THE SUPREME COURT OF FLORIDA
Case No. SC08-2128
Lower Tribunal Case No. 4d07-4241

BARBARA BERTONI,

Plaintiff/Respondent,

v.

STOCK BUILDING SUPPLY, INC.,
f/k/a CAROLINA HOLDINGS, INC.,
f/k/a STUART LUMBER COMPANY OF
POMPANO BEACH, FLORIDA, and
STUART LUMBER COMPANY OF FORT
MYERS, FLORIDA; STOCK BUILDING
SUPPLY OF FLORIDA, INC.

Defendants/Petitioners.

BERTONI'S REPLY BRIEF ON JURISDICTION

Re: Discretionary Review from a Decision of the District Court of Appeal of Florida, Fourth District

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TABLE OF CONTENTS

	Page Number(s)
TABLE OF AUTHORITIES	ii-iii
ARGUMENT	1-7
CONCLUSION	8
CERTIFICATE OF COMPLIANCE	9

TABLE OF AUTHORITIES

Cases

Page Number(s)

Bertoni v. Stock Building Supply, Inc.
989 So.2d 670, 672-678 .....1, 2, 3, 4 & 5

Bradshaw v. Ultra-Tech Enterprises, Inc., 247 So.2d 1008, 1009
p.6 (Fla. 2nd DCA, 1999) 6

Coyne & Delany Co. v. Selman, 98 F.3d 1457,
1471-1472 (4th Cir. 1996) 4-5

Frappier v. Wishnov, D.O., 678 So. 2d 884
(Fla. 4th DCA, 1996) 6-7

Hiller v. Wachovia Corp., 2008 WL 4938424
(S.D. Fla., Nov. 18, 2008) 7

Miller v. Rite Aid Corp., 504 F.3d 1102, 1106
(9th Cir. 2007) 5

Villazon v. Prudential Health Care Plan, Inc.,
843 So.2d 842, 846 (Fla., 2003) 6

Statutes

Employee Retirement Income Security Act of 1974,
as amended, 29 U.S.C. § 1001 et seq. 1

29 U.S.C. §1144(a) 3

Rule

Rule 9.030(a)(2)(A) (iv), Fla. R. App. P. 1, 6, n.4, 8

Rule. 9.331, Fla. R. App. P. ..... 6, n. 4

TABLE OF AUTHORITIES

Cases **Page Number(s)**

Committee Notes

Rule 9.030, Fla. R. App. P.
Committee Notes, 1980 Amendment 6, n.4

ARGUMENT

Petitioners Stock Building Supply, Inc., f/k/a Carolina Holdings, Inc., f/k/a Stuart Lumber Company of Pompano Beach, Florida, and Stuart Lumber Company of Fort Myers, Florida; Stock Building Supply of Florida, Inc. (collectively, "Stock") are seeking to invoke the discretionary jurisdiction of this Court, pursuant to Rule 9.030(a)(2)(A)(iv),[1] based on conflict –

But there is no conflict.

Therefore, Barbara Bertoni respectfully requests this Court to deny Stock's attempt to invoke the discretionary jurisdiction of this Court.

The District Court Holding. The decision of the Fourth District Court of Appeal in the present action (the "District Court Decision") holds:

> "Plaintiff Barbara Bertoni sued her deceased husband's former employer, asserting that the employer negligently failed to procure supplemental life insurance for her husband after he submitted an enrollment application for supplemental life insurance. The trial court entered summary judgment in favor of the employer, finding that plaintiff's negligence claim is preempted by the Employment Retirement Income Security Act of 1974, as amended ('ERISA'). Because we conclude that plaintiff's claim is not related to an ERISA plan and, thus, is not

[1] The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. *Id.*

> preempted, we reverse the final summary judgment and the order which struck plaintiff's demand for jury trial." *Bertoni v. Stock Building Supply*, 989 So. 2d 670, 672 (Fla. 4th DCA, 2008). (Appendix, p.1.)[2]

The District Court Decision's Statement of Facts. Stock's Benefit Manager processed an insurance form on which Barbara Bertoni's late husband had written that he wanted supplemental life insurance in the amount of $150,000. Stock's Benefit Manager, however, stated that she ignored attempts to elect supplemental insurance using that form and did not follow up to inquire if the given associate actually desired supplemental life insurance coverage. *Id.,* 673. (Appendix, p. 2.)

On January 4, 2002, Mr. Bertoni was diagnosed with cancer. He subsequently died without the supplemental life insurance protection which he had attempted to procure. *Id., 673.* (Appendix, p.2.)

The District Court Decision's Conclusion. The District Court concludes that Barbara Bertoni's negligence action against her late husband's employer does not relate to an ERISA plan and therefore is not preempted by ERISA. *Id.,* 678 (Appendix, p.10.)

[2]"Appendix" here and below refers by page number to the copy of the District Court Decision appended to Stock's Brief.

The District Court Decision's Rationale. The District Court Decision agrees with the finding by the federal district court in this action, that Barbara Bertoni is neither a "participant" nor a "beneficiary" under ERISA's statutory definitions:

> "As the federal district court found, the plaintiff in this action lacks standing to utilize the ERISA civil enforcement mechanism because she does not fit the statutory definitions of a 'participant' or a 'beneficiary.' *See* 29 U.S.C. 1002(7), (8) (2007)." *Id.*, 674 (Appendix, p. 4).

The District Court Decision distinguishes between "complete preemption" and "defensive preemption."(*Id.*, 674-675, Appendix, p. 4.) "Complete preemption" converts state law claims into federal claims. (*Id*., 674, Appendix, p.4.) "Defensive preemption" merely provides an affirmative defense to certain state law claims. It calls for their dismissal, if they "relate to" an ERISA plan. *(Id.*,674-675, Appendix, p. 5.) Defensive preemption originates from ERISA's express preemption provision, 29 U.S.C. sect.1144(a). (*Id.*, 674, Appendix, p. 5.)

The District Court Decision concludes that Barbara Bertoni's negligence claim against Stock for negligently failing to procure supplemental life insurance, after her late husband submitted an enrollment application, is simply not related to an ERISA plan. It thus is not preempted. (*Id.*, 672, Appendix, p.1).

The District Court Decision determined:

- The neutral application of Florida tort law is an exercise of traditional state authority.
- Barbara Bertoni is not a principal ERISA entity. Her claim would not affect relations between principal ERISA entities. It simply would result in a money judgment against her late husband's employer.
- This action would not affect the plan at all, because Barbara Bertoni is seeking damages from her late husband's employer, not from the insurance company insuring the plan.(*Id.*, 675, Appendix, p.6).

The District Court Decision notes that Barbara Bertoni alleges negligence in the processing of an insurance enrollment application rather than in the denial of an insurance benefit claim. (*Id.*, 675, Appendix, p. 6.) A claim against the plan's insurer for plan benefits would be preempted.(*Id.*, 675, Appendix, p.6.) However. here, like the claim by the employer in *Coyne* against the company specializing in designing group health insurance plans based on the latter's failure to obtain the proper replacement insurance, Barbara Bertoni's claim is a traditional state law of general applicability that does not affect the relations among the traditional ERISA plan entities. (*Id.*, 675-676, Appendix, pp. 6-7), citing and quoting with approval *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1471-1472 (4th Cir. 1996):

> "We find *Coyne* persuasive and factually analogous to this case. Along with the other cases cited above, it supports the conclusion that plaintiff's claim is not preempted." (*Id.*, 676, Appendix, p.7.)

The District Court Decision additionally notes that the weight of authority holds that where a plaintiff lacks standing under ERISA, ERISA cannot preempt the plaintiff's claim. (*Id.*, 677, Appendix, p. 8.) The District Court Decision notes that Barbara Bertoni:

> "[c]ites *Miller v. Rite Aid Corp*., 504 F.3d 1102, 1106 (9th Cir. 2007) which plainly holds that:
>
> ERISA does not preempt the claims of parties who do not have the right to sue under ERISA because they are neither participants in nor beneficiaries of an ERISA plan." (*Id.*, 677, Appendix, p. 8),(citing and quoting with approval *Miller*, *supra*, 1106.)

The District Court Decision concludes that, where there is no standing, there is no ERISA preemption. (*Id.*, 678, Appendix, p. 10).[3]

The District Court Decision concludes that Barbara Bertoni's action in this case does not relate to an ERISA plan and is thus not preempted by ERISA. (*Id.*, 678, Appendix, p.10.)

[3] The District Court Decision also notes that this has the virtue of being an easy line to draw – no standing, no preemption. (*Id.*, 678, Appendix, p. 10.)

The District Court Decision accords with and does not conflict with the decisions cited by Stock.

In *Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842 (Fla., 2003) this Court held that a common law medical malpractice claim against member physicians of an HMO did not relate to an ERISA plan. *Id.*, 846. This Court held that ERISA did not preempt Villazon's vicarious liability claim. *Id.*, 856, n. 12.

In *Bradshaw v. Ultra-Tech Enterprises, Inc.*, 247 So.2d 1008 (Fla. 2nd DCA, 1999) a retiree, Bradford, alleged "[a] claim for benefits under retirement plans governed by ERISA." *Id.*, 1009 (Emphasis added), (affirming dismissal and remanding to allow Bradford to attempt to state a cause of action for benefits unrelated to an ERISA plan).

Because *Frappier v. Wishnov, D.O.*, 678 So. 2d 884 (Fla. 4th DCA, 1996), is a decision by the same court of appeal as in the present action, *Frappier* cannot form the basis for a conflict of decisions.[4] In any event, *Frappier* is in accord with the present case, because the plaintiff in *Frappier* challenged the manner in which the health plan benefits were dispensed by the HMO. *See Frappier, supra*, 885. The

[4]"Subdivision (a)(2)(A)(iv) represents the most radical change in the supreme court's jurisdiction. . . . The new article also terminates supreme court jurisdiction over purely intradistrict conflicts, the resolution of which is addressed in rule 9.331." Rule 9.030 Fla. R. App. P., Committee Notes, 1980 Amendment.

challenge to how well or poorly the plan arranged for the benefits to be provided – which were in fact provided – was held preempted. *Id*., 887. In contrast, in *Frappier* the alleged cause of action against the HMO for the medical malpractice of its physicians escaped ERISA preemption. *Id*., 888.

Additionally, the District Court Decision in the present action accords with *Hiller v. Wachovia Corp.*, 2008 WL 4938424 (S.D. Fla., Nov. 18, 2008) (remanding the case to the Fifteenth Judicial Circuit in and for Palm Beach County, Florida). Georgia Hiller, individually and as personal representative of the estate of Anthony Hiller, deceased, alleged claims for negligence, breach of contract, and accounting, all under Florida state law. *Id*, *1. Hiller claimed that Wachovia failed to give Anthony Hiller, deceased,

the opportunity to enroll for certain insurance benefits. The federal district held that Hiller's "[c]ommon law claims are not preempted by ERISA." *Id.*, *1.

Like Bertoni's claim here, Hiller's claims "[d]o not seek to enforce the terms of any ERISA-covered plan." Id.*1. Hiller's damage might be measured against what a plan would have provided, but that is not enough for preemption. Id., *1. "Plaintiff's state law claims have not been preempted by ERISA." Id., *1.

CONCLUSION

Barbara Bertoni respectfully requests this Court to deny the exercise of its discretionary jurisdiction in the present action. The District Court Decision does not conflict with any decision of another district court of appeal or of this Court. Pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., this Court's discretionary jurisdiction cannot be invoked in the present action.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail to: Juan C. Enjamio, Esq., counsel for Defendants/Petitioners, Hunton & Williams, LLP 1111 Brickell Avenue, Suite 2500, Miami, FL 33131; A. Todd Brown, Esq., counsel for Defendants/Petitioners, Hunton & Williams, LLP, Bank of America Plaza, Suite 3500, 101 S. Tryon Street, Charlotte, NC 28280 and John F. Romano, Esq., counsel for Plaintiff/Respondent, P.O. Box 21349, West Palm Beach, FL 33416-1349 this 2nd day of December, 2008.

s/Paul M. Sullivan, Jr.
PAUL M. SULLIVAN, JR.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

s/Paul M. Sullivan, Jr.
PAUL M. SULLIVAN, JR.