SUPREME COURT OF FLORIDA

OMAR DAVID HUSSAMY, M.D.; OMAR DAVID HUSSAMY, M.D., P.A.; and COASTAL ORTHOPEDIC CENTER,

Petitioners,

vs.

BEATRICE ROSE,

Respondent.

CASE NO.: SC03-1399

Lower Tribunal No.: 4D01-2856

REPLY BRIEF OF PETITIONERS OMAR DAVID HUSSAMY, M.D.; OMAR D. HUSSAMY, M.D., P.A.; and COASTAL ORTHOPEDIC CENTER

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ARGUMENT

I. INTRODUCTION.

The Record on Appeal is replete with evidence of misconduct on the part of Mr. Tobkin. The Fourth District Court reviewed that record and found that Mr. Tobkin's disobedience was willful, deliberate, and contumacious. Yet, the Respondent's Answer Brief argues that there was no misconduct by Mr. Tobkin, only the misperception of misconduct by an impaired judge.

Defense counsel at trial, the trial judge, and the Fourth District Court of Appeal all recognized that Mr. Tobkin intentionally and continuously violated the trial judge's orders. Mr. Tobkin's outrageous response in the Answer Brief demonstrates the very difficulty visited by the trial judge, the Defendants, and their counsel throughout the various phases of the underlying case. No issue is directly addressed by Mr. Tobkin. No question nor reasonable request receives a direct and responsive answer. Facts are created from weak inferences or thin air. Court orders are treated as inconveniences that Mr. Tobkin disregards at will.

When Mr. Tobkin attempted to introduce excerpts of depositions on the sixth day of trial that had not been previously disclosed to the court or defense counsel, on its own accord and without regarding Defendants' objections or cross

examination, the trial court recognized that the case could not be completed in a fair manner. Additionally, the trial court recognized that a mistrial would result in significant abuse upon the Defendants.

The directed verdicts in favor of the Defendants created a very harsh result for the Plaintiff. However, Defendants assert that such result was justified where the Plaintiff chose to hire Mr. Tobkin, file this case, and pursue it to trial. There was ample opportunity for the Plaintiff to make herself knowledgeable of the proceedings, including the motions and orders regarding sanctions. Plaintiff was present during her own deposition when Mr. Tobkin was proven to be lying, and Mr. Tobkin's misconduct at trial occurred in an open court for all of those present to see. On the sixth day of trial, Mr. Tobkin represented that the Plaintiff would testify. Certainly, the Plaintiff was made aware that the trial had commenced but that it was not completed. After trial, there were more motions for sanctions, a Final Judgment, an appeal with the filing of briefs, and the opinion of the Fourth District Court of Appeal. Now this case is before this Court, and Plaintiff continues to retain Mr. Tobkin as counsel. She has done nothing to disavow his acts nor her knowledge or role in them. Instead, Plaintiff continues to permit Mr. Tobkin to make outrageous and insulting accusations without factual basis.

Defendants are powerless to stop the misconduct. They could not obtain relief before trial despite their numerous motions and requests. Their efforts to force compliance by Mr. Tobkin at trial, despite continued and open noncompliance, were obviously unsuccessful. Defendants were not able to sanction Mr. Tobkin themselves. Nor could they fire him. Furthermore, the Defendants could not ethically talk to the Plaintiff concerning Mr. Tobkin's misconduct and they could not make her further aware of it. To the Defendants' dismay, the abuse resulting from Mr. Tobkin's misconduct continues.

Plaintiff has contributed to the abuse that has been imposed on the Defendants. She has been either knowingly complicit or wilfully ignorant. Either way, it is justified that the Plaintiff bear the consequence of Mr. Tobkin's misconduct and not the Defendants.

The trial judge properly exercised his discretion and directed verdicts in favor of the Defendants. This Court should answer the certified question in the affirmative, upholding the trial judge's appropriately exercised discretion.

II. **ALLEGED IMPAIRMENT OF THE TRIAL JUDGE**.

Mr. Tobkin suggests that all rulings of the trial judge should be considered a nullity because after the completion of the underlying trial there were allegations of alcohol abuse by the judge. In examining Respondent's argument,

Respondent is essentially asking that every ruling or order from the trial judge during his career be nullified regardless of whether there was evidence or allegation of impairment at the time of the trial judge's order or ruling.

Mere allegations of alcohol abuse cannot support the nullification of all judicial acts by a trial judge. That is particularly true in this case where there was never a claim nor suggestion made that this trial judge appeared impaired at any point during the course of the underlying trial. If Mr. Tobkin or others observed actions that caused suspicion of impairment, such suspicions should have been raised immediately. Over the course of months of pretrial activity and six days of trial, no party, attorney, nor court personnel reported having a suspicion of impairment.

As the Fourth District Court of Appeal concluded, a review of the record demonstrates that the trial judge correctly perceived the misconduct by Mr. Tobkin. The judge's rulings were considered, made calmly, and with restraint. There is no basis to conclude otherwise.

III. **EX PARTE COMMUNICATION BY THE TRIAL JUDGE**.

The Answer Brief suggests that the Final Judgment should be nullified due to alleged ex parte communication by the trial judge. Again, there is no evidence of any improper ex parte communications. Despite the Respondent's argument, the only support for an allegation that the trial judge spoke to other judges is found in a

transcript of the case management hearing held on June 30, 1999. The trial judge stated: "I have read every single pleading in the file, and I have talked to some of the other judges who were in this case. I am fully familiar with what has gone on in this case." (R-1815) The nature of any such communication with other judges is not known. Regardless, if Mr. Tobkin felt that the judge had acted improperly, justifying recusal, the time for action was then, prior to the commencement of trial. Indeed, the Florida Rules of Judicial Administration require that a party file a motion to disqualify a judge "within a reasonable time not to exceed ten days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling." *Florida Rules of Judicial Administration 2.160(e)*. Not only did the Respondent fail to raise the basis for the trial judge's disqualification at the time of when the alleged misconduct occurred, Respondent failed to raise the issue during and after trial or on appeal before the Fourth District Court of Appeal. It is too late to raise such an issue for the first time in the Answer Brief before the Florida Supreme Court. More importantly, even if it may be raised, there is no actual evidence of there being any improper communication. Neither does Mr. Tobkin's new allegation in this regard negate the fact that Mr. Tobkin engaged in continuous and intentional contumacious conduct.

IV. **ALLEGED FRAUD BY DEFENDANT HUSSAMY**.

The Answer Brief suggests that Defendant Hussamy engaged in fraudulent conduct to deprive the Plaintiff of a fair trial. Not only are the allegations of fraud on the part of Dr. Hussamy completely unsubstantiated, this argument ignores the fact that the directed verdicts were based on clear misconduct by Mr. Tobkin. Had Mr. Tobkin followed court orders in preparing this case and presenting it at trial, any alleged misconduct on the part of Dr. Hussamy could have been fully explored with the jury. This is but another example of Mr. Tobkin's practice of trying to confuse issues by making spurious and unfounded claims.

Mr. Tobkin argues that Dr. Hussamy lied when he claimed that he was in his Vero Beach office when Mrs. Rose was reported by a nurse to be in crisis. Indeed, Dr. Hussamy recalled that he received a call in his office and that he traveled immediately to the hospital, arriving in approximately 15 minutes. Dr. Cordner, the anesthesiologist who responded to the same call, stated that he believed he was actually in surgery with Dr. Hussamy at the time of the call. Mr. Tobkin takes those two conflicting recollections and suggests that it is sufficient evidence of fraud on the part of Dr. Hussamy to justify dismissal of this case. Although Dr. Cordner recalls it differently, there is no evidence at all to contradict Dr. Hussamy's recollection. Mr. Tobkin has chosen to take the position that Dr. Hussamy lied, without any evidence to support it. In order to further his argument, he refuses to recognize that

one of the two witnesses might have a faulty recollection of what occurred years earlier, specifically including Dr. Cordner. Respondent attempts to raise this insignificant jury issue to a level sufficient to justify his misconduct. The issue is insignificant because it involves events that arose after the incident giving rise to the claim occurred. Respondent has offered no explanation as to why anyone would lie about their whereabouts after the Plaintiff was allegedly injured.

Respondent also suggests that Dr. Hussamy lied about having examined the Plaintiff on rounds during the morning prior to her injury. In fact, as noted in the Answer Brief, Dr. Hussamy clearly testified, repeatedly, that he did not recall when he made rounds that morning. He testified that although he did not recall, it was his usual practice to make rounds in the morning. From that, Tobkin argues that Dr. Hussamy lied about when he made rounds. Dr. Hussamy does not recall when he made rounds and clearly said so. There is simply no evidence that Dr. Hussamy lied concerning the timing of his rounds on that morning.

V. ALLEGATIONS OF FALSIFIED MEDICAL RECORDS

Respondent makes outrageous accusations that medical records were falsified by the Defendants or other witnesses. There is absolutely no record evidence of any such falsification. Again, if the Respondent had such evidence, it should have been presented at a trial in which Mr. Tobkin conducted himself consistent with the trial

judge's orders. Had he conducted himself appropriately, he could have presented all appropriate and relevant evidence so that the jury could fairly decide this case. It should be noted that although this wild accusation is made in the Answer Brief, it is wholly unsupported by cites to the record.

CONCLUSION

The Respondent has failed to address the main issue certified before this Court. Specifically, the Plaintiff, Mrs. Rose, has again failed to disavow any of the misconduct by her retained counsel. Respondent, through her counsel, continues to argue that there was no substantive misconduct, but that the misconduct was all on the part of the judge and Defendants. Respondent apparently continues to believe, through her counsel, at least, that it would have been fair to have allowed her to finish the presentation of her case-in-chief by presenting excerpts of depositions without regard to Defendants' objections nor their ability to contemporaneously respond. Mr. Tobkin suggested that he be allowed to present evidence in that manner, because it was obvious that as a result of his misconduct the case would not be concluded during that trial period. The judge clearly faced the decision of either ordering a mistrial, because of Mr. Tobkin's misconduct, or directing verdicts for the Defendants. The failure of the Respondent, Plaintiff below, to disavow the actions of her counsel, is sufficient to justify the sanction of the trial judge. The certified question should be answered in the affirmative.

Respectfully submitted,

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Robert D. Henry FBN: 342165

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail delivery this _____ day of September, 2003, to **RICHARD A. BARNETT, ESQ.**, 121 South 61st Terrace, Hollywood, Florida 33023 - appellate counsel for Beatrice Rose; **DONALD A. TOBKIN, ESQ.**, Post Office Box 220990, Hollywood, Florida 33022 - *counsel for Beatrice Rose*; **JENNIFER CARROLL, ESQ.**, 700 Village Square Crossing, Suite 101, Palm Beach Gardens, Florida 33410 - appellate counsel for Fischman; and **LEWIS W. MURPHY, ESQ.**, Post Office Box 3406, Vero Beach, Florida 32964-3406 - counsel for Fischman.

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DOCUMENT CERTIFICATION

I FURTHER CERTIFY that this document comports with the

requirements of this Court in that this document has been prepared with the Times New Roman 14 type style and all margins are at least one inch, and on bond paper measuring 8 1/2 x 11 inches.

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