ORIGINAL

SUPREME COURT OF FLORIDA

Case No. SCOO-2 19

L.T. Case No. 5D99-2899

Fla. Bar No. 765960

ENTERPRISE LEASING COMPANY,

Petitioner,

VS.

JOSIAH NATHANIEL DOUGLAS JONES,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS AND APPENDIX

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And
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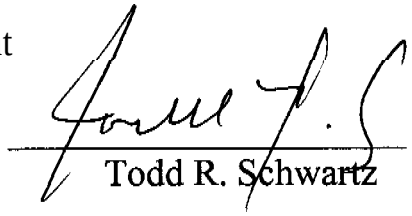
CERTIFICATE OF INTERESTED PERSONS

Counsel for the Respondent, Josiah Jones, certifies, that to the best of his information, knowledge and belief, the following persons and entities have or may have an interest in the outcome of this case:

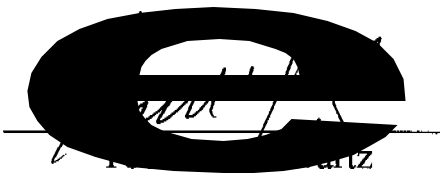
1. Enterprise Leasing Company, Petitioner
2. Kenneth L. Bednar, Esquire, Counsel for Petitioner
3. Bradley W. Sinclair, Esquire, Counsel for Respondent
4. John N. Hamilton, Esquire, Counsel for Respondent
5. Robin A. Blanton, Esquire, Counsel for Howard Steven Schwartz, Co-Defendant
6. George W. Maxwell, III, as Circuit Court Judge of the Eighteenth Judicial Circuit
7. Ginsberg & Schwartz, Counsel for Respondent
8. Todd R. Schwartz, Counsel for Respondent
9. Nance, Cacciatore & Hamilton, Counsel for Respondent
10. Josiah Nathaniel Douglas Jones, Respondent
11. Shevon Shedore Douglas Jones, Respondent's minor child
12. Howard Steven Schwartz, Co-Defendant



Todd R. Schwartz

STATEMENT OF COMPLIANCE

Undersigned counsel certifies that this brief has been typed in 14 point Times Roman and complies with the Administrative Order of this Court entered on July 13, 1998.



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LIST OF CITATIONS AND AUTHORITIES

CITATIONS

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

This is an automobile negligence case arising out of a collision which rendered Respondent, Josiah Jones, quadriplegic. (R.55) Jones sued the lessee-operator of the offending vehicle, Howard Schwartz, and the lessor-owner, Petitioner Enterprise, for his injuries. (R.56-8) The case was specially set for trial by jury on November 15, 1999 before the Honorable George W. Maxwell, III. (R.61)

Pursuant to the court's pre-trial order, the parties were required to file pre-trial statements disclosing trial witnesses and exhibits, identifying those issues agreed to and those which remained to be tried, and other information including whether a settlement demand had been made by Jones, whether a counteroffer had been made by defendants, and the perceived likelihood of a settlement being reached. (R.59-6 1) In his response, Jones noted his demand of $12,000,000, Enterprise's counteroffer of $1 ,OOO,OOO, and, accordingly, of the "poor" prospect of settlement of this case. (Petitioner's Appendix, at tab A, p.7)

On October 8, 1999, Enterprise moved to disqualify the assigned trial judge based upon Jones' filing. (Id., at tab B) Enterprise's motion and accompanying affidavit did not allege that the trial judge discussed or commented upon (or even reviewed) Jones' settlement demand or Enterprise's counteroffer or that he

advocated a particular settlement of the case. (Id., at tabs B & E) Enterprise alleged only that Jones had reported his settlement demand and Enterprise's counteroffer. (Id.) The trial judge did not hold a hearing or pass upon the truth of Enterprise's motion. The court simply denied the motion as legally insufficient. (Id., at tab D)

Enterprise then petitioned the District Court of Appeal, Fifth District, for a writ of prohibition. (Id., at tab C) The Fifth District agreed with the trial court that Enterprise's motion to disqualify was legally insufficient and denied the petition. The court held that "[m]ere knowledge by the trial court of settlement offers, standing alone, should not place a reasonable person in fear of not receiving a fair trial." ENTERPRISE LEASING CO. v. JONES, 25 Fla.L.Weekly D57 (Fla. 5th DCA Dec. 23, 1999) (also found in Respondent's Appendix hereto).

At the end of its opinion, the Fifth District certified conflict with FABBER v. WESSEL, 604 So.2d 533 (Fla. 4th DCA 1992), rev. den., 617 So.2d 322 (Fla. 1993). 25 Fla.L.Weekly at D58 [Respondent's Appendix, at p.2]. Enterprise then filed a notice to invoke this Court's discretionary jurisdiction, (R.84-5) This Court postponed a decision on (conflict) jurisdiction and set a merits briefing schedule. (R. 86)

SUMMARY OF ARGUMENT

The Fifth District applied the correct standard for judicial disqualification and correctly denied Enterprise's petition for prohibition in this case. §38.10, Fla.Stat. (1999), governs the disqualification of judges in Florida, and requires an affidavit of the party seeking disqualification stating facts which tend to show personal bias or prejudice on the part of the trial judge that would place a reasonably prudent person in fear of not receiving a fair and impartial trial. In the instant case, neither Enterprise's motion nor its accompanying affidavit alleged any such actual bias or prejudice on the part of the trial judge. In fact, Enterprise alleged no action or statements by the trial judge at all. Its filings stated only that Jones disclosed his monetary demand and Enterprise's counteroffer to the court. Pursuant to the disqualification statute and the settled decisional law interpreting it, same was legally insufficient to authorize disqualification.

The Fourth District's decision in FABBER v. WESSEL, 604 So.2d 533 (Fla. 4th DCA 1992), rev. den., 6 17 So.2d 322 (Fla. 1993), establishes no jurisdictional conflict. In FABBER, one of the petitioner's grounds for disqualification was that the trial judge had demonstrated his partiality by assisting the petitioner's adversary in a contested hearing. In his response filed in the district court, the trial judge took exception with the accuracy of the

petitioner's factual account on this issue. The Fourth District accordingly held that the judge's response had the effect of creating an intolerable adversarial atmosphere between judge and litigant mandating disqualification.

It is true the FABBER court agreed with the petitioner's additional contention that, even absent any particular bias or prejudice, the mere fact of mediation disclosure establishes an unavoidable presumption of contamination of the neutrality of the judge who heard or read the disclosures requiring disqualification as a matter of law. This statement was unnecessary to the court's decision, however, and in any event, most respectfully, reflects a misinterpretation of the settled standards for disqualification.

Should this Court choose to reach the issue in this case, Jones respectfully submits that the Fifth District's opinion is correct and should be approved and the Fourth District's contrary dicta in FABBER should be disapproved and overruled.

ARGUMENT

THE FIFTH DISTRICT APPLIED THE CORRECT STANDARD FOR JUDICIAL DISQUALIFICATION AND CORRECTLY DENIED ENTERPRISE'S PETITION FOR PROHIBITION IN THIS CASE.

§38.10, Fla.Stat. (1999), governs the disqualification of judges in Florida. That section provides, in pertinent part:

> Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the preiudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of the state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or preiudice exists....
>
> [emphasis supplied]

The judge against whom such an averment is directed is obliged to determine its "legal sufficiency." Rule 1.432(d), Fla.R.Civ.P. While all facts asserted by the movant must be accepted as true, the standard for determining legal sufficiency is an objective one. The test is "whether the facts alleged would place a ***reasonably prudent person*** in fear of not receiving a fair and impartial

trial." MACKENZIE v. SUPER KIDS BARGAIN STORE, INC., 565 So.2d 1332, 1335 (Fla. 1990) (emphasis the Court's), quoting LIVINGSTON v. STATE, 441 So.2d 1083, 1086 (Fla. 1983). And although the subject judge's perception of his or her ability to act fairly and impartially and his or her actual prejudice vel non are irrelevant to the inquiry, consistent with the disqualification statute the facts and reasons given by the movant for its belief in bias or prejudice must tend to show personal bias or prejudice on the part of the trial judge in order to be legally sufficient. See SUAREZ v. STATE, 115 So. 5 19 (Fla. 1928); LEVINE v. STATE, 650 So.2d 666, 667 (Fla. 4th DCA 1995)("To determine the legal sufficiency of a motion for judicial disqualification based on prejudice, the test is whether the motion demonstrates a well-founded fear on the part of the party that he will not receive a fair trial at the hands of the trial judge...Further, the facts and reasons given must tend to show personal bias or prejudice." [the court's citations omitted]); JACKSON v. STATE, 599 So.2d 103, 107 (Fla. 1992)("A motion to disqualify must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy."), cert. den., 506 U.S. 1004 (1992); RIVERA v. STATE, 7 17 So.2d 477, 480- 1 (Fla. 1998)(same); DAVIS v. BAT MANAGEMENT FOUNDATION, INC., 723 So.2d 349,350 (Fla. 5th DCA 1998)("Ms. Davis also argues that the trial court erred in denying her motion to

disqualify as being legally insufficient...This ruling was also correct because Ms. Davis' motion failed to specifically describe any prejudice or bias on the part of the trial court, and instead, merely cited to the fact that the trial court had denied Ms. Davis' motion for summary judgment.").

It is axiomatic in this context that a trial judge is not required to abstain from forming mental impressions and opinions in the course of a case or even prejudices, and disqualification is unauthorized on such grounds even where the judge's overt conduct or words might tend to support such accusations. See e.g. RAGSDALE v. STATE, 720 So.2d 203 (Fla. 1998); RIVERA v. STATE, 7 17 So.2d 477 (Fla. 1998); MOSER v. COLEMAN, 460 So.2d 385 (Fla. 5th DCA 1984), rev. den., 467 So.2d 1000 (Fla. 1985); MOBIL v. TRASK, 463 So.2d 389 (Fla. 1st DCA 1985); NATEMAN v. GREENBAUM, 582 So.2d 643 (Fla. 3d DCA), rev. dism., 591 So.2d 183 (Fla. 1991). As this Court observed and concluded in NICKELS v. STATE, 86 Fla. 208, 98 So. 497,502 (Fla. 1923):

> If having an opinion as to the guilt or innocence of an accused person on trial would disqualify a judge, no judge could well try the same case twice. Such was not the purpose of the statute. It is in derogation of the common law, and was designed to secure for accused persons and litigants in civil cases trials by judges against whom the charge could not be reasonably made that by reason of some fact germane to the proceedings, or relating to the transaction, the judge's sympathy, bias, or prejudice was unduly created against the movant. It

> was not intended by the statute to put it within the power of a person accused of crime or a litigant who was disinclined to come to trial to defeat justice and procure delays by arbitrarily asserting his belief in the judge's unfairness without any supporting fact to sustain it. The affidavits were insufficient under the statute, and failed of their purpose.

In the instant case, Enterprise sought to recuse the trial judge a month before trial. Neither its motion nor its accompanying affidavit exposited, however, any actual bias or prejudice on the part of the judge. In fact, Enterprise alleged no action or statements by the trial judge at all. Its motion and affidavit stated only that Jones disclosed his monetary demand and Enterprise's counteroffer and that "Enterprise objectively believes that it cannot be heard fairly and impartially by this court due to the obvious bias and prejudice arising" therefrom. (Petitioner's Appendix, at tab E) Pursuant to the disqualification statute and the above settled decisional law, the trial court rightly denied Enterprise's motion as legally insufficient.[1]

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[1] As the facts alleged in Enterprise's motion and supporting affidavit were required to be accepted as true, Jones does not belabor here his vehement disagreement with Enterprise's suggestion that his settlement demand was made at mediation or that Enterprise's counteroffer first discussed at mediation was intended to remain confidential and was not freely and openly discussed

Enterprise advocates that a trial court's mere knowledge of settlement overtures requires automatic disqualification. This cannot and should not be the law. Settlements are the favored method of resolution, ROBBIE v. CITY OF MIAMI, 469 So.2d 1384 (Fla. 1985), and Rule 1.200(a)(7) and (b)(5), Fla.R.Civ.P., expressly authorize trial courts to ""pursue the possibilities of settlement" at case management and pretrial conferences. This is precisely what informed the court's pre-trial disclosure order and Jones' response in the instant case.

While untoward judicial comment or advocacy in settlement negotiations may tend to invite grounds for disqualification, see EVANS v. STATE, 603 So.2d 15 (Fla. 5th DCA 1992), and ANNOTATION: PROPRIETY AND PREJUDICIAL EFFECT OF SUGGESTION OR COMMENTS BY JUDGE AS TO

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thereafter. (See e.g. R.63-8, and Petitioner's Appendix, at tab G, pp.78 [wherein Judge Maxwell, at a subsequent hearing following his recusal at Jones' request in order to obviate any further delays or unsubstantiated claims by Enterprise of judicial bias, confirmed the factual inaccuracy of Enterprise's contentions in this case and opined that the concurring opinion -- not the Fifth District's majority opinion as Enterprise erroneously asserts (Amended Initial Brief, at 12) -- was factually misplaced and thus ill-advised.])

COMPROMISE OR SETTLEMENT OF CIVIL CASE, 6 A.L.R. 3d 1457 (1966) (collecting numerous cases holding that disqualification may be inappropriate even where tial judge comments upon or participates in settlement negotiations), a jurist's mere knowledge of settlement offers, standing alone, cannot place a "reasonably prudent person" in fear of not receiving a fair and impartial trial. See KEPPEL v. BAROSS BUILDERS, INC., 509 A.2d 51 (Conn. Ct. App. 1986)(acting judge not required to disqualify himself from case pursuant to Connecticut disqualification statute substantially identical to Florida's merely after hearing plaintiffs' demand and defendant's counter-offer of settlement); HUDSON v. HUDSON, 600 So.2d 7 (Fla. 4th DCA 1992)(principally relied upon by Enterprise here)(former wife's introduction in dissolution trial of mediation communications, including settlement negotiations and proposed agreement, required vacation of judgment and new trial, but before same judge!).

Trial courts are frequently called upon to enforce and set aside settlements, thereby requiring disclosure of their terms. Recusal is unauthorized in those instances where settlements are litigated but, for whatever the reason, do not end the litigation in turn necessitating further judicial involvement. See e.g. HARRIS v. P.S. MORTGAGE AND INVESTMENT CORP., 558 So.2d 430 (Fla. 3d DCA 1990) (trial judge's prior ex parte order erroneously approving settlement did not

entitle aggrieved party to disqualification of judge); HUDSON supra (introduction of mediation settlement required new trial, not disqualification).

Taken to its logical extreme, Enterprise's construct would require disqualification every time a trial judge is called upon to make in limine rulings concerning a plaintiff's prior settlement with a co-defendant or non-party, a litigant's DUI or other criminal history, or his or her personal habits, religious beliefs or sexual preferences. None of those prejudicial facts will generally be admissible in a civil jury trial, but a trial judge must necessarily become apprised of them in the course of a proceeding. That mere apprisal should not support recusal, else the statutory disqualification exception swallows the common law rule. Cf. MOSER v. COLEMAN, 460 So.2d 385, 386 (Fla. 5th DCA 1984)(fact that judge had heard some of the evidence and had expressed an attitude regarding the guilt of probationer at preliminary warrant hearing held not a ground for disqualification: "Many times this court sends cases back for a new trial, either by judge or jury. That does not mean the reversed judge must recuse himself because he has already determined the matter. This would be especially true in the very sensitive circumstances regarding the allocation of assets, provision of support and award of custody and residency in marriage dissolution cases. There is nothing in this record, as minimal as it is, to indicate any bias, prejudice or ill-will on the part

of the judge."), rev. den., 467 So.2d 1000 (Fla. 1985); JACKSON v. STATE, 599 So.2d 103 (Fla. 1992)(trial judge not disqualified from presiding over defendant's fifth murder trial notwithstanding judge's entry of two prior convictions since reversed), cert. den., 506 U.S. 1004 (1992).

Enterprise relies principally upon the Fourth District's decisions in HUDSON v. HUDSON, 600 So.2d 7 (Fla. 4th DCA 1992) and FABBER v. WESSEL, 604 So.2d 533 (Fla 4th DCA 1992), rev. den., 617 So.2d 322 (Fla. 1993), and the Third District's decision in ROYAL CARIBBEAN CORP. v. MODESTO, 614 So.2d 5 17 (Fla. 3d DCA 1993), in support of its position, As noted above, however, HUDSON was not a disqualification case, but rather reversed a domestic relations decree and remanded the cause for a new non-jury trial before the same trial judge following the judge's erroneous admission into evidence of the parties' confidential mediation communications. This was eminently correct since the mediation statute, §44.102(3), Fla.Stat. (1999), expressly provides that such matters "shall be...inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise." Same informed the court's holding "that the well was poisoned by the admission of the foregoing evidence of the 'agreement' and so infected the judgment reached that it should be vacated and the matter tried anew." 600 So.2d at 8.

FABBER is also readily distinguishable. In FABBER, one of the petitioner's grounds for disqualification was that the trial judge had demonstrated his partiality by assisting the petitioner's adversary in a contested hearing. In his response filed in the district court, the trial judge took exception with the accuracy of the petitioner's factual account on this issue. 604 So.2d at 534. The Fourth District accordingly held that the judge's response had the effect of creating an intolerable adversarial atmosphere between judge and litigant mandating disqualification. Id.

It is true the FABBER court agreed with the petitioner's additional contention that, even absent any particular bias or prejudice, the mere fact of mediation disclosure establishes an unavoidable presumption of contamination of the neutrality of the judge who heard or read the disclosures and requires disqualification as a matter of law, and the court commented that its earlier decision in HUDSON seemed to support such contention. 604 So.2d at 534. This statement was unnecessary to the court's decision, however, see CIONGOLI v. STATE, 337 So.2d 780 (Fla. 1976)(dicta establishes no jurisdictional conflict), and in any event, most respectfully, reflects a misreading of HUDSON and a misinterpretation of the settled standards for disqualification.

ROYAL CARIBBEAN, like HUDSON, was also not a disqualification case.

The ROYAL CARIBBEAN court simply mentioned HUDSON and FABBER (with the introductory signal "Cf.") in explaining its affirmance of a trial court order refusing to enforce an alleged oral settlement reached at mediation and quashing a subpoena served upon the mediator. 6 14 So.2d at 5 19.

Trial judges are, first and foremost, experienced lawyers. They well understand the risks of going to trial before a jury and the practical reasons for offering to compromise a case out of court. In a catastrophic injury case like this one, what ordinarily might be considered a substantial settlement offer by the defendant indicates here, at worst, a belief by Enterprise that Jones' claim has only nuisance value. Enterprise alleged no requisite actual bias or prejudice on the part of the trial judge to support disqualification and to further delay the trial of this cause. The opinion of the Fifth District was correct and should be affirmed.[2]

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[2] Jones has not overlooked Enterprise's new and unauthorized prayer for relief in this Court for a change of venue or the striking of Jones' pleadings (Amended Initial Brief, at pp. 13-14), now that Jones and the originally assigned trial judge (through voluntary recusal) have removed disqualification as a vehicle for further delay. (Petitioner's Appendix, at tab G) Tellingly, Enterprise never requested such relief either in its original motion for disqualification in the trial court or in its prohibition petition in the district court. (Id., at tabs B and C) Its

CONCLUSION

For the foregoing reasons and upon the authorities cited, Respondent, Josiah Jones, respectfully urges this Honorable Court to approve the order and opinion of the District Court of Appeal, Fifth District, in this case.

Respectfully submitted,

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conduct here only serves to highlight the importance of strict construction of the requirements of the disqualification statute so as to prevent its misuse: "It was not intended by the statute to put it within the power of a . ..litigant who is disinclined to come to trial to defeat justice and procure delays by arbitrarily asserting his belief in the judge's unfairness without any supporting fact to sustain it." NICKELS v. STATE, 86 Fla. 208, 98 So. 497,502 (Fla. 1923).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent has been furnished by U.S. Mail to counsel of record this 24th day of March, 2000:

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Appendix

IDA, DISTRICT SCHOOL BOARD OF PUTNAM COUNTY, FLORIDA, and ROBERTS LAND AND TIMBER COMPANY OF PALATKA, FLORIDA, Respondents. 5th District. Case No. 99-1608. Opinion filed December 23, 1999. Petition for Certiorari Review of Order from the Circuit Court for Putnam County, Stephen L. Boyles, Judge. Counsel: Michael W. Woodward of Keyser & Woodward, P.A., Interlachen, for Petitioner. Russell D. Castleberry, Palatka, for Respondent Board of County Commissioners of Putnam County, Florida. Edward E. Hecstrom, Palatka, for Respondents District School Board of Putnam County, Florida, and Roberts Land and Timber Company of Palatka, Florida.

(GOSHORN, J.) Putnam County Environmental Council, Inc. (PCEC) seeks certiorari review of an order of the circuit court dismissing PCEC's petition for writ of certiorari, which petition sought review of an order of the Putnam County Commission (County Commission) approving a special exception. We grant the petition for certiorari and quash the dismissal order.

The County Commission approved a decision of the Zoning Board granting an application for a special exception allowing the Putnam County School Board (School Board) to construct a school on a site owned by Roberts Land and Timber Company of Palatka (Landowner). PCEC sought certiorari review of the County Commission's decision in the circuit court. The circuit court orderedthe respondents-County Commissioners, School Board, and Landowner-to respond to the petition. The School Board and Landowner filed a motion to dismiss asserting that PCEC failed to include in the appendix to its petition portions of the record necessary for review of the actions of the County Commission. Specifically, these respondents objected to PCEC's failure to attach the transcript of the pertinent zoning board meeting. In a memorandum in opposition to the motion to dismiss, PCEC asserted that the record attached in the appendix to the petition was adequate to the determination of the issues presented.

The trial court held a hearing on the motion to dismiss, during which the transcript issue, PCEC's standing, and the merits of the petition were discussed. PCEC objected to the consideration of any issues outside those raised in the motion to dismiss, but this objection was overruled. The trial court entered an order dismissing the petition for writ of certiorari on the basis that PCEC did not have standing to challenge the special exception grant.

PCEC moved for rehearing asserting that the standing issue was not pled and PCEC had no notice or opportunity to be heard on that issue. Thecourt, onrehearing, vacated its previous dismissal order and entered a new order dismissing the petition. The court found that: 1) the decision of the County Commission was based on competent, substantial evidence; 2) the constitutional issue would not be determined because neither the state attorney nor the attorney general was Provided timely notice of the claim; 3) PCEC lacked standing to raise these issues and the issues of deficiencies in the site plan; and 4) the deliberations of the County Commission do not rise to the level to confer "enlarged standing on PCEC." PCEC contends the circuit court incorrectly applied the law and violated PCEC's due process rights by dismissmg the petition on grounds beyond those raised in the motion to dismiss and ruling on the merits of the petition in dismissing the petition.

We grant the petition for writ of certiorari. The basis of the motion to dismiss was the insufficiency of the appendix to the petition for the writ of certiorari. The court never ruled on that issue, but instead made findings of fact and ultimately dismissed the petitionon grounds not raised in the motion. PCEC had no notice or opportunity to fully argue these issues. It is a fundamental requirement of law and due process that a party be given adequate notice and an opportunity to be heard. The order granting dismissal after rehearing is quashed.

PETITION FOR WRIT OF CERTIORARI GRANTED; ORDER QUASHED. (SHARP, W. and GRIFFIN, JJ., concur,)

* * *

Judges-Disqualification-Motion for disqualification of trial judge on ground that judge bad been exposed to settlement negotiations occurring in context of mediation proceedings when counsel for plaintiffs revealed defendant's settlement offer to judge by including it in plaintiffs' pretrial compliance statement-Motion insufficient where there was no allegation of bias or prejudice on part of judge—Mere knowledge by trial judge of settlement offers, standing alone, should not place a reasonable person in fear of not receiving a fair trial-Conflict certified

ENTERPRISE LEASING COMPANY, Petitioner, v. JOSIAH NATHANIEL DOUGLAS JONES, ET AL., Respondents. 5th District. Case No. 99-2899. Opinion filed December 23, 1999. Petition for Writ of Prohibition, George W. Maxwell, III, Respondent Judge. Counsel: Kenneth L. Bednar of Arnstein & Lehr, West Palm Beach, for Petitioner. Todd R. Schwartz of Ginsberg & Schwartz, and Nance, Cacciatore and Hamilton, Miami, for Respondent.

(COBB, J.) Enterprise Leasing Company has petitioned for a writ of prohibition disqualifying the trial judge, George W. Maxwell, III, frompresiding mthe instant case because the latter was exposed to settlement negotiations occurring in the context of a mediation proceeding between Enterprise and the opposing party plaintiffs below.' This occurred when counsel for the plaintiffs revealed the defendant's settlement offer to Judge Maxwell by including ir in the plaintiffs' pre-trial compliance statement.

The petitioner relies on the Fourth District opinion in *Fabber v. Wessel*, 604 So. 2d 533 (Fla. 4th DCA 1992), *rev. denied*, 617 So. 2d 322 (Fla. 1993). There, it was held that the mere act of disclosure of such confidential negotiations, even in the absence of any particularized prejudice apart from the disclosure itself, "establishes an unavoidable presumption of contamination of the neutrality of the judge who heard or read the disclosure and, hence, disqualification is required as a matter of law." *Fabber* at 534.

The respondents, on the other hand, rely on the express language of section 38.10, Florida Statutes (1991) as requiring the supporting affidavit for disqualification to specifically state facts showing a basis for the belief that bias or prejudice exists on the part of the trial judge. That bias or prejudice, say the respondents, must be actual rather than presumptive. See. *e.g., Jackson v. State, 599 So.* 2d 103, 107 (Fla. 1992), *cert. denied, 506* U.S. 1004 (1992); *Davis v. Bat Management Foundation,* Inc., 723 So. 2d 349,350 (Fla. 5th DCA 1998); *Levine v. State,* 650 So. 2d 666,667 (Fla. 4th DCA 1995). In the instant case Enterprise does not allege any specific action or statements by the trial judge at all. Instead, Enterprise advocates that a trial court's mere knowledge of settlement overtures requires automatic disqualification.

We agree with the respondents that the motion for disqualification herein was insufficient as a matter of law. As the respondents observe, settlements are the favored method of resolution. *Robbie* v. *City of Miami*, 469 So. 2d 1384 (Fla. 1985). Mere knowledge by the trial court of settlement offers, standing alone, should not place a reasonable person in fear of not receiving a fair trial. As set forth in the response:

> Trial courts are frequently called upon to enforce and set aside settlements, thereby requiring disclosure of their terms. Recusal is unauthorized in those instances where settlements are litigated but, for whatever the reason, do not end the litigation in turn necessitating further judicial involvement. See e.g. *Harris v. P.S. Mortgage and Investment Corp., 558 So.* 2d 430 (Fla. 3d DCA 1990) (trial judge's prior ex parte order erroneously approving settlement did notenti tle aggrieved party to disqualification of judge); *Hudson* [v. *Hudson* 600 So. 2d 7 (Fla. 4th DCA 1992)] (mtroductioo of mediatidn settlement required new trial, not disqualification).
>
> Taken to its logical extreme, Enterprise's construct[ion] would require disqualification every time a trial judge is called upon to make in limine rulings concerning a plaintiffs prior settlement with a co-defendant or non-party, a litigant's DUI or other criminal history, or his or her personal habits, religious beliefs or sexual preferences. None of those prejudicial facts will generally be admissible in a civil jury trial, but a trial judge must necessarily become apprised of them in the course of a proceeding. That mere apprisal should not support recusal, else the statutory disqualification exception swallows the common law rule. Cf., *Moser* v. *Coleman,460* So. 2d 385, 396 (Fla. 5th DCA 1984) (fact thatjudge had heard some of the evidence and had expressed an attitude regarding the guilt of probationer at preliminary warrant hearmg held not a ground for disqualification: "Many times this court sends cases back for a new trial, either by judge or jury. That does not mean the reversed judge must recuse himself because he has already determined the matter. This would be especially true in the very sensitive circumstances regarding the allocation of assets, provision of support and award of custody and residency in marriage dissolution cases. There is nothing in this record, as minimal as it is, to indicate any bias, prejudice or ill-will on the part of the judge."), *rev. den., 467 So.* 2d 1000 (Fla. 1985); *Jackson v. State. 599 So.* 2d 103 (Fla. 1992) (trial judge not disqualified from presiding over defendant's fifth murder trial notwithstanding judge's entry of two prior convictions since reversed).

Accordingly, we deny the instant petition for prohibition. We certify conflict with *Fabber.*

PETITIONDENIED. (ANTOON, C.J. concurs. GRIFFIN, J., concurs specially, with opinion.)

[1]See section 44.102(3), Florida Statutes (1999), which provides in pertinent part:

Each party involved in a court-ordered 'mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding. All oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of Chapter 119 and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

(GRIFFIN, J,, concurring specially .) I agree with the conclusion of the majority that mere disclosure of settlement negotiations in violation of the mediation statute and rules is not sufficient to support disqualification, at least for civil jury cases like this one. In anon-jury case, the considerations are different because the judge is the fact-finder. See Hudson v. *Hudson*, 600 So. 2d 7 (Fla. 4th DCA 1992). It is not clear from the opinion whether *Fabber* was jury or non-jury.

There should be a remedy for this (apparently) blatant breach of confidentiality, however. Whether disclosure was wilful or negligent. the disclosing attorney should be disciplined, See Florida Standards for Imposing Lawyer Sanctions 4.2, 6.22, 7.0. If there is no lawyer discipline for such conduct, it will recur.

* * *

Civil procedure-Default-Vacation-Motion to set aside final default judgment on ground that defendant did not receive copies of filings in case after she filed her motion to dismiss-Where motion seeking relief consisted of unsworn representations of counsel, unsupported by proof showing any excusable neglect, and the only evidence before the court actually refuted representations, court abused discretion in granting motion to set aside final default judgment

POLYGRAM LATIN0 U.S., a Division of FOLYGRAM RECORDS, INC., a Delaware corporation, Appellant, vs. CRYSELL TORRES, individually, d/b/a V & C RECORDS, Appellee. 3rd District. Case No. 99-2298. L.T. Case No. 98-26923. Opinion filed December 29, 1999. An appeal from a non-final order from the Circuit Court for Dade County, Thomas S. Wilson, Judge. Counsel: Karen L. Stetson, for appellant. Pedro F. Mar-tell, for appellee.

(Before NESBITT, JORGENSON, and SORONDO, JJ.)

(NESBITT, J.) On June 4, 1999, a Final Default Judgment was entered against the defendant. On July 14, 1999, the defendant filed an Emergency Motion to Set Aside Final Default Judgment, which the court subsequently granted. We reverse.

In her Emergency Motion to Set Aside Final Default Judgment, the defendant claimed that she never received copies of anything filed in the case after she filed her initial Motion to Dismiss. She attributed this to the fact that the plaintiff was sending copies of the filings in envelopes that contained an incorrect Puerto Rico mailing address. Defendant submitted no evidence in support of this bare bones, unverified assertion. In fact, all of the evidence before the court showed that the defendant did in fact receive copies of the filings in the case. This included both a prior admission by the defendant, as well as a sworn affidavit from a member of the United States Postal Service in Puerto Rico which indicated that the defendant would have received all of the filings even if the address on the envelopes contained the errors that the defendant complained of.' Since the motion seeking relief consisted of merely unsworn to representations of counsel, unsupported by proof showing any excusable neglect, and the only evidence before the court actually refuted these representations, the lower court abused its discretion by granting the Motion to Set Aside Final Default Judgment. See *Vanguard Group, Inc. v. Vanguard Security, Inc., 409 So.* 2d 1219 (Fla. 3dDCA 1982); *Yu* v. *Weaver, 364* So. 2d 539 (Fla. 4th DCA 1978); *Cullaghan v. Callaghan, 337 So.* 2d 986 (Fla. 4th DCA 1976).

Accordingly, we reverse the order granting Defendant's Emergency Motion to Set Aside Final Default Judgment and remand with directions to reinstate the Final Default Judgment.

'This is because in spite of the mistake in address, the envelope contained enough correct information so as to assure successful delivery.

* *

Real property--Mortgages--Quiet &e-Where mortgagee made mortgage loan to party to whom property had been conveyed by recorded quitclaim deed, and grantor who conveyed property by quitclaim deed subsequently obtained default Judgment in action against grantee which set aside quitclaim deed, trial court did not err in quieting title in favor of mortgagee and setting aside prior default-Mortgagee was bona fide purchaser without notice of any alleged irregularities in public record chain of title, and it is protected from claims outside that chain of title

ROY HARDEMON, Appellant, vs. UNITED COMPANIES LENDING CORP., Appellee. 3rd District. Case No. 98-2935. L.T. Case No. 96-2207. Opinion filed December 29, 1999. An appeal from the Circuit Court of Dade County, Gisela Cardonne, Judge. Counsel: Roy Hardemon. in proper person. Moran & Shams and Brian J. Moran (Orlando), for appellee.

(Before JORGENSON, COPE, and FLETCHER, JJ.)

FLETCHER, Judge.) Roy Hardemon appeals from a final order and judgment quieting title in favor of United Companies Lending Corporation [United], We affirm.

Roy Hardemonand his girlfriend, lacquelyn Harris, purchased a home in 1992 as tenants in common. In 1994, Hardemon was incarcerated as a result of a violent domestic dispute with Harris, and Hardemon was subsequently charged with aggravated battery and attempted kidnapping. Hardemon allegedly proposed to Harris that she drop the criminal charges and pursue no further action and, in exchange, Hardemon would execute a quit claim deed to the property. Harris apparently agreed, for on the same day that Hardemon was released from county jail, he conveyed to Harris by notarized quit claim deed his one-half interest in the property . Harris dropped her complaint, the State nolle prossed all charges against Hardemon, and Harris recorded the deed in the public records m April 1994.

Nearly three months after the deed was recorded, United extended a loan to Harris secured by a first mortgage on the property . United performed a title search which revealed that Harris was the sole and exclusive record owner at the time. United recorded the mortgage. In June 1994, almost one month after the mortgage was recorded, Hardemon filed a suit against Harris (not joining United), and obtained a default judgment against Harris which set aside the quit claimdeed on Hardemon's claim that his signature was forged. Harris never contested the action.

The current action was initiated by United seeking to quiet title to the property. A non-jury trial included testimony from the notary that it was indeed Hardemon who signed the quit claim deed. The trial court (same judge that previously granted the default to Hardemon) entered a fmal order and judgment quieting title in favor of United, and set aside the previous default order *nunc pro tunc* to the date of its original entry. Hardemon has appealed this judgment.

Based on evidence presented to the trial court: United was a bona fide purchaser without notice of any alleged irregularities in the public record chain of title, and it is protected from claims outside that chain of title. See Section 695.01(1), Florida Statutes (1995); *see, e.g., Koschler v. Dean,* 642 So. 2d 1119 (Fla. 2dDCA 1994) (purchaser or mortgagee, dealing with the record owner of real property, , may rely on the chain of title found in official records in the absence of actual knowledge of an adverse unrecorded right). After a thorough review of the record, we can find no error below and affirm the judgment of the circuit court.

Affirmed.

* * *

Liens-Redemption-Civil procedure-Estoppel-Inconsistent positions-Where summary judgment had been entered requiring lienor, who had been omitted from mortgage foreclosure action, to exercise right of redemption, and appellate court reversed and remanded for trial court to set proper redemption amount, mortgagee could not, on remand, voluntarily dismiss action to compel redemption or satisfy and extinguish claim-Having elected to pursue remedy of forcing redemption, and having succeeded on that theory, mortgagee could not alter its course of action and assert inconsistent position

SECRETARY OF VETERAN AFFAIRS, Appellant, vs. JOSE TEJEDO, Appellee. 3rd District. Case No. 98-2113. L.T. Case No. 93-8705. Opinion filed