THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DENISE C. SHARON

Petitioner,

v.

C. WILLIAM SHARON,

Respondent.
_____/

CASE NO. SCO6-93

L.T. NO. 2D03-3051
2D03-5731
(Consolidated)

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

(On Review from the Second District Court of Appeal)

VIRGINIA R. VETTER
P. O. Box 7834
Tampa, Florida 33673-7834
(813) 935-4867

FBN 221902
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS..... ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS..... 2

SUMMARY OF ARGUMENT 4

ARGUMENT

THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE SUBJECT DECISION BECAUSE RULE 1.525 NO LONGER APPLIES TO FAMILY LAW CASES. A DECISION ON REVIEW WOULD, THEREFORE, HAVE NEGLIGIBLE IMPACT AS PRECEDENT. 5

CONCLUSION..... 9

CERTIFICATE OF SERVICE.....10

CERTIFICATE OF COMPLIANCE 10

TABLE OF CITATIONS

CASES **PAGE NO.**

Ansin v. Thurston, 101 So.2d 808, 811 (Fla.1958), ... 5

Diaz v. Bowen, 832 So.2d 200 (Fla. 2d DCA 2002)..... 7

Fisher v. John Carter & Associates, Inc., 864 So.2d 493,
(Fla. 4th DCA 2004).....2, 7, 8

Jollie v. State, 405 So.2d 418, 423 (Fla. 1981) 6

Molloy v. Flood, 884 So.2d 256 (Fla. 2d DCA 2004) 2, 3

Mook v. Mook, 873 So.2d 363, 364 (Fla. 2d DCA 2004) 7

Nicoletti v. Nicoletti, 902 So.2d 215 (Fla. 2d DCA 2005) 3, 8

Saia Motor Freight Line, Inc. v. Reid, 888 So.2d 102 (Fla 3d DCA 2004),
rev. granted, Case No. SC04-2443 .....7, 8

Smith v. Smith, 902 So.2d 859, 863 (Fla. 1st DCA 2005).....3, 6

Ulico Casualty Co. v. Roger Kennedy Construction, Inc.,
821 So. 2d 452, 453 (Fla. 1st DCA 2002) 7

Wentworth v. Johnson, 845 So.2d 296, 299 (Fla. 5th DCA 2003)..... 7

COURT RULES

Fla. R. Civ. P. 1.090 8

Fla. R. Civ. P. 1.525 .....2, 3, 4, 6, 7, 8, 9

Fla. Fam. L. R. P. 12.525 ..... 3, 4, 6, 7, 8

OTHER AUTHORITY

Philip J. Padovano, FLORIDA APPELLATE PRACTICE 438 (1988) 5

PRELIMINARY STATEMENT

The Petitioner will be referred to as "the Former Wife", and the Respondent will be referred to as "the Former Husband".

The Second District Court of Appeal Opinion on review, attached as the Appendix to the Initial Brief, will be referred to as "(O:)". The Initial Brief on jurisdiction will be designated as "(IB:)".

STATEMENT OF THE CASE AND THE FACTS

Petitioner is seeking a discretionary review of the Second District Court of Appeal's Opinion entered on September 23, 2005, which reversed the award of attorney's fees to the Former Wife. The facts, which follow, are reflected in the Opinion of the Second District Court of Appeal.

The Former Husband appealed to the Second District Court of Appeal from two post-dissolution orders awarding fees to the Former Wife. (O: 1) The Second District reversed the award of attorney's fees and costs because the Former Wife had failed to file any post-judgment motion for fees and costs, pursuant to Florida Rule of Civil Procedure 1.525. (O: 1 - 2) The Former Wife had sought fees in her counterpetition and amended counterpetition for dissolution of marriage. Subsequently, the final judgment of dissolution reserved "jurisdiction to award attorney's fees, costs and litigation expenses to either party". Rather than filing a post-judgment motion for fees, the Former Wife had simply set the matter of fees and costs for a hearing. (O: 2)

The Opinion from the Second District stated:

> This court has clearly held that rule 1.525 requires a separate written motion for attorneys' fees to be filed within thirty days of the entry of the judgment. See Molloy v. Flood, 884 So.2d 256 (Fla. 2d DCA 2004) (certifying conflict with Fisher v. John Carter & Associates, Inc.,

864 So.2d 493 (Fla. 4th DCA 2004)).

The Second District also declined to retroactively apply Family Law Rule of Procedure 12.525, citing to its earlier decision in Nicoletti v. Nicoletti, 902 So.2d 215 (Fla. 2d DCA 2005). Rule 12.525 provides that Florida Rule of Civil Procedure 1.525 does not apply in family law cases. (O: 3) Continuing, the Court said:

> But see Smith v. Smith, 902 So.2d 859, 863 (Fla. 1st DCA 2005) (holding that "[b]ecause the supreme court's adoption of Family Law Rule 12.525 occurred during the pendency of this appeal, and the rule is a procedural, rather than a substantive, change in the law, it applies to this case"). (O: 3 - 4)

The Second District reversed the orders awarding attorneys' fees and costs, based upon the Molloy and the Nicoletti decisions (O: 4) A footnote observed that in light of its determination that the Former Wife had failed to comply with rule 1.525, the Court did not reach the Former Husband's second issue regarding the propriety of the award itself. (O: 3)

The Former Wife filed a timely Motion for Rehearing, Rehearing En Banc and for Certification, which was denied on December 19, 2005. Petitioner is seeking this Court's discretionary jurisdiction, based upon an express and direct conflict with other District Courts of Appeal.

SUMMARY OF THE ARGUMENT

THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE SUBJECT DECISION BECAUSE RULE 1.525 NO LONGER APPLIES TO FAMILY LAW CASES. A DECISION ON REVIEW WOULD, THEREFORE, HAVE NEGLIGIBLE IMPACT AS PRECEDENT.

The power of the Supreme Court to exercise its discretionary review of District Court of Appeal decisions should be utilized only when settlement of the issue is of importance to the public, not merely to that of the parties, and when precedent requires uniformity of principle and practice.

Rule 1.525 no longer applies to family law cases. The issues of whether rule 12.525 should be applied retroactively and whether a final judgment's reservation of jurisdiction serves to extend the 30-day requirement of rule 1.525 have exceedingly limited shelf life. Resolving these issues is important to the parties, but it would have negligible impact as precedent in family law cases. Once the pending family law cases which have been affected by rule 1.525 have gone through the appeal pipeline, the issues raised by that rule will be moot. This mitigates against the constitutional intent of discretionary conflict review.

Furthermore, a resolution of any conflicts among the District Courts of Appeal would not end this case. The Second District declined to rule on the issue

of the Former Wife's entitlement to fees, and that issue would remain for further review.

This Court should decline to exercise its discretionary power to review the Second District Court's opinion in this case.

ARGUMENT

THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE SUBJECT DECISION BECAUSE RULE 1.525 NO LONGER APPLIES TO FAMILY LAW CASES. A DECISION ON REVIEW WOULD, THEREFORE, HAVE NEGLIGIBLE IMPACT AS PRECEDENT.

Although the Supreme Court has the power for discretionary review in conflict cases, it is not an obligation which must be exercised. Philip J. Padovano, FLORIDA APPELLATE PRACTICE 438 (1988). *Ansin v. Thurston*, 101 So.2d 808, 811 (Fla.1958), defined the limited use of the Supreme Court's discretionary review, as follows:

> But it is of obvious importance that there should be developed consistent rules for limiting issuance of the writ of certiorari to cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between decisions.
> . . . . A limitation of review to decisions in 'direct conflict' evinces a concern with decisions as precedents as opposed to adjudications of the

rights of particular litigants.

Ansin further described discretionary review as limited to "certain specified areas *essential* to the settlement of issues of public importance and the preservation of uniformity of principle and practice. . . ." *Id.* at 810. (emphasis added)

Another court observed that discretionary review should be confined to cases having important ramifications for the state's jurisprudence. *Jollie v. State,* 405 So.2d 418, 423 (Fla. 1981).

Resolving any conflicts in the application of rule 1.525 to family law cases does not have important "ramifications for the state's jurisprudence." The Second District decided in the present case that rule 12.525 should not be applied retroactively and that rule 1.525 requires a separate, written motion for fees. This decision appears to conflict with the First District case of *Smith v. Smith*, 902 So.2d 859, 863 (Fla.1st DCA 2005), which held that a reservation of jurisdiction serves to extend the time limitation of rule 1.525. *Smith* also applied rule 12.525 retroactively.

The issues in conflict, however, are mooted by rule 12.525. Petitioner contends that "there are likely hundreds or possibly thousands of cases throughout Florida that would have been pending either post-judgment or on appeal when rule 12.525 was adopted and in which this well could be a dispositive issue." (IB: 4)

That is unlikely. Rule 12.525 removed the necessity of filing a separate post-judgment motion for fees in family law cases. Whether 1.525 should be applied retroactively or whether a reservation of jurisdiction in a family law case serves to extend the thirty-day requirement is relevant only to cases which are presently in the appellate pipeline.

Furthermore, the number of cases in that pipeline is likely limited to those from the Second, First and Fifth District Courts of Appeal. Prior to rule 12.525, the Third and the Fourth Districts took the position that the 30-day time limitation of rule 1.525 was extended by a reservation of jurisdiction. *Fisher v. John Carter & Associates, Inc*, 864 So.2d 493, 496 (Fla. 4th DCA 2004); *Saia Motor Freight Line, Inc. v. Reid*, 888 So.2d 102 (Fla 3d DCA 2004), rev. granted, Case No. SC04-2443.

The Second and Third Districts took the opposite position: A reservation of jurisdiction to consider fees does not extend the 30-day requirement. Further, rule 1.525 does apply to family law cases, *Wentworth v. Johnson*, 845 So.2d 296, 299 (Fla. 5th DCA 2003); *Mook v. Mook*, 873 So.2d 363, 364 (Fla. 2d DCA 2004).

The First District held, prior to 12.525, that the requirements of rule 1.525 are mandatory but that the rule must be considered in conjunction with Florida Rule of Civil Procedure 1.090(b), which provides for an extension upon a showing of excusable neglect. *Smith*, 902 So.2d at 862, citing to *Ulico Casualty Co. v. Roger*

Kennedy Construction, Inc., 821 So. 2d 452, 453 (Fla. 1st DCA 2002).

Any pending cases which have applied 1.525 as a bright-line rule probably predate, at the latest, mid-2003, when *Wentworth* applied the rule to family law cases. As early December, 2002, however, the Second District made it clear that it was applying rule 1.525 as a bright-line rule in a civil case. *Diaz v. Bowen*, 832 So.2d 200 (Fla. 2d DCA 2002).

This time line indicates, therefore, that the pipeline of family law cases affected by rule 1.525 is about to close.

The Second District in the present case denied the Former Wife's motion for conflict certification without explanation. The identical issues in another Second District case is presently before the Supreme Court. *Nicoletti v. Nicoletti*, Case No. SC05-949. Proceedings in that case have been stayed pending disposition of *Saia Motor Freight Line, Inc. v. Reid*, Case No. SC04-2443. The issue in the latter case is whether a motion for costs filed after thirty days is untimely unless the movant has moved for an enlargement pursuant to Florida Rule of Civil Procedure 1.090.

Unlike *Saia* and *Fisher v. John Carter & Assoc., Inc.*, 864 So. 2d 493 (Fla. 4th DCA 2004), which are non-family law cases, the interpretation of rule 1.525 continues to be an issue of considerable significance as precedent. That is not so in the case at bar or in other family law cases. Rule 1.525 has not applied to family

law cases since March 3, 2005. The concern over the issues presented by that rule is not with precedent. Rather, it is only with the rights of the particular litigants. The number of those litigants is necessarily diminishing, and the end is foreseeable. The necessity, therefore, of establishing precedent is negligible.

There is a further reason for denying review in the present case. Given the Second District's reversing the trial court on the rule 1.525 issue, the Court declined to rule on the Former Husband's issue regarding the Former Wife's entitlement to attorney's fees. The issue would remain outstanding and would require remand to the District Court for further review.

CONCLUSION

Respondent urges this Court to deny discretionary review of the decision of the Second District Court of Appeal.

Respectfully submitted,

VIRGINIA R. VETTER
P. O. Box 7834
Tampa, Florida 33673-7834
(813) 935-4867
FBN 221902
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Answer Brief on Jurisdiction has been served by regular U.S. mail on February 15, 2006, to Marie Tomassi, Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, 200 Central Avenue, Ste. 2100, St. Petersburg, Florida 33701, Attorney for Petitioner.

VIRGINIA R. VETTER
P. O. Box 7834
Tampa, Florida 33673-7834
(813) 935-4867
FBN 221902
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief has been prepared in Times New Roman 14-point proportional font, in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure

VIRGINIA R. VETTER
Attorney for Respondent