IN THE SUPREME COURT
STATE OF FLORIDA

ENTERPRISE LEASING COMPANY,

Petitioner,

vs.

JOSIAH NATHANIEL DOUGLAS JONES and SHEVON SHADORE DOUGLAS JONES, a minor, and HOWARD STEVEN SCHWARTZ,

Respondents.
_____/

Supreme Court
Case No: SC00-219

DCA Case No.: 5D99-2899

On Review of a Decision by the
Fifth District Court of Appeal

AMENDED INITIAL BRIEF OF PETITIONER, ENTERPRISE LEASING COMPANY

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Counsel for the Petitioner, ENTERPRISE LEASING COMPANY, certifies, that to best of their information, knowledge and belief, the following persons and entities have or may have a interest in the outcome of this case:

1. Enterprise Leasing Company, Petitioner
2. Kenneth L. Bednar, Esq., Counsel for Petitioner
3. Bradley W. Sinclair, Esq., Counsel for Plaintiffs
4. John N. Hamilton, Esq., Counsel for Plaintiffs
5. Robin A. Blanton, Esq., Counsel for Howard Steven Schwartz, Co-defendant
6. George W. Maxwell, III, as Circuit Judge of the Eighteenth Judicial Circuit

RESPECTFULLY SUBMITTED,

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IV. CERTIFICATE OF FONT

The size and style of type used in this Brief is 14 point arial.

V. ISSUES PRESENTED

A. DISCLOSURE OF ANY TERM OF A MEDIATION, IN DIRECT CONTRAVENTION OF THE MEDIATION STATUTE, ESTABLISHES AN UNAVOIDABLE PRESUMPTION OF CONTAMINATION OF THE NEUTRALITY OF THE JUDGE WHO HEARD OR READ THE DISCLOSURE.

B. THE FIFTH DISTRICT MISAPPLIED THE STANDARD OF PROOF REQUIRED UNDER THE JUDICIAL QUALIFICATION STATUTE.

VI. STATEMENT OF THE CASE AND FACTS

Petitioner is the corporate defendant in an automobile negligence case pending in the 18th Judicial Circuit (Brevard County). The Honorable George W. Maxwell, III was the circuit judge assigned to the case.[1] Mediation in this case was held pursuant to Florida Statutes § 44.102(3) 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. Notwithstanding the provisions of § 119.14, ***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 inadmissable as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

Fla. Stat. § 44.102(3) (1999) (emphasis added).

Enterprise attended the mediation through its authorized representative, Sarah Hall, and its attorneys of record, Kenneth L. Bednar and Eric A. Gordon. Based on the statutory mandate that any and all statements made during the mediation were confidential, Enterprise engaged in settlement negotiations.

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[1] Although the matter has apparently been recently re-assigned to another judge, the case remains in the same Judicial Circuit and the issue remains one of great public importance that should be settled by this Court. Art. V, § 3(b)(4), Fla. Const.

In direct contravention of the letter and spirit of the mediation statute, Plaintiffs' attorneys then unilaterally and gratuitously revealed to the trial court the substance of the mediation negotiations, including the specific amounts of money demanded and offered by the respective parties. (Appendix A).

In response to this blatant statutory violation, Enterprise filed a Motion to Disqualify Judge Maxwell, which was denied. (Appendix B). Enterprise then filed a Petition for Writ of Prohibition with the Fifth District Court of Appeal, requesting that Court to grant Enterprise's Motion to Disqualify. (Appendix C). The Petition for Writ of Prohibition was denied, although the Fifth District specifically certified that its decision conflicted with contrary law in the Fourth District. The strongly worded concurring opinion urged disciplinary action against Plaintiff's attorneys for their blatant breach of the confidentiality requirement. (Appendix D).

Enterprise now files this Initial Brief with this Honorable Court. The Fifth District's opinion in Enterprise Leasing Co. v. Jones, 25 Fla. L. Weekly D57 (Fla. 5th DCA 1999), not only threatens the sanctity of the confidentiality mandates of the mediation statute, but also violates Enterprise's constitutional right to a fair trial.

VII. SUMMARY OVERVIEW

Enterprise respectfully submits that the Fifth District's decision in Enterprise Leasing Co. v. Jones, flies in the face of the express intent and purpose of § 44.102(3), which controls court-ordered mediation. In upholding the trial court's denial of Enterprise's Writ of Prohibition, the District Court blatantly ignored the spirit of § 44.102(3) and thus, in essence, ignored its dictate. Specifically, the Court reasoned that the standard of proof for § 38.10 Florida Statutes (1999), governing judicial disqualification, was not met here, because Enterprise failed to "state facts showing a basis for the belief that bias or prejudice exists on the part of the trial judge." Enterprise Leasing Co. v. Jones, 25 Fla. L. Weekly at D57. However, the Fifth District misapplied the standard of proof required by § 38.10, and further failed to give equal weight to § 44.102(3) and § 38.10 in determining the inter-relationship of two equally binding rules of law on the ultimate and most crucial issue of bias or prejudice on the part of a trial judge. In so holding, the Fifth District not only threatens the touchstone predicate of the entire mediation process, namely, confidentiality, but also the due process guarantee to a fair trial.

The core purpose of § 38.10 is to ensure that every litigant receives a

fair trial before no less than a coldly neutral and impartial judge. Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980). In the same vein, this Court has recognized that confidentiality of mediation proceedings is crucial to the mediation process by mandating that "[i]f the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court *without comment or recommendation*. FLA.R.CIV.P. 1.730 (emphasis added); see also Royal Caribbean Corporation v. Modesto, 614 So. 2d 517, 519 (Fla. 3d DCA1993). Additionally, § 44.102(3) provides that "[e]ach 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 . . . and [such communications] shall be confidential and inadmissible as evidence in *any subsequent proceeding*." Fla. Stat. § 44.102(3) (1999) (emphasis added).

As the Courts of Appeal in Fabber v. Wessel, 604 So. 2d 533 (Fla. 4th DCA 1192) and Royal Caribbean Corporation v. Modesto, 614 So. 2d 517 (Fla. 3d DCA 1993) correctly recognized, the "mere act of disclosure or violation of section 44.102(3) establishes an unavoidable presumption of contamination of the neutrality of the judge who heard or read the disclosure,

and hence that disqualification is required as a matter of law." Fabber, 604 So. 2d at 534; Royal Caribbean Corporation, 614 So. 2d at 519. As a result, when § 44.102(3) and § 38.10 are read in conjunction, the Fifth District's decision in Jones clearly violates the due process guarantee of a fair trial by a neutral and impartial judge.

This brief will set forth the conflict the Jones decision creates with well established case law, as well as the serious implications the Fifth District's holding in Jones has on the constitutional right to a fair trial. Because this miscarriage of justice may often occur at the trial court level, specifically during pre-trial practice in which there is no direct appeal, a determination of this issue by this Court is of great public importance.

VIII. ARGUMENT

A. DISCLOSURE OF ANY TERM OF A MEDIATION, IN DIRECT CONTRAVENTION OF THE MEDIATION STATUTE, ESTABLISHES AN UNAVOIDABLE PRESUMPTION OF CONTAMINATION OF THE NEUTRALITY OF THE JUDGE WHO HEARD OR READ THE DISCLOSURE.

The Fifth District failed to recognize, as the Fourth District did in Fabber, that the "mere act of disclosure or violation of § 44.102(3) establishes an unavoidable presumption of contamination of the neutrality of the judge who heard or read the disclosure, and hence that disqualification is required

as a matter of law." Fabber, 604 So. 2d at 534. The mediation in this case was held pursuant to Florida Statutes § 44.102(3) which provides, in pertinent part that:

> Each party involved in a Court-Ordered mediation proceeding has the privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding. Notwithstanding the provisions of § 119.14, ***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 inadmissable as evidence and any subsequent legal proceeding, unless all parties agree otherwise.**

Fla. Stat. § 44.102(3) (1999) (emphasis added).

Enterprise attended the mediation through its authorized representative, Sarah Hall, and its attorneys of record, Kenneth L. Bednar and Eric A. Gordon. Based on the statutory mandate that all statements made during the mediation were confidential, Enterprise engaged in settlement negotiations. However, in direct contravention of the spirit and letter of the mediation statute, Respondent's attorneys willfully and deliberately disregarded the confidentiality requirement by gratuitously and deliberately revealing to the trial court the entire substance of the mediation negotiations, including the specific amounts of money demanded and offered by the respective parties. (Appendix A). As will be discussed further, the disclosure was made in

response to a pre-trial statement form inquiring only whether settlement discussions had occurred, not what occurred. The disclosure was thus obviously intended to "poison the well."[2]

The case at hand is indistinguishable from Fabber v. Wessel, 604 So. 2d 533 (Fla. 4th DCA 1192), on any principled basis. In Fabber, the petitioner alleged no specific prejudice, apart from the disclosure of privileged mediation communications in violation of § 44.102(3). The Court there held that such a violation established an unavoidable presumption of contamination of the neutrality of the judge who heard or read the disclosure and hence, disqualification was required as a matter of law. Accordingly, the Fifth District erred in reaching the contrary result, denying Enterprise's Writ of Prohibition while acknowledging the fact that the trial court was apprised of privileged and confidential communications between the parties in violation

[2] In response to questions asking only (1) whether a settlement demand had been made, (2) whether an offer has been made and (3) whether settlement possibilities are considered good, fair, poor, or nil, plaintiff's counsel set forth the amount of the demand ($12,000,000) and the amount of Enterprise's offer ($1,000,000). (Appendix A). Judge Griffin's concurring opinion in Jones succinctly observed that "(t)here should be a remedy for this (apparently) blatant breach of confidentiality. . . (w)hether disclosure was willful 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 reoccur." (Appendix D). But nothing at all was done; rather, the Fifth District gave it the proverbial "pass."

of the mediation statute.

B. THE FIFTH DISTRICT MISAPPLIED THE STANDARD OF PROOF REQUIRED UNDER THE JUDICIAL QUALIFICATION STATUTE.

The Fifth District also misapplied the standard of proof required by § 38.10, Fla. Stat. (1999), governing judicial disqualification. Section 38.10, Fla. Stat. (1999), provides in pertinent, in 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 prejudice 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 this 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 reasons for the belief that any such bias or prejudice exists...

Fla. Stat. § 38.10 (1999).

Pursuant to this statute, when a party files a motion to disqualify a judge, the role of the judge is limited to determining whether the motion is sufficient on its face. The judge has no authority to pass on the truth of the facts alleged in the motion or the merits of the motion. FLA.R.JUD.ADMIN. 2.160(f); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978); Lake v. Edwards, 501 So. 2d 759 (Fla. 5th DCA 1987). If the motion is sufficient on its face, then the judge must "immediately enter an order granting disqualification and

proceed no further in the action." FLA.R.JUD.ADMIN. 2.160(f).

Enterprise filed an Affidavit stating its fear that it would not receive a fair trial in the Court where the suit was pending on account of the prejudice of the trial court. (Appendix E). The Affidavit expressly states that Respondent's attorneys have "revealed to this Court the substance of the confidential mediation negotiations, including the specific amounts of money demanded by Plaintiffs and the specific amount of money offered by Enterprise." (Appendix E, para. 5). The Affidavit further states that "Enterprise objectively believes that it cannot be heard fairly and impartially by this Court due to the obvious bias and prejudice by rising from the matters set forth above." (Appendix E, para. 6). Especially in light of Fabber v. Wessel, 604 So. 2d 533 (Fla. 4th DCA 1992) and Hudson v. Hudson, 600 So. 2d 7 (Fla. 4th DCA 1992), which held that disclosure of any terms of the mediation establishes an unavoidable presumption of contamination, and when injected into a subsequent proceeding necessarily "poisons the well," Hudson, 600 So. 2d at 9; Fabber, 604 So. 2d at 534, Enterprise's Affidavit clearly stated facts sufficient to show a basis for its belief that bias or prejudice existed on the part of the trial judge, and thus, was sufficient on its face.

Although Petitioner recognizes the trial court's authority pursuant to

Rule 1.200(a)(7) and (b)(5), FLA.R.CIV.P., to "pursue the possibilities of settlement" at case management and pre-trial conferences, § 44.102(3) nonetheless dictates that each party holds the privilege to prevent any person present at the mediation proceeding from disclosing the substance of the communications during such proceeding.

As discussed above, the Pre-Trial Order here requested, in pertinent part, only:

> i. A statement containing the following information:
>
> (1) Whether a settlement demand has been made. If so, the date last such demand was made.
>
> (2) Whether opposing parties have made an offer to said settlement demand. If so, date last such settlement offer was made.
>
> (3) Whether you consider settlement possibility to be good, fair, poor or nil.

Accordingly, Respondent's counsel were hardly "required" to violate the mediation statute by gratuitously disclosing the specific monetary amounts of the settlement demand and offer. The Pre-Trial Order did not require the disclosure of specific monetary amounts. Rather it required simply "yes" or "no" answers and dates.

Even more disturbing than Respondent's blatant violation of the

mediation statute, is Respondent's vapid attempt to justify its actions by stating that this Pre-Trial Order is "a standard order employed in Brevard County" and suggesting that Respondent was within his rights in disclosing the specific monetary information. If this were so, then all cases in Brevard County continuously violate the dictates of the mediation statute as well as defendants' rights to a fair trial by an impartial judge at the pre-trial level. Judge Griffin's concurring opinion in Jones ["(t)here should be a remedy for this (apparently) blatant breach of confidentiality. . . (w)hether disclosure was willful or negligent, the disclosing attorney should be disciplined. . . . If there is no lawyer discipline for such conduct, it will reoccur."] would go only half-way even if counsel were disciplined, and they were not. Petitioner respectfully submits that the proper remedy is not only lawyer discipline, which never occurred, but also mandated disqualification.

The mere act of disclosure of mediation communication establishes an unavoidable presumption of contamination of the neutrality of the trial court.[3] Accordingly, Enterprise's Affidavit was sufficient on its face because it stated

[3]Indeed, Respondent even argued to the Fifth District, "[i]n a catastrophic injury case like this one, what ordinarily might be considered a substantial settlement offer by the defendant indicates, here at best, a belief by Enterprise that Plaintiff's claim has only nuisance value." (Appendix F, 11). This is exactly what Enterprise was afraid of and exactly what the judicial disqualification and mediation/confidentiality statutes were intended to prevent.

a basis for the belief that bias or prejudice existed on the part of the trial judge. Therefore, the Fifth District erred in failing to grant Enterprise's Writ of Prohibition.

As further evidence of the prejudice against Enterprise, subsequent to Enterprise taking the instant appeal, Respondent's counsel filed a Motion to have the court disqualify itself. The trial court upon hearing of the instant appeal, granted Respondent's Motion and reluctantly recused itself. At the hearing, the trial court clearly expressed displeasure with the opinion of the Fifth District,[4] as well as with the appellate process stating "again it's interesting to see how much judicial time gets taken up with tempest and teapots. It's further interesting to see how appellate courts can sometimes make decisions based upon no facts, period." (Appendix G).

Respondent's counsel as well as the trial court in recusing itself realized there was a clear issue as to whether Enterprise could receive a fair trial before that court. Upon recognizing this issue, even Respondent's counsel recommended a visiting senior judge be assigned to this case, however, this recommendation was not followed and this matter was merely sent back and randomly reassigned to a sitting circuit trial judge in the Circuit Court.

Enterprise, has a legitimate concern that it will not receive a fair trial in

[4] "I think it was an ill advised opinion." Appendix G, 8.

Brevard County Circuit Court due to the fact that the trial judge clearly harbors animosity toward Enterprise as a result of Enterprise filing the Motion for Recusal and subsequent appeal. Enterprise's fear of not receiving a fair trial is further based upon the appearance of impropriety created in a circuit with few trial judges all of whom have exposure to the files contained in the Office of the Clerk, to say nothing of their informal discussions off the record. While Petitioner is cognizant of the fact that the trial judge did ultimately recuse himself, Petitioner still fears it will not receive a fair trial as the well from which all of the trial judges in the circuit drink is poisoned. Accordingly, Petitioner, Enterprise Leasing Company argues that the only way it will receive a fair trial in this matter is to have this case reassigned to a visiting judge or be reassigned to a trial judge outside Brevard County. Accordingly, Petitioner, Enterprise Leasing Company respectfully requests this Court grant it relief in the form of a mandate requiring this case be reassigned to a visiting circuit trial judge from outside the Eighteenth Judicial Circuit (Brevard County) or transferred to Orange County Circuit court where Plaintiff, Josiah Nathaniel

Douglas Jones resides, or, in the alternative, based upon the actions of Plaintiff's counsel, dismiss Plaintiff's Complaint with Prejudice.

IX. CONCLUSION

Based upon the foregoing, the mere act of disclosure or violation of § 44.102(3) establishes an unavoidable presumption of contamination of the neutrality of the judge who heard or read the disclosure, and thus disqualification is required as a matter of law. Petitioner urges that the relief sought be granted. Petitioner's belief that it cannot receive a fair unbiased trial in Brevard County Circuit Court is well founded given the circumstances outlined above.

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X. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Federal Express this ____ day of March: Bradley W. Sinclair, Esq., SINCLAIR LAW OFFICES, 200 South Harbor City Boulevard, Suite 302, Melbourne, FL 32901; John N. Hamilton, Esq., 525 N. Harbor City Boulevard, P.O. Drawer 361817, Melbourne, FL 32936-1817; and Robin A. Blanton, Esq., MOSS, HENDERSON, BLANTON, LANIER & DEVONMILLE, P.A., 817 Beachland Boulevard, P.O. Box 3406, Vero Beach, FL 32964-3406, George W. Maxwell, III, as Circuit Judge of the Eighteenth Judicial Circuit, Moore Justice Center, 2825 Judge Fran Jamieson Way, Viera, FL 32940.

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