IN THE SUPREME COURT OF FLORIDA

CASE NO. 4D 02-1402

MOGERMAN, O'LEARY & PATEL, INC.,
a Florida corporation,

Petitioner,

vs.

MARCIA SHERWIN,

Respondent.
_____/

BRIEF OF THE PETITIONER ON JURISDICTION

Allyson D. Goodwin, Esq.
Florida Bar No. 0076902
Renee G. Lillard, Esq.
Florida Bar No. 0382670
Damaso W. Saavedra, Esq.
Florida Bar No. 607886
SAAVEDRA. PELOSI & GOODWIN,.A.P.A.
312 S.E. 17th Street, 2nd Floor
Ft. Lauderdale, Florida 33316
p. (954) 767-6333 x24
f. (954) 767-8111
email. Agoodwin @lawspg.com
email. Rlillard@lawspg.com

MOGERMAN, O'LEARY & PATEL, INC. V. MARCIA SHERWIN

_____

TABLE OF CONTENTS **Page**

TABLE OF AUTHORITIES

MOGERMAN, O'LEARY & PATEL, INC. V. MARCIA SHERWIN

PRELIMINARY STATEMENT

Petitioner, Mogerman, O'Leary & Patel, Inc., files its Petition for Jurisdiction seeking to appeal that portion of the Fourth District Court of Appeal's holding filed April 23, 2003, which affirmed the trial court's Final Judgment granting Respondent's/Defendant's, Marcia Sherwin's, Motion to Quash Service.

The Petitioner will be referred to as "MOP". The Respondent will be referred to as "Sherwin". All emphasis will be supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On October 18, 1999, MOP commenced the present action by filing a single count Complaint seeking specific performance of a real estate contract. Service was thereafter perfected on Sherwin on November 18, 1999 at 10:45 p.m. by substitute service on a co-resident at Sherwin's primary residence (hereinafter "Sherwin Residence"). A Verified Return of Service was sworn to, and filed, on November 29, 1999 by a licensed Florida private investigator and authorized process server, Carl R. Stevens (hereinafter "Stevens").

On December 8, 1999, Sherwin timely filed a *pro se* Motion to Dismiss For Bad Service of Process and in the Alternative, Failure to State a Cause of Action For Which Relief Can Be Granted For. (hereinafter "Motion to Dismiss for Bad Service"). Prior to the trial court ruling on the then pending Motion to Dismiss for

Bad Service, Sherwin retained counsel who filed a Motion to Dismiss and/or Dissolve Lis Pendens, on January 15, 2002 (hereinafter "Second Motion to Dismiss").

Hearing was held on Sherwin's, *pro se* Motion to Dismiss for Bad Service (hereinafter "Adequate Service Hearing") on February 13, 2002. At the Adequate Service Hearing, the verified return of service was corroborated by testimony given by Sherwin's own husband, Mr. Irwin Sherwin (hereinafter "Mr. Sherwin"). (Although a transcript was not taken of this hearing, the evidence presented was preserved in a lawful manner as it was reiterated, and sworn, to by an officer of the court in the Verified Motion for Rehearing filed on February 22, 2002 by MOP. The accuracy of the description of the evidence presented as set forth in the Verified Motion for Rehearing was not challenged or objected to in Sherwin's Response to MOP's Motion for Rehearing which was subsequently filed. Both the Verified Motion for Rehearing and Sherwin's Response were both filed before the trial court rendered its judgment in the matter, and were thus properly made a part of the record on appeal.)

Subsequent to the Adequate Service Hearing, the trial court entered a Final Judgment of Dismissal in favor of Sherwin (hereinafter "Final Dismissal for Bad Service"). In response to the Final Dismissal for Bad Service, MOP filed a

Verified Motion for Rehearing on February 22, 2002, outlining the validity of the substituted service of process and introducing newly discovered testimony given in an Affidavit by Stevens (hereinafter "Stevens' Affidavit"). (Despite repeated inquiry, Petitioner had been unable to locate Stevens prior to the Adequate Service Hearing). The Stevens' Affidavit confirmed that Stevens was familiar with, and followed the requirements of, §48.031, Fla. Stat. by perfecting service on Sherwin, through a co-resident of Sherwin's primary residence.

Despite the newly discovered evidence which corroborated the Verified Return of Service, the trial court refused a new hearing and denied MOP's Verified Motion for Rehearing by Order filed with the Clerk of Court on March 4, 2002. A timely notice of appeal was thereafter taken to the Fourth District Court of Appeal, raising both this Final Judgment, as well as a second ruling of the trial court.

On April 23, 2003, without oral argument, the Fourth District Court of Appeal vacated the second ruling of the trial court, but affirmed the dismissal of defective service on the sole basis of a lack of a transcript of the Adequate Service Hearing.

This Petition followed.

STANDARD OF REVIEW

This Court's standard of review is de novo.

SUMMARY OF ARGUMENT

Discretionary jurisdiction to review the ruling of the Fourth District Court of Appeals as related to the dismissal for defective service exists pursuant to Fla. R. App. P. 9.030(a)(2)(iv), and should be invoked. The Fourth District misapplied and wrongfully extended the *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979) decision to the present facts. Specifically, the ruling of *Applegate* controls only where the factual findings of an evidentiary hearing are necessary to the ruling at issue on appeal, and *which are not otherwise preserved*. In the present case, the evidence presented was preserved via a "proper substitute" to a transcript. Thus, the application of *Applegate* in the instant case creates a misapplication conflict.

ARGUMENT

The Fourth District Court misapplied the holding of *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979) to the matter at issue by extending its application to the present facts. The record presently on appeal contains a proper substitute for a transcript, thus the precedent of *Applegate* should not apply to preclude appellate review.

Specifically, the Verified Motion for Rehearing contained sworn statements by an officer of the court setting forth the evidence presented at the hearing in

question. The *accuracy* of these material sworn statements *was not questioned or objected to in any manner or fashion* by Sherwin's counsel in his voluntarily filed Response. Thus, under *Applegate* and applicable law, the evidence presented at the hearing has been otherwise preserved via a "proper substitute" to a trial transcript. *Id.* at 1152; *see Bass Orlando Lee Road v. Lund*, 703 So.2d 250 (Fla. 4th DCA 1997). This Court in Applegate did not limit appellate reviews to only those cases where a transcript is available, nor did this Court specifiy the requirements of a "proper substitute". Thus, to side step the import of the public policy in question, to wit upholding the validity of verified returns of service which are statutorily compliant on their face, by route application of *Applegate*, misapplies the ruling in that decision and undermines its intent.

Specifically, the ruling in *Applegate* was based on this Court's well founded concerns related to the propriety of reviewing lower court rulings when the evidence presented has not in any manner been preserved as a proper part of the record. In such cases it is impossible for an appellate court to review the factual underpinnings of the legal conclusions reached, and thus this Court held that in such instances appellate review would not be appropriate.

In the present case, however, a proper substitute was available to the appellate court, that is the affidavit of an officer of the court timely submitted to the

trial judge, and opposing counsel, prior to a final ruling being reached. Opposing counsel was presented with an opportunity to object to any of the statements of evidence contained in that affidavit and did not do so. Opposing counsel instead used much of the same evidentiary statements contained in the Verified Motion for Rehearing to argue for a contra position in his Response.

Thus, in the present case, the record brought forward by the appellant is more than *adequate* to demonstrate reversible error as the statements of evidence were properly part of the record prior to the trial court making its final ruling. Therefore, the record on appeal clearly reveals that the trial court ignored established precedent and found a compliant return of service fatally defective despite overwhelming corroborating evidence, and based its ruling in direct contravention to established case law on a simple denial of service.

The import of this decision on the stability of trial litigation cannot be ignored. In the precise words of the Fourth District, "[t]o permit a defendant to impeach a summons by simply denying service would create chaos in the judicial system." Slomowitz vs. Walker, 429 So.2d 797 (Fla. 4th DCA 1983). This Court should therefore exercise its jurisdiction to accept review of the Fourth District Court of Appeal's decision.

CONCLUSION

This Court should exercise its discretionary jurisdiction in this matter as the Fourth District Court of Appeals misapplied this Court's decision in *Applegate*. The effect of the Fourth District's ruling would be to narrowly limit the availability of appellate review to only those cases where a full transcript is available, in direct contradiction to this Court's holding which clearly authorized the use instead of a "proper substitute". In the present case, such a proper substitute was a part of the record on appeal and clearly demonstrated that the lower court committed reversible error. To find otherwise is to allow defendants to call into question the validity of all returns of service by mere denial, and to add an almost insurmountable burden of proof to all Plaintiffs seeking to prosecute civil actions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Charles Wender, Esq., attorney for Appellee, 190 West Palmetto Park Road, Boca Raton, Fl. 33432 this _____ day of May, 2003.

By:_____
Allyson D. Goodwin, Esq.

By:_____
Damaso W. Saavedra, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with the font requirements as set forth in the Fla. R. App. P. 9.210.

By:_____
Allyson D. Goodwin, Esq.

By:_____
Damaso W. Saavedra, Esq.

APPENDIX

UNITED STATES DISTRICT COURT OF
APPEALS, FOURTH DISTRICT OF FLORIDA
OPINION FILED APRIL 23, 2003