IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC 03-1400

L.T. CASE NO. 4D01-2856

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CHARLES M. FISCHMAN, M.D.,
FISCHMAN AND BORGMEIER, M.D., P.A.,

Petitioners,

vs.

BEATRICE ROSE,

Respondent.

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PETITIONERS' REPLY BRIEF

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PREFACE

Petitioners, Charles M. Fischman, M.D., Fischman and Borgmeier, M.D., P.A., were defendants/appellees below, and will be referred to as Petitioners, Defendants, or Dr. Fischman and/or his P.A. Respondent, Beatrice Rose, was the plaintiff below and will be referred to in this brief as Respondent, Plaintiff, or Ms. Rose.

The following references will be used in this brief:

[R.]	Record on Appeal
[T.]	Trial Transcripts
[ST.]	Supplemental Transcript – Pretrial Hearing Transcript of August 20, 1999, attached as an appendix to Appellee's Brief in the Fourth District
[IB.]	Petitioner Fischman's Initial Brief
[A.]	Appendix to Respondent's Answer Brief
[MS.]	Petitioner Hussamy's Motion to Strike Respondent's Answer Brief and Respondent's Appendix

SUMMARY OF ARGUMENT

Respondent Rose, in her Amended Answer Brief, ignores the Fourth District's Certified Question entirely, and ignores Appellants' Initial Brief.[1] Instead of responding to the issue before this Court, Respondent raises new and different issues. Respondent demands, *inter alia*, that the trial judge be recused, the case be transferred to the 17th Circuit, Petitioners be sanctioned, and the case be remanded for retrial on the following grounds: 1) the trial judge was intoxicated during the proceedings, 2) the trial judge had improper ex parte communications with other judges, 3) Respondent was deprived of a fair trial because Petitioners lied, and 4) Respondent was deprived of a fair trial because Petitioners spoliated evidence.

Respondent's arguments are without merit because they focus on irrelevant matters that at best would only be appropriate for the trial court, and then only if the Certified Question were answered in the negative and the case remanded. These arguments are also procedurally barred because they were not raised in the lower appellate court.

[1] Respondent further states at p. 13 of her Amended Answer Brief that "the Kozel test is relatively inapplicable to any decision of great public importance."

ARGUMENT

I. THE TRIAL JUDGE WAS NOT IMPAIRED

There is no evidence in the record that the trial judge was impaired at any point during the lower court proceedings. In fact, the record shows that the trial judge patiently dealt with a difficult situation without getting angry or losing control of his courtroom. [ST.162, 203; T.492] Respondent relies on bare allegations alone. If it were not for Respondent's counsel's constant surprise tactics and disregard of court orders, the case would have proceeded to a final determination on the merits. By not justifying or denying Respondent's counsel's misconduct, Respondent admits that her counsel committed willful, contumacious misconduct both before and at trial. State v. Town of Sweetwater, 112 So. 2d 852, 854 (Fla. 1959).

Moreover, Respondent did not raise this impairment argument on appeal in the 4th DCA so this Court should not consider it. Dance v. Tatum, 629 So. 2d 127, 129 (Fla. 1993) ("it is inappropriate to raise an issue for the first time on appeal"); Carillon Hotel v. Rodriguez, 124 So. 2d 3, 5 (Fla. 1960) ("[i]t has long been the rule that . . . this Court is not required to determine points not raised and determined in the court below"); Johnson v. Johnson, 28 So. 2d 438, 439 (Fla. 1946) ("argument in the brief must flow from and be raised by the complaint against the lower court and be supported by the record on appeal"). Even if true, this impairment argument

would constitute harmless error because it is irrelevant to the disposition of this case and would not result in a miscarriage of justice. § 59.041, Fla. Stat. (2001). Respondent's counsel's misconduct was so egregious that no reasonable judge would have allowed the trial to continue. The record amply supports the trial judge's directed verdict for Petitioners.

II. THE TRIAL JUDGE DID NOT ENGAGE IN ANY IMPROPER EX PARTE COMMUNICATIONS

There is no evidence in the record that the trial judge had any improper ex parte communications. Respondent relies on bare allegations of favoritism and bias even though the trial judge showed exceptional patience with Respondent's counsel's antics, and withheld ruling on sanctions many times when they were deserved. [R.2423; ST. 94, 118] In fact, the trial judge's order explicitly details the overwhelming misconduct of Respondent's counsel that forced the trial judge to enter a directed verdict for Petitioners. [R.3106-12]

Moreover, Respondent did not raise this bias argument on appeal in the 4th DCA so this Court should not consider it. Dance, 629 So. 2d at 129; Carillon Hotel, 124 So. 2d at 5; Johnson, 28 So. 2d at 439. Even if true, this bias argument would constitute harmless error because it is irrelevant to the disposition of this case and

would not result in a miscarriage of justice. § 59.041, Fla. Stat. (2001). The record amply supports the trial judge's directed verdict for Petitioners.

III. PETITIONERS DID NOT LIE

There is no evidence in the record that Petitioners lied, and even if there were, witness credibility is a fact issue best left to the trial court. Cross examination is the main tool used to uncover and undermine inconsistent testimony. Respondent should not get a second bite at the apple when her own counsel's misconduct prevented Petitioners from calling witnesses, who could have then been cross examined by Respondent.

Moreover, Respondent did not raise this perjury argument on appeal in the 4th DCA so this Court should not consider it. Dance, 629 So. 2d at 129; Carillon Hotel, 124 So. 2d at 5; Johnson, 28 So. 2d at 439. Even if true, this perjury argument would constitute harmless error because it is irrelevant to the disposition of this case and would not result in a miscarriage of justice. § 59.041, Fla. Stat. (2001). The record amply supports the trial judge's directed verdict for Petitioners.

IV. PETITIONERS DID NOT SPOLIATE EVIDENCE

There is no evidence in the record that Petitioners spoliated any piece of evidence. In fact, it was Respondent who obstructed discovery by, *inter alia*,

refusing to timely respond to requests for interrogatories, refusing to sign responses to interrogatories, and intimidating witnesses at depositions. [R.734-35, 827-28, 939-43, 2353-55] The proper forum for these spoliation allegations is a separate suit for the tort of spoliation of evidence, which Respondent actually filed. [A.21] However, Respondent's spoliation complaint was stricken as a sham pleading. [MS.3]

Moreover, Respondent did not raise this spoliation argument on appeal in the 4th DCA so this Court should not consider it. Dance, 629 So. 2d at 129; Carillon Hotel, 124 So. 2d at 5; Johnson, 28 So. 2d at 439. Even if true, this spoliation argument would constitute harmless error because it is irrelevant to the disposition of this case and would not result in a miscarriage of justice. § 59.041, Fla. Stat. (2001). The record amply supports the trial judge's directed verdict for Petitioners.

CONCLUSION

This Court should reject Respondent's arguments because they are irrelevant and immaterial. This Court should answer the Certified Question in the affirmative because no one Kozel factor is dispositive, Respondent never filed an affidavit that she was without knowledge of her counsel's misconduct, and to this day she still retains Mr. Tobkin as her counsel. [IB.24-28] Furthermore, the trial court has tremendous discretion when imposing sanctions. [IB.28-31]

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Court answer the Certified Question in the affirmative, quash the Fourth District's decision, and AFFIRM the trial court's original order striking Plaintiff's pleading and granting Defendants' motion for directed verdict.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Lewis W. Murphy, Jr., Esquire, Moss, Henderson, Blanton, Lanier, Kretschmer & Murphy, P.A., Trial Attorneys for Dr. Fischman and Fishman and Borgmeier, M.D., P.A., Post Office Box 3406, Vero Beach, Florida 32964-3406; Robert D. Henry, Esquire, Attorney for Dr. Hussamy and his P.A., Post Office Box 4922, Orlando, Florida 32802-4922; Richard A. Barnett, Esquire, Richard A. Barnett, P.A., Attorney for Plaintiff, 121 South 61st Terrace, Hollywood, Florida 33023; and Donald A. Tobkin, Esquire, Attorney for Plaintiff, Post Office Box 220990, Hollywood, Florida 33022, by mail, this _____ day of November, 2003.

_____

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Florida Bar Number: 512796

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font standards, i.e., Times New Roman 14-point font, as set forth in Florida Rule of Appellate Procedure 9.210.

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