IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. SC03-1670
FOURTH DCA CASE NO. 4D01-4894

STACEY and ROBERT ROBINSON,

Petitioners,

v.

NATIONWIDE MUTUAL
FIRE INSURANCE COMPANY

Respondent.

_____/

RESPONDENT'S AMENDED ANSWER BRIEF ON JURISDICTION

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JURISDICTIONAL ISSUES PRESENTED

I. The Fourth District's opinion does not expressly and directly conflict with the opinion of any other District's opinion or with any Supreme Court opinion on the issue of whether a Demand for Judgment served by a Plaintiff on a Defendant within 90 days after Service of Process can be deemed timely despite the fact that Civil Procedure Rule 1.442 expressly provides that such Demands may be served no earlier than 90 days after Service of Process.

II. The Fourth District's opinion does not conflict with decisions of other courts holding that, in certain circumstances, a Certificate of Service creates a rebuttable presumption of mailing on the date set forth in the Certificate because, although the Plaintiffs "disputed" their own certified mailing date, there was no other evidence of mailing on a different date and because the Court properly held that Rule 1.442, which is in derogation of common law, should be strictly construed .

III. The Fourth District's opinion does not conflict with this Court's decision in Mercer v. Raine because that case does not authorize the trial court to default a party on a nonexistent claim.

STATEMENT OF THE CASE AND FACTS

ROBINSONS' Statement of the Case and Facts should be disregarded as relying on "facts" that are not present in the Fourth District's opinion and as

argumentative. See, Fla. R. App. P. 9.120 Committee Notes ("[t]he jurisdictional brief should be a short, concise statement of the grounds for invoking jurisdiction and the necessary facts. It is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue.) The relevant facts of record are as follows.

After the ROBINSONS prevailed in their uninsured motorist claim against NATIONWIDE, they moved for an award of attorneys' fees pursuant to Florida Statute 768.79, the Offer of Judgment statute. NATIONWIDE objected to an assessment of attorneys' fees because the Demand for Judgment because it was prematurely served within 90 days of service of process. NATIONWIDE requested that the trial court consider the timeliness of the Demands prior to permitting the ROBINSONS to conduct attorneys' fee discovery, but the Court was persuaded by the ROBINSONS that there were factual issues related to the timeliness of service of the Proposal that merited discovery.

After several months of discovery skirmishes, the trial court determined that NATIONWIDE should be sanctioned for discovery violations related to the fee discovery. As the sanction, the trial court struck NATIONWIDE'S opposition

to the ROBINSONS' Motion for Attorneys' Fees pursuant to their Demand for Judgment and awarded the ROBINSONS almost $450,000.00 in attorneys' fees expended from the date of service of the Demand for Judgment as the discovery sanction.

On appeal, the Fourth District concluded that the Demand for Judgment at issue bore a Certificate of Service that was clearly within 90 days from the date of Service of Process of the Complaint and, under the plain language of Florida Rule of Civil Procedure 1.442(b), it was premature and void. Although the ROBINSONS disputed the date of their own Certificate of Service, the appellate court found that, for purposes of measuring the timeliness of a Demand for Judgment, the Certificate of Service was the date by which timeliness would be measured. The Court explained, "[t]o do otherwise, as the plaintiffs suggest, would create uncertainty in the enforcement of the rule. There would be no end to the myriad of factual scenarios presented by litigants to demonstrate timeliness."

Because the Fourth District has repeatedly held that untimely Offers or Demands for Judgment are void from their inception, the appellate court found that striking NATIONWIDE'S opposition to the ROBINSONS' fee motion, which was based upon a void Demand for Judgment, was an inappropriate sanction.

Accordingly, the Fourth District reversed the award of attorneys' fees and costs premised on the void Demand and remanded the case for entry of a more appropriate discovery sanction.

SUMMARY OF THE ARGUMENT

None of the arguments presented by the ROBINSONS supports this Court's jurisdiction to consider this case. The appellate decision in this case does not conflict with the Third District's decision in Kuvin v. Keller, in which the Court held that an offer of judgment made in violation of the Rule providing that no such offer may be made within 90 days after Service of Process, was a "harmless and technical" violation of the Rule. Kuvin is factually distinguishable from this case and it was effectively overruled by this Court's subsequent decisions in Sarkis v. Allstate Ins. Co. and Willis Shaw Express, Inc. v. Hilyer Sod, Inc.. There is no reason for this Court to issue a third opinion holding that the Rule and Statute mean what they say.

The appellate decision in this case does not conflict with any other decision on the issue of whether the Certificate of Service creates a rebuttable presumption of service on the date set forth in the Certificate. None of the cases cited as in conflict with the present case address a party's disavowal of its **own**

Certificate of Service; all of the cases are concerned with the opposing party's challenge to a Certificate. In addition, none of the cases cited address the time limitations set forth in Rule 1.442. Therefore, there is no express and direct conflict among the Districts on this issue.

Finally, the appellate decision does not conflict with this Court's decision in Mercer v. Raine because neither that case nor any other provides that a defaulted party may be subject to the payment of a nonexistent or void claim. In fact, authority from this Court implies the contrary. Thus, the ROBINSONS have set forth no conflict establishing this Court's jurisdiction to consider this case.

ARGUMENT

I. The Fourth District's opinion does not expressly and directly conflict with the opinion of any other District Court of Appeal or with any Supreme Court opinion on the issue of whether a Demand for Judgment served by a Plaintiff on a Defendant within 90 days after Service of Process can be deemed timely despite the fact that Civil Procedure Rule 1.442 expressly provides that such Demands may be served no earlier than 90 days after Service of Process.

The ROBINSONS first argue that the Fourth District's opinion in this case expressly and directly conflicts with Kuvin v. Keller Ladders, Inc., 797 So. 2d 611 (Fla. 3d DCA 2001), which, they imply, stands for the proposition that

violations of the time requirements set forth in Florida Rule of Civil Procedure 1.442(b) may be deemed "harmless technical violations". Kuvin, however, is not only clearly distinguishable by virtue of the fact that the offer in that case was made by a **defendant** to a **plaintiff**, but has also been called into question by this Court's recent pronouncements in both Sarkis v. Allstate Ins. Co., 2003 Fla. LEXIS 1710 (Fla., Oct. 2, 2003) and Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276 (Fla. 2003). In both of those cases, this Court clearly and unequivocally held that Florida Statute 768.79 and Rule 1.442 must be strictly construed because the statute and rule are in derogation of common law. Thus, the Third District's finding that a violation of the statute can be deemed "harmless and technical" is no longer good law (if it ever was) by virtue of this Court's subsequent opinions implicitly holding that there is no such thing as a "harmless and technical" violation. For that reason, any asserted "conflict" between Kuvin and this case has already been resolved by this Court and there is simply no reason for this Court to issue yet another opinion to the effect that the Rule and the Statute mean what they say.

II. The Fourth District's opinion does not conflict with decisions of other courts holding that, in certain circumstances, a Certificate of Service creates a rebuttable presumption of mailing on the date set forth

in the Certificate because, although the Plaintiffs "disputed" their own certified mailing date, there was no other evidence of mailing on a different date and because the Court properly held that Rule 1.442, which is in derogation of common law, should be strictly construed .

Preliminarily, the "factual" recitation set forth on page 7 of the ROBINSONS' brief is not only outside the four corners of the Fourth District's opinion, but is also false in fact for several reasons.[1] The ROBINSONS argue that the Fourth District's opinion conflicts with other District Court opinions finding that a Certificate of Service creates a rebuttable presumption that a document was served on the date set forth in the Certificate. They assert that the Fourth District's decision to determine the timeliness of the service of a Proposal for Settlement with reference to the date set forth on the Certificate of Service conflicts with several decisions of other District Courts of Appeal holding that a Certificate of Service is

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[1] Although we believe that reference to "facts" not set forth in the appellate decision sought to be reviewed should not be considered because such "facts" could not form the basis for an "express and direct" conflict, if this Court considers facts outside the opinion, it should have the true facts.

In this case, there **was** evidence establishing that NATIONWIDE'S counsel had received the Demand for Judgment by facsimile on the date set forth in the Certificate of Service sought to be disavowed by ROBINSONS' counsel. Since the Demand was properly served on NATIONWIDE'S counsel, and not NATIONWIDE itself, the insurer could not have a post-marked envelope evidencing a later service date than the date set forth in the Demand.

prima facie proof of service on the date set forth in the Certificate but that proof may be rebutted. See, Abrams v. Paul, 453 So. 2d 826 (Fla. 1st DCA 1983); Scutieri v. Miller, 584 So. 2d 15 9Fla. 3d DCA 1991); Jones v. State, 785 So. 2d 561 (Fla. 2d DCA 2001).

The appellate court's decision in this case does not conflict with the aforementioned authority for the simple reason that, in this case, it is the party whose counsel certified the date of service who now seeks to disavow his own certificate of service. In all of the other cases cited by the ROBINSONS, it was the **recipient** of the served document who sought to question the true date of service. This case is also distinguishable from those cited because it involves the interpretation of the time limitations set forth in Florida Rule of Civil Procedure 1.442 which is strictly construed and none of the cited cases involve the interpretation the rule. Thus, there is no express and direct conflict which would vest this Court with jurisdiction to review this case.

III. The Fourth District's opinion does not conflict with this Court's decision in Mercer v. Raine because that case does not authorize the trial court to default a party on a nonexistent claim.

Once again, the ROBINSONS seek to divert this Court's attention away from the "merits" of their jurisdictional arguments by including in their Brief,

at page 9, misleading "factual" recitations designed solely to prejudice this Court against NATIONWIDE.[2] See, Fla. R. App. P. 9.120 Committee Notes (noting that it is not appropriate to discuss any matters not relevant to the jurisdictional issue in the jurisdictional brief).

Contrary to the ROBINSONS contention, on page 9 of their Brief, the Fourth District did not hold "that a trial court cannot strike a defendant's pleadings and defenses for misconduct under Fla. R. Civ. P. 1.380 without first examining the merit to [sic] the plaintiff's claim to make sure it is not void." Rather, the District Court explained, "[w]hile Florida Rule of Civil Procedure 1.380 permits the striking

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[2] As the Fourth District noted in its opinion, the discovery propounded upon NATIONWIDE was completely unnecessary because the Certificate of Service on the Demand was dispositive of that issue. The Court also noted that NATIONWIDE objected to much of the discovery on the ground that it had nothing to do with the fee issue and was solely crafted to obtain information in preparation for a subsequent bad faith claim. Opinion, p. 1. NATIONWIDE'S adjuster appeared for two depositions and gave at least 8 hours of deposition testimony, none of which had anything to do with the date of service of the proposals.

Further, as was repeatedly pointed out to the trial and appellate courts, NATIONWIDE'S alleged discovery violations did not preclude the ROBINSONS from proving that service was timely and, contrary to the ROBINSONS' statement on page 10 of their Brief that "Nationwide refused to produce [evidence establishing the timeliness of their Demand]", the record clearly reflects that NATIONWIDE had no such evidence because it did not exist. Nothing in NATIONWIDE'S possession could have proven or disproven when the ROBINSONS' counsel served the Demand for Judgment. That Demand was faxed only to NATIONWIDE'S counsel and he received it on the date that the ROBINSONS' counsel certified that it was served. Moreover, the ROBINSONS' counsel never offer sworn testimony disputing their own Certificate of Service.

of "pleadings" as a discovery sanction in certain instances, it does not allow a defense to be stricken so as to validate and breathe new life into a void claim". (A.2) Simply put, the Court determined that since an untimely demand was void from its inception, it did not exist at the time of default. If it does not exist at the time of default, the default could not subject a party to paying the nonexistent claim. Cf., North American Accident Ins. Co. v. Moreland, 53 So. 635 (Fla. 1910)("judgment by default entitles the plaintiff to the relief for which a proper predicate has been laid in the declaration.") Neither Mercer v. Raine, 443 So. 2d 944 (Fla. 1983) nor any other case in the State of Florida holds to the contrary. Thus, this ground, like the others argued by the ROBINSONS, does not demonstrate the requisite "express and direct" conflict to establish this Court's jurisdiction to consider this case.

CONCLUSION

For the foregoing reasons, the Respondent NATIONWIDE MUTUAL FIRE INSURANCE COMPANY respectfully requests that this Court deny the Petition to Invoke this Court's jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: Diego C. Asencio, Esquire, Diego C. Asencio, P.A., 636 U.S. Highway 1, Suite 115, North Palm Beach, Florida 33408; Richard A. Kupfer, Esquire, Richard A. Kupfer, P.A., 5725 Corporate Way, Suite 106, West Palm Beach, Fla. 33407; and H. Randall Brennan, Esq., Hendrix & Brennan, 1443 30th Street, Suite F, P.O. Box 520, Vero Beach, Fla. 32961 via U.S. mail on October 22, 2003.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief was typed in 14-point Times New Roman font.

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