

IN THE SUPREME COURT
STATE OF FLORIDA

CASE No. 93,038

MICHAEL JON DiPIETRO and MYRA DiPIETRO, a/k/a MYRA BELLIO,
a/k/a MYRA J. CHANDLER, a/k/a MYRA LaPOINT,
a/k/a MYRA NO LAST NAME, a/k/a MYRA,

Petitioners,

v.

DAVID GRIEFER and ANN GRIEFER, his wife, as Guardians of the
Person and Property of LAUREL B. GRIEFER, an Incompetent,

Respondents.

RESPONDENTS' AMENDED REPLY BRIEF ON CROSS-REVIEW

ON REQUEST FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

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REFERENCE TO SYMBOLS USED IN THIS BRIEF

The record will be referenced with the same symbols used in the Griefers' initial brief.

The Griefers' answer brief and initial brief on cross-review will be referenced as "Griever ___."

DiPietro's reply brief and answer brief on cross-review will be referenced as "DiPietro ___."

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is "CG Times," 14 point.

SUMMARY OF ARGUMENT

There is an independent ground for reversing the liability trial. Although not reached by the District Court, it was error for the successor judge to conclude a trial proceeding in which he heard no evidence, saw no witnesses, and was unfamiliar with the record.

ARGUMENT

The Griefers' post-trial motion in this case had called into question evidentiary rulings made during the course of trial, assailed the jury's verdict as being against the manifest weight of the evidence, and criticized the entry of a final judgment by a successor judge who had seen no witness testify, heard no evidence, and admitted his complete unfamiliarity with the case. (Griefer at 8). Worse, the predecessor judge who *had* heard the evidence, *had* seen the witnesses, and had guided the jury to their verdict, had recused himself in recognition of the fact that he had conveyed to the jury in its closing phases "vivid and negative facial expressions showing disbelief, incredulity, humor and disapproval . . . of [the Griefers'] case." (R:2 at 213-18, 338). The motion for a new trial was denied by the successor judge who proceeded to enter a final judgment. The Griefers raised the denial of their motion for a new trial as a point on appeal to the Fourth District, but the court did not reach that issue in light of the other more blatant errors which were held to require a new trial.

On cross-review, the Griefers contend that a successor judge has no legal authority to conclude an unfinished jury trial by entering a final judgment and denying a motion for new trial under the circumstances outlined above. The Griefers contend that the successor judge's actions provide an independent reason to sustain the district court's reversal of the final judgment with a remand for re-trial. (Griefer 46-49).

DiPietro initially suggests that this issue is questionably before the Court since the appellate rules provide no “cross-review” authority (DiPietro 13), but the propriety of the post-trial rulings by the successor judge in this case is very properly before the Court. The procedural propriety of the issue is not dependent on the Griefers’ having filed a cross-notice to invoke the Court’s jurisdiction. Such a notice could only have been filed if the issue presented an express and direct conflict of appellate decisions, of course, and this issue cannot meet that constitutional threshold because there was nothing on the point expressed in the district court’s decision: the court never rendered a “decision” on the actions taken by the successor trial judge.

It is properly before the Court, however, because *DiPietro* made it an issue when he went beyond his own “notice to invoke” to request that the Court review evidentiary rulings that were made in the trial court proceeding. To the extent DiPietro has authority to ask for plenary review of non-“conflict” issues, *all* issues before the district court are before this Court. (Griefer 11-12). That is not to say that the Court should consider any of DiPietro’s non-conflict issues, however, since none of them is in any way related to the prejudgment interest issue which the Court did tentatively agree to review.

On the merits of the successor judge issue, DiPietro argues six points: (i) that the Griefers’ motion for recusal was untimely; (ii) that the Griefers improperly gambled on the outcome of jury deliberations before filing their motion to recuse as a matter of trial tactics; (iii) that the factual allegations of the motion to recuse were not concessions of bias; (iv) that recusal of the predecessor judge for cause should not be deemed to require the new trial which the district court has ordered; (v) that the Griefers never objected to the actions taken by the successor judge; and (vi) that in any event the successor judge did have authority to conclude the proceeding with a post-trial ruling and the entry of

a final judgment. For a host of reasons, these arguments provide no basis for the Court to avoid sending the case back for re-trial.

DiPietro's arguments concerning the motion to recuse — that it was untimely, tactical and without legal effect — are irrelevant here and unavailable for consideration by the Court. DiPietro did not cross-appeal to the district court the timeliness or legality of the trial court's recusal, or the sufficiency of the Griefers' motion to recuse. Judge Moe's recusal came to the Fourth District as an unchallenged legal conclusion, based on the undisputed facts which prompted the recusal. There is no basis for allowing a challenge to that legal conclusion now.

The recusal motion was very definitely timely, coming within 5 days of the trial-tainting actions taken by Judge Moe during the *concluding* phases of the trial. (Griever 47, n.32). DiPietro's claim that recusal was a "trial tactic," because the motion was filed after the jury rendered its verdict, is nonsensical. The 5-day interval between the advent of the judicial misconduct and the filing of the motion can hardly be considered a "lie in wait" tactic. The judge, not the Griefers, chose to misbehave before the jury in the concluding phase of the trial. This situation in no way compares with the authorities on tactical delay which DiPietro has mustered — one decision from the Second Circuit Court of Appeals, and one from the Pennsylvania Supreme Court. (DiPietro 17-18).

DiPietro's contention that the Griefers failed to object to rulings by the successor judge is not well taken. The successor judge's impermissible post-trial rulings were a separate, independent ground for reversal in the Fourth District, and the successor judge's authority to rule was in fact argued in post-trial hearings. DiPietro's counsel expressed serious doubt that the successor judge could "review a trial that Your Honor didn't sit in. . . . I just don't think that's proper." (T:7:5/6/96 at 23-24). *And see* T:7:5/6/96 at 25 (DiPietro's counsel

citing “case law . . . that it is in very rare situations that a subsequent judge can make rulings on motions for new trial”); T:7:5/6/96 at 28.

DiPietro argues that a successor judge has the authority to rule on post-trial motions and to revisit interlocutory rulings of the predecessor, and that the jury, not the predecessor judge, was responsible to weigh the evidence. None of these arguments come to grips with the problem in this case. It is pertinent here to note that although the Griefers provided the successor judge with copies of some of the material comprising the trial record (R:2 at 239-94), no full transcript of the trial proceeding was available to the court. (R:7:5/6/96 at 20, 23, 25, 29, 32).

The Griefers’ motion for a new trial suggested it was error for the predecessor judge to exclude one expert witness entirely and to foreclose rebuttal testimony by another. (R:2 at 220-35). It also asserted that the jury’s verdict was against the manifest weight of the evidence. (R:2 at 219). These issues called for a complete record review, with *the trial court* having direct responsibility to evaluate the weight of the evidence in order to rule on the new trial motion. *E.g., E.R. Squibb & Sons, Inc. v. Farnes*, 697 So. 2d 825, 826 (Fla. 1997) (when evaluating a motion for new trial alleging the verdict is against the manifest weight of the evidence, the trial judge must necessarily consider the credibility of the witnesses along with the weight of all of the other evidence) (citation omitted); *e.g., National Healthcorp Limited Partnership v. Cascio*, 1998 WL 904101 at 4 (Fla. 2d DCA 1998) (record review by a successor judge is required for a new trial motion alleging the jury’s verdict is against the manifest weight of the evidence). This case is like *Anders v. Anders*, 376 So. 2d 439 (Fla. 1st DCA 1979), in which there was no effective post-trial ruling by the predecessor judge and a successor judge was obliged to enter final judgment and act on a motion for rehearing. The district court reversed the final judgment,

holding that “in effect, *no decision* has been made in this case,” and that the successor judge was required to conduct a *de novo* hearing. (Emphasis supplied).

Without a transcript of a trial he never heard, the successor judge could not possibly have discharged his duty to pass on the issues presented in the motion. *Wohlfiel v. Morris*, 122 So. 2d 235, 237 (Fla. 2d DCA 1960) (successor judge’s action on a motion for new trial reversed for lack of record review) *citing*, *Wolkowsky v. Goodkind*, 153 Fla. 267, 14 So. 2d 398, 401 (Fla. 1943) (when a successor judge acts on a motion for new trial, he or she must rely on the written record). Judge Reasbeck admitted he did not have the relevant information,¹ but he nonetheless declined to postpone his decision until he could undertake a complete review of the trial transcripts. (R:7:5/6/96 at 34).

The cases identified by DiPietro as authorizing post-trial rulings by a successor judge are not relevant in the circumstances of this case. *Leibovit v. Garfunkel*, 68 Fla. 463, 67 So. 98 (Fla. 1914), did not involve jury-tainting conduct of such gravity that the predecessor judge stepped out of the case. *General Hospital of Greater Miami, Inc. v. Gager*, 160 So. 2d 749 (Fla. 3d DCA), *cert. denied*, 168 So. 2d 145 (Fla. 1964), involved a successor judge who came in after the presiding judge had entered judgment on a jury’s verdict, and then “read the record with great particularity.” *Id.* at 750-51. Although the successor judge’s grant of a new trial was reversed on appeal, the district court

¹ In the post-trial hearings, Judge Reasbeck made comments which displayed his utter unfamiliarity with the case and issues presented. (R:7:5/6/96 at 2 “[w]hose motion?”; at 2 “[w]hat’s the case about?”; at 7-8 “[t]his is the expert we are talking about?”; at 13 “I take it you haven’t appealed yet?”; and at 14 “[w]hat do you mean, you tried it the second time?”).

did not question the successor judge's authority to rule after a full record review. *Id.* at 751.

Otis Elevator Co. v. Gerstein, 612 So. 2d 659 (Fla. 3d DCA 1993), was a mandamus proceeding which directed a successor judge to rule on post-trial motions following entry of a judgment by his predecessor. That case involved a judicial decision which the successor judge could review, unlike the situation here. This situation is more akin to that in *Bradford v. Foundation & Marine Construction Co., Inc.*, 182 So. 2d 447, 449 (Fla. 2d DCA), *cert. denied*, 188 So. 2d 821 (Fla. 1966), which held that a "successor judge cannot render verdict or judgment without a trial de novo, unless upon the record by stipulation of the parties." (Citations omitted). DiPietro has not even attempted to address the reasoning of *Bradford*. Similarly, he offers no reason to distinguish *Beattie v. Beattie*, 536 So. 2d 1078 (Fla. 4th DCA 1988), in which the court held that "a successor judge may not enter an order or judgment based upon evidence heard by the predecessor."

The defining feature of this case, which differentiates it from all other precedent, is the prejudicial effect of Judge Moe's conduct on the jury's verdict. Unlike all other cases, no weight could be given to a jury verdict procured through a process tainted with acknowledged judicial misconduct. *Cf. Sears Roebuck and Co. v. Polchinski*, 636 So. 2d 1369 (Fla. 4th DCA), *review denied*, 648 So. 2d 724 (Fla. 1994) (new trial required due to ex-parte communications between the judge, bailiff and jury).

CONCLUSION

The Court need not reach the impropriety of Judge Reasbeck's denial of the Griefers' post-trial motion, and the entry of a final judgment, unless it elects to entertain DiPietro's request for plenary review of issues other than the one on

which conflict review was accepted. Inasmuch as the issues raised by DiPietro are unrelated to the alleged conflict issue and present no policy question of statewide import, none of these collateral issues commend the Court's attention.

This cross-review issue must be reached, however, if the Court goes beyond the conflict issue. In that circumstance, the Court is respectfully requested to hold that the post-trial rulings of Judge Reasbeck were legally impermissible, and that the Fourth District's reversal and remand for a new trial was warranted on this independent basis.

Respectfully submitted,

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