IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-1196
L.T. CASE NO.: 2D08-6242

MARK DAVID KANAREK, M.D. and NADAL PEDIATRICS, P.A.,
Petitioners,

v.

JOSEPH SULLIVAN, as Personal Representative
of the Estate of Sammy Sullivan,
Respondent.

ON DISCRETIONARY REVIEW OF AN OPINION
OF THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

George A. Vaka, Esquire
VAKA LAW GROUP, P.L.
777 S. Harbour Island Blvd., #300
Tampa, Florida 33602
813.549.1799 Telephone
813.549.1790 Facsimile

C. Steven Yerrid, Esquire
Florida Bar No.: 207594
Tammy J. Judge, Esquire
Florida Bar No.: 0280770
The Yerrid Law Firm
101 E. Kennedy Blvd., # 3910
Tampa, Florida 33602-5192
813- 222-8222 – Telephone
813- 222-8224 – Facsimile

TABLE OF CONTENTS

Table of Authorities

STATEMENT OF THE CASE AND FACTS

The Respondent, JOSEPH SULLIVAN,[1] as Personal Representative of the Estate of Sammy Sullivan, adopts the facts stated in the decision of Second District Court of Appeal as his Statement of the Case and Facts.[2] To assist the Court, however, Mr. Sullivan provides the following summary of relevant facts as follows:

This case arises from the tragic death of a 23-month old baby boy. (A2) His death was caused by an invasive, flesh eating Group A Streptococcus bacterial infection, 48 hours after he was diagnosed by Dr. Kanarek as having only a viral cold or flu. (A2) The Estate maintained that the child would have been successfully treated with antibiotics had he been correctly diagnosed when he was seen by Dr. Kanarek. The position of the Defendants was that the child did not have the deadly infection when he was seen by Dr. Kanarek and therefore, Dr. Kanarek was not negligent in his care and treatment of the child.

[1] The Respondent, as Personal Representative of the Estate of Sammy Sullivan, will be referred to as Plaintiff or the Estate. The Petitioners, Mark David Kanarek, M.D. and Nadal Pediatrics, P.A., will be referred to as Defendants or by name.

[2] In conformity with Florida Rule of Appellate Procedure 9.120(d), the Decision of the Second District Court of Appeals is attached hereto as an Appendix. All references to the Appendix will be referred to as (A) followed by citations to the appropriate page number of the Appendix.

The five-day jury trial was highly contentious. (A2) On two occasions, the Court cleared the courtroom at which time the trial judge held private off-the-record discussions with the attorneys. (A2)

After the jury returned a defense verdict, the Estate moved for a new trial maintaining that it was deprived of a fair trial based upon the improprieties of defense counsel which included both verbal behavior, some that was recorded on the transcript and non-verbal behavior which occurred in the presence of the jury. During the course of the trial, the Estate did not move for a mistrial. Instead, on several occasions when the Court sustained the Estate's repeated objections regarding defense counsel's inappropriate behavior, the Estate stated that it was not moving for a mistrial. (A-2-3)

Several weeks after the trial and during the first hearing on the Motion for New Trial, the trial judge stated that the case was extraordinary because of the conduct of defense counsel which had risen to the level of causing her grave concern as to the fairness of the trial. She also noted that what had occurred during the course of the trial could not be gleaned from the cold record in the case. (A3) Because the Estate had filed a memorandum response to the one filed by the defense, the trial judge offered the defense the opportunity to file a further written reply. Three days later and before she could rule on the Motion for New Trial, the

defense filed a Motion to Disqualify which she found to be facially sufficient. (A4)

Thereafter, because the presiding trial judge had witnessed the inappropriate conduct of defense counsel during the course of the trial, much of which was outside the scope of the transcribed record, and only she could observe its pernicious effect upon the jury, the Estate attempted to take her deposition for the benefit of the successor judge who would rule on the Motion for New Trial. The defense moved for a protective order. That Motion was granted by the first successor judge. (A4) Thereafter, the first successor judge recused herself, and the second was transferred out of the division. The Motion was heard by a third successor judge. He recognized that it was the presiding trial judge, and not he, who was in the best position to address the Motion for New Trial given the fact that it was based on the effect of defense counsel's conduct during the course of the trial. (A7) He also was concerned that defense counsel's tactic of disqualifying the trial judge gave the defense an unfair advantage by frustrating the Court's fair consideration of the Motion for New Trial. (A5) Ultimately, that judge denied the motion without explanation. Reversing the Final Judgment and remanding for a New Trial, the Second District concluded that given the issues concerning the effect of defense counsel's courtroom behavior upon the jury, and the fact that much of that behavior was non-verbal and therefore not reflected in the transcribed

record, that the successor judge was not in a position to fairly rule on the merits of the motion for a new trial and as such, he should have granted the Motion rather than deny it. (A8) The Defendants thereafter timely filed their Notice to Invoke this Court's jurisdiction.

SUMMARY OF THE ARGUMENTS

The decision of the Second District Court of Appeal cited to a case that is currently pending before this Court. The Estate acknowledges that such a citation would provide a proper basis to accept jurisdiction in this case if the Court were to rule on the merits of *City of Tampa v. Companioni*, 26 So. 3d 598 (Fla. 2nd DCA 2009) review granted, 23 So. 3d 771(Fla. 2010)

The decision of the Second District otherwise did not announce a rule that expressly and directly conflicts with any of the rules announced by any of the cases cited by the Defendants. Likewise, the Court did not misapply any rules stated in those cases, and as such, if the Court does not rule on the merits in the *Companioni* case, there is no other basis for jurisdiction.

ARGUMENT I

THIS COURT HAS *PRIMA FACIE* JURISDICTION BECAUSE THE SECOND DISTRICT'S DECISION CITES AS CONTROLLING AUTHORITY A DECISION THAT IS PENDING ON REVIEW IN THIS COURT

The Estate acknowledges the principle expressed by this Court in *Jollie v. State*, 405 So. 2d 418 (Fla. 1981) that a District Court of Appeal opinion which

cites as controlling authority a decision that is either pending review or has been reversed by this Court constitutes *prima facie* express conflict that would allow this Court to exercise its constitutional discretion. The Second District's decision references *City of Tampa v. Companioni*, 26 So. 3d 598, 599 (Fla. 2DCA 2009), review granted 23 So. 3d 711 (Fla. 2010) which is obviously pending before this Court. However, and most respectfully, the undersigned has reviewed the jurisdictional briefing in that case and jurisdiction may have been improvidently granted. This Court has the ability to reconsider its jurisdictional decision, even after oral argument. *See, Sterling v. Ohio Casualty Ins. Co.*, 967 So. 2d 846 (Fla. 2007) If jurisdiction is determined to have been improvidently granted in that case, then it cannot form the basis of constitutional conflict sufficient to provide this Court with jurisdiction to review the present decision. *See, Harrison v. Hyster Company*, 515 So. 2d 1279 (Fla. 1987).

ARGUMENTS II AND III

At the outset, there are several principles of Florida law common to the two arguments raised by the Petitioners. Pursuant to Article V, Section 3(b)(3) Florida Constitution (1980), this Court may only exercise its discretionary jurisdiction when an appellate decision expressly and directly conflicts with a decision of another District Court of Appeal or this Court on the same question of law. The conflict must be expressed and contained within the written rule announced by the

Court. *See, Jenkins v. State,* 385 So. 2d 1356 (Fla. 1980); *Dodi Publishing Co. v. Editorial America S.A.,* 385 So. 2d 1369 (Fla. 1980); *Reaves v. State,* 485 So. 2d 829 (Fla. 1986); *Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.* 498 So. 2d 888 (Fla. 1986); *Florida Star v. B.J. F.*, 530 So. 2d 286 (Fla. 1988). Those decisions which hold express and direct conflict on the same point of law must exist on the face of the two different opinions before jurisdiction may arise.

This Court has generally recognized two situations which authorize the invocation of its conflict jurisdiction. The first situation is when a decision announces a rule of law which conflicts with a rule previously announced by another appellate court. The second is where there has been an application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case decided by another appellate court. *See, Neilson v. City of Sarasota,* 117 So. 2d 731, 734 (Fla. 1960). The only facts that are relevant to this Court's decisions to accept or reject a Petition based upon decisional conflict are the facts within the four corners of the decision allegedly in conflict. *See, Reaves v. State,* 485 So. 2d 829, 830 n.3, (1986); *Hardee v. State,* 534 So. 2d 706, 707 (Fla. 1988). The Defendants do not analyze the alleged conflict in this manner. Using the appropriate analysis, they have not, and cannot, demonstrate such a conflict here.

II.

THE SECOND DISTRICT'S DECISION DOES NOT CONFLICT WITH CASE LAW FROM THE FOURTH AND FIFTH DISTRICT COURTS OF APPEAL.

At the outset, it must be noted that the Defendants misstate the rule of law which they claim as their basis of conflict. Neither the Fourth District's decision in *Blackpool Associates, Ltd. v. S.M.-106, Ltd.* 839 So. 2d 837, 838 (Fla. 4DCA 2003), nor the Fifth District's decision in *Goolsby v. State*, 948 So. 2d 965 (Fla. 5DCA 2007) stand for the proposition that statements or rulings of disqualified trial judges must be reconsidered or disregarded. In *Blackpool* the Fourth District merely stated that the successor judge may reconsider any prior factual or legal ruling of a disqualified judge. In *Goolsby*, the Fifth District had ordered the circuit court to reconsider Goolsby's motion for post-conviction relief, *de novo*. The matter was assigned to a different circuit judge who considered the court file along with the transcript of the hearing conducted by the disqualified judge and Goolsby's motion was denied. On appeal, Goolsby argued that it was error for the judge to rely upon the prior transcript. The Fifth District agreed indicating that when it ordered the *de novo* reconsideration, it contemplated either a new hearing or that the motion would be summarily denied with appropriate references to the

record and attachments. The Court noted that the procedure utilized by the trial court denied it the opportunity to view witnesses and weigh their credibility.

The Second District here did not announce a rule of law that in any way conflicts with rules expressed by the Fourth and Fifth Districts, respectively. Nor did the Second District misapply those rules in matters with substantially the same factual pattern as those cases. There simply is no conflict with those decisions.

III.

THE SECOND DISTRICT'S DECISION IS NOT IN CONFLICT WITH DECISIONS FROM THE FIRST AND FOURTH DISTRICTS HOLDING THAT A REVERSAL MUST BE BASED ON THE RECORD AND NOT STATEMENTS BY THE TRIAL JUDGE.

The Defendants also contend that the Second District's decision conflicts with *Dailey v. Hendricks,* 213 So. 2d 600 (Fla. 1DCA 1968); *Manes v. Rowley,* 218 So. 2d 487 (Fla. 4DCA 1969); *Zimmerman v. Langlais*, 248 So. 2d 694 (Fla. 4DCA 2971). They claim that the Second District held that even on remand, it would be insufficient for a successor judge to review the trial record and determine whether the trial court's stated observation was supported by the record. The Defendants further claim that the Second District ruled the trial judge's post-trial statement automatically requires a new trial notwithstanding the record. Most respectfully, the Second District never announced such a rule.

What the Second District did was very simple. Under circumstances it characterized as unique, it noted that the record demonstrated that the Defendants

were given an extension to file a reply memorandum but instead, filed a motion to disqualify the trial judge, after she had vocally expressed her observations about defense counsel's conduct, and its effect of the fairness of the proceedings. The Second District also noted that when the Estate attempted to depose the trial judge, who was the only person charged by law to consider the effect of defense counsel's misconduct upon the fairness of the proceedings, the Defendants moved for and were granted a protective order, thus forever silencing the only person in the judicial system who could have issued a meaningful ruling on the motion. Since it was impossible for any successor judge and frankly, for the Second District, to evaluate not only the verbal misconduct that may or may not appear in the transcript (inflection of voice, volume, etc.) and the non-verbal misconduct which clearly would not be reflected in the transcript (facial expressions, gestures, invasion of jury's space, etc.) the Second District had no alternative but to give deference to the record observations of the trial judge and order a new trial so as to guarantee fair proceedings among the parties. The Court did not announce any rule which conflicts with the cited cases, nor misapply the rules those cases supply.

CONCLUSION

Admittedly, the Second District has cited to an opinion that is currently pending before this Court and such citation would provide a proper basis to accept jurisdiction in this case, if the Court rules on the merits of *City of Tampa v.*

Companioni, 26 So. 3d. 598 (Fla. 2dDCA 2009) rev. granted, 23 So. 3d 771 (Fla. 2010).

If the Court reconsiders the exercise of jurisdiction in that case, there is no basis for the Court to exercise its discretion and accept jurisdiction as Defendants have not, and cannot, demonstrate any express and direct conflict between the present decision and any of the reported appellate decisions in the state.

Respectfully submitted,

/s/ George A. Vaka
George A. Vaka
Florida Bar No.: 374016

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this Thursday, July 29, 2010 to: Dinah Stein, Esquire, 799 Brickell Plaza, 9th floor, Miami, Florida 33131 and Ron Josepher, Esquire, 100 S. Ashley Drive, Suite 1100, Tampa, Florida 33602.

/s/ George A. Vaka

George A. Vaka
Florida Bar No.: 374016
VAKA LAW GROUP, P.L.
777 S. Harbour Island Blvd., Suite 300
Tampa, Florida 33602
813.549.1799 Telephone
813.549.1790 Facsimile

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

/s/ George A. Vaka

George A. Vaka
Florida Bar No.: 374016