mock Plumbing Contractor, Inc. when in fact no such director/trustees existed would clearly amount to an unconstitutional denial of access of courts under

Article 1, Section 21 of the Florida Constitution.

Petitioners have shown the inapplicability of each of the four findings necessary for this Court to affirm the decision of the Second District in the case sub judice. Therefore, this Court must reverse the decision of the Second District, and adopt the holdings of the Fourth in Wong v. Gonzalez & Kennedy, Inc.,719 So.2d 937 (Fla. 4th DCA 1998), review granted, 727 So.2d 905 (Fla. 1999) and the Fifth District in Liszka v. Silverado Steak & Seafood Co., Inc, 703 So.2d 1226 (Fla. 5th DCA 1998).

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 Jeffrey W. Pearson, Esq., 1519 Dale Mabry Hwy., , Ste. #100, Lutz, Fl., 33549, this ___ day of November, 1999.

Roy C. Skelton, Esq.
326 N. Belcher Rd.
Clearwater, Fl. 33765
(813) 791-8810
Counsel for Petitioners
Fla Bar #396930