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

REPLY BRIEF OF PETITIONER, ENTERPRISE LEASING COMPANY

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III. CERTIFICATE OF INTERESTED PERSONS

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. Todd R. Schwartz, Esq., Counsel for Respondents
7. George W. Maxwell, III, as Circuit Judge of the Eighteenth Judicial Circuit

RESPECTFULLY SUBMITTED,

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IV. <u>CERTIFICATE OF FONT</u>

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

V. ARGUMENT

No matter how Respondents twist and turn, the holding in Fabber v. Wessel, 604 So. 2d 533 (Fla. 4th DCA 1992) is crystal clear: "[t]he mere act of disclosure [of mediation communications] 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, disqualification is required as a matter of law." Fabber, 604 So. 2d at 534 (emphasis supplied). Although Respondents attempt to minimize the impact of Fabber, their attempt to denigrate the holding goes much too far. Specifically, Respondents allege that:

> 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). . . .

(Respondent's Brief on the Merits and Appendix, 13.)

However, the decision in Fabber, when read as it was written, first and foremost found that the respondent in that case, although citing to no specific prejudice apart from the disclosure of mediation communications in violation

of section 44.102(3), established an unavoidable presumption of contamination of the neutrality of the judge who heard or read the disclosure. In so holding, the Fourth District relied on Hudson v. Hudson, 600 So. 2d 7 (Fla. 4th DCA 1992), finding that the essential facts in Hudson were not measurably different from those in Fabber.[1]

The Court went on to say that "[e]ven if we could [distinguish Fabber from Hudson], we would still be forced to grant prohibition for an equally compelling reason. One of the petitioner's grounds for disqualification of this trial judge was an assertion that he had demonstrated his partiality by assisting her adversary in a contested hearing." Fabber, 604 So. 2d at 534.

There is nothing, not even a whisper, in the Fabber opinion suggesting that the holding; specifically, that the mere fact of mediation disclosure establishes an unavoidable presumption of contamination of the neutrality of the judge who heard or read the disclosure, was "unnecessary to the Court's decision" or merely an "additional contention" as Respondents allege here. (Respondent's Brief on the Merits and Appendix, 13.) Accordingly,

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[1]The fact that Hudson was, as alleged by Respondents, "not a disqualification case, but rather . . . a domestic relations" case, is irrelevant and indistinguishable on any principled basis. Respondent's Brief on the Merits, 12; Fabber, 604 So. 2d at 534.

Respondents' argument is not only misleading, but also inaccurate.[2] Fabber held exactly what Petitioner says it held. That there may have been an alternate ground for the decision hardly lessens its importance and propriety.

Similarly, Fabber refutes Respondents' attempt to distinguish Hudson v. Hudson, 600 So. 2d 7 (Fla. 4th DCA 1992). The Fabber Court stated that "we are unable to distinguish Hudson on any principle basis." Fabber, 604 So. 2d at 534. Not only are Hudson and Fabber indistinguishable from the case at hand, they represent the proper view of the law. Petitioner respectfully submits that the Fabber rule is indeed necessary to fully protect the letter and spirit of the mediation statute.

The express language of the mediation statute, § 44.102(3), Florida Statutes, is irrefutable. It provides in pertinent part:

> 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 in any subsequent**

[2]Equally misleading is Respondents' allegation that Fabber "establishes no jurisdictional conflict." (Respondent's Brief on the Merits and Appendix, 3). Clearly, this case is before this Court because the Fifth District in Enterprise Leasing Company v. Jones, et al., 25 Fla. L. Weekly D57 (Fla. 5th DCA 1999), expressly recognized and correctly certified conflict with Fabber.

legal proceeding, unless all parties agree otherwise.

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

Although Respondents dedicate several pages to arguing that "[t]rial courts are frequently called upon to enforce and set aside settlements, thereby requiring disclosure of their terms" (Respondent's Brief on the Merits and Appendix, 10), this analogy is misplaced. In fact, § 44.102(3) expressly provides that "all oral or written communications in a mediation proceeding, **other than an executed Settlement Agreement, . . . shall be confidential and inadmissable as evidence.**" In other words, Settlement Agreements are exempted from the dictate of § 44.102(3), Florida Statutes.

Respondents' suggestion that disaster would result were this Court to take Enterprise's argument to "its logical extreme," is just another effort to cloud the issues. Respondents argue, and Petitioner agrees, that trial courts are frequently called upon to enforce and set aside settlement agreements. Respondents further argue and Petitioner also agrees that recusal is unauthorized in those instances where settlements are litigated but, for whatever reason, do not end the litigation, in turn necessitating further judicial involvement. Petitioner also agrees with Respondents that a trial judge may be 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. (Respondent's Brief on the Merits and Appendix, 11). But, none of those situations are comparable to this case. Rather, this Court is presented with a willful and blatant violation of the mediation statute by Respondents in a flagrant effort to curry favor with the trial court, and the concomitant issue of whether this blatant violation warrants judicial disqualification.[3]

The facts are not complex. Enterprise attended 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 letter and spirit of the mediation statute, Respondents' attorneys willfully and deliberately disregarded the confidentiality requirement, instead gratuitously and deliberately revealing to the trial court the entire substance of the mediation negotiations, including the specific amounts of money demanded

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[3]Respondents' violation of the mediation statute was "(apparently) [a] blatant breach of confidentiality," as the concurring opinion in Enterprise Leasing Company v. Jones, et al., 25 Fla. L. Weekly D57 (Fla. 5th DCA 1999) noted, Respondent's Brief on the Merits and Appendix. (Griffin J., Concurring).

and offered by the respective parties.[4]

The disclosure was made in response to a pretrial statement that inquired only whether settlement discussions had occurred, not what occurred. The disclosure was thus obviously intended to "poison the well." Respondents themselves continue to prove that very point by arguing that; "[i]n 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." (Respondent's Brief on the Merits and Appendixes, 14). This is exactly the bias Enterprise feared and exactly what the judicial disqualification and mediation/confidentiality statutes were intended to prevent. The trial court should have recused itself immediately.

Eventually, the trial court, upon hearing of the instant appeal, granted Respondents' Motion and reluctantly did recuse itself. At that hearing, the trial court expressed displeasure with the concurring opinion of the Fifth

[4] That the settlement discussions may have continued between opposing counsel after the formal mediation session ended does not make them any less confidential. Any such conversations were just an extension of the mediation and were likewise confidential.

District,[5] which criticized the deliberately improper conduct of Respondents' counsel. The trial court also criticized the appellate process, stating ". . . 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." (Amended Initial Brief of Petitioner, Enterprise Leasing Co., Appendix G).

Respondents' counsel and the trial court obviously realized there was serious doubt that Enterprise could receive a fair trial before that court. That is obviously why the trial court finally recused itself. Upon recognizing the problem, even Respondents' counsel recommended that a visiting senior judge be assigned to the case. However, this recommendation was not followed and the matter was merely sent back and randomly reassigned to another sitting circuit trial judge in Brevard County.

Enterprise indeed has legitimate concerns that it will not receive a fair trial in Brevard County Circuit Court because the former trial judge clearly harbors animosity toward Enterprise as a result of Enterprise's Petition for Writ of Prohibition seeking recusal and subsequent appeal. Enterprise's fear that it will not receive a fair trial is further based upon the necessary

[5] "I think it was an ill advised opinion." (Amended Initial Brief of Petitioner, Enterprise Leasing Company, Appendix G, 8).

appearance of impropriety 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 Enterprise is cognizant of the fact that the trial judge did ultimately recuse himself, it still fears it will not receive a fair trial because the "well" from which all of the trial judges in the circuit drink is necessarily "poisoned."[6] Because the trial court refused to recuse itself from the outset, Enterprise was forced to further pursue its argument for recusal. As a consequence, the entire well is necessarily poisoned, thereby requiring whatever remedy is just and necessary under this Court's general authority to assure Enterprise of a fair trial.

Respondents imply that Enterprise is participating in dilatory tactics, pointing to the fact that Enterprise sought to recuse the trial judge a month before trial. There is no merit to that accusation either. The Pre-trial Compliance Statement, in which Respondents blatantly violated the mediation statute by supplying the trial court with the specific amount of money demanded by Plaintiffs and the specific amount of money offered by Enterprise, was served on October 4, 1999. A mere four (4) days later, on

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[6] Respondents are wrong in characterizing Enterprise's request for change of venue as "new and unauthorized." Enterprise made that very request to the Fifth District in its Reply Memorandum, at page four (4), for the very same reasons advanced here to this Court.

October 8, 1999, Enterprise served its Motion to Disqualify and Supporting Memorandum of Law. Clearly, if Respondents had not deliberately breached the confidentiality mandate of the mediation statute, Enterprise would not have had to file its Petition for Writ of Prohibition and this case would have proceeded to trial accordingly. Enterprise respectfully submits that the only parties attempting to “defeat justice” are the Respondents, not Enterprise.

VI. 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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VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this ____ day of April: 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, Todd R. Schwartz, GINSBERG & SCHWARTZ, Suite 410 Concord Building, 66 West Flagler Street, Miami, FL 33130, 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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