IN THE SUPREME COURT OF FLORIDA

CASE NO. _____
L.T. Case No. 2D08-6242

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

Petitioners,

vs.

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

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioners, MARK DAVID KANAREK, M.D. and NADAL PEDIATRICS (hereinafter "Dr. Kanarek"), pursuant to Rule 9.120, Fla.R.App.P., file this brief in support of their notice invoking the Court's conflict jurisdiction under Article V, section 3(b)(3) of the Florida Constitution, and state as follows.

In an opinion reversing a judgment in favor of Petitioners and remanding for a new trial, the Second District below cited as controlling authority *City of Tampa v. Companioni*, 26 So. 3d 598 (Fla. 2d DCA 2009), *rev. granted*, 23 So. 3d 711 (Fla. 2010), a decision that is currently pending in this Court, and the outcome of which would be dispositive of the instant action.

The Second District also held, in contrast to established precedent, that a where a presiding judge is disqualified after a trial based on perceived bias, a successor judge ruling on post-trial motions must order a new trial if the disqualified judge indicated post-trial that error occurred, even if the purported error is not reflected anywhere in the trial transcript.

This is a wrongful death medical malpractice action that resulted in a jury verdict for Dr. Kanarek, the defendant below. Although counsel for Respondents made numerous objections during the trial, he specifically represented throughout that he was not seeking a mistrial. (Op. p. 3).

After the jury rendered a verdict in favor of Dr. Kanarek, Respondent moved for a new trial based solely on alleged misconduct by Dr. Kanarek's counsel. At the hearing on the motion for new trial, the presiding judge made comments accusing counsel for Dr. Kanarek of engaging in inappropriate behavior during the trial, and stated that it caused her to question the fairness of the trial. (Op. p. 3). Curiously, both the presiding judge and the Second District noted that any such alleged misconduct which purportedly deprived the Respondents of a fair trial "could not be gleaned from the cold record," despite the existence of a complete trial transcript. (Op. pp. 3, 4).

Because the presiding judge's post-trial comments were contrary to the trial transcripts and suggested that the court was going to rule based on perceptions not supported by the record, Dr. Kanarek had no choice but to move to disqualify the judge. (Op. p. 4).[1] The presiding judge found the motion to be legally sufficient and disqualified herself from the proceeding. (*Id.*). A successor judge who was presented with the trial record denied Respondents' motion for new trial. (Op. p. 5).

On appeal, the Second District elevated the post-trial comments of the presiding judge over the contents of the trial transcripts and held that, based solely on the presiding judge's post-trial comments that provided grounds for

[1] It was Dr. Kanarek's position in the motion to disqualify and on appeal that the trial transcripts evidenced absolutely no improper or prejudicial conduct on the part of his counsel, and that no such misconduct occurred.

disqualification, a new trial was required. Although the Second District noted that Dr. Kanarek had prevented Respondent's attempt to take a post-trial deposition of the presiding judge, it did not remand the case to allow for a deposition. (Op. p. 4).

Significantly, in its opinion ordering the new trial the Second District recognized that the legal authority it was relying on in permitting a new trial is currently pending review in this Court. After recognizing that the Respondent had never moved for a mistrial, the Second District stated as follows:

> We note that where a party has objected to errors at trial, is it not necessary for that party to move for a mistrial during the course of the trial in order to preserve the issue for purposes of a motion for new trial filed in the trial court. See City of Tampa v. Companioni, 26 So. 3d 598, 599 (Fla. 2d DCA 2009), review granted, 23 So. 3d 711 (Fla. 2010); Robinson v. State, 989 So. 2d 747, 750 (Fla. 2d DCA 2008); Nigro v. Brady, 731 So. 2d 54, 56 (Fla. 4th DCA 1999).

(Op. p. 3, n.1). As the Second District noted in its opinion, this Court granted review in *City of Tampa v. Companioni*, and it is currently pending as Case Number SC09-1800. Oral argument is scheduled for September 2, 2010.

Dr. Kanarek thereafter filed his notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

This Court has conflict jurisdiction under *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), because the Second District's decision cited as controlling authority its decision in *City of Tampa v. Companioni*, 26 So. 3d 598 (Fla. 2d DCA 2009), *rev.*

granted, 23 So. 3d 711 (Fla. 2010), which is pending review in this Court. If *Companioni* were reversed, it would mandate reversal in this case as well. This creates a *prima facie* express conflict.

The Second District's decision also conflicts with case law from the Fourth and Fifth Districts holding that a litigant is permitted to remove the taint of a disqualified judge's ruling by seeking reconsideration of the judge's factual rulings from the successor judge. *Blackpool Assocs., Ltd. v. SM-106, Ltd.*, 839 So. 2d 837 (Fla. 4th DCA 2003); *Goolsby v. State*, 948 So. 2d 965 (Fla. 5th DCA 2007). Under the Second District's decision, a presiding judge's post-trial comment about the trial cannot be assailed, even where a complete trial transcript exists.

The Second District's decision also conflicts with case law from the First and Fourth District's holding that a trial judge's stated observation cannot provide grounds for a new trial in the face of a contrary record. *Dailey v. Hendricks*, 213 So. 2d 600 (Fla. 1st DCA 1968); *Manes v. Rowley*, 218 So. 2d 487 (Fla. 4th DCA 1969); *Zimmerman v. Langlais*, 248 So. 2d 694 (Fla. 4th DCA 1971).

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.

This Court has held that "a district court decision which cites as controlling authority a decision that is either pending review in or has been reversed by this

Court constitutes prima facie express conflict and allows this Court to exercise its jurisdiction." *Wingfield v. State*, 799 So. 2d 1022, 1024 (Fla. 2001) (e.s.), *citing Jollie v. State*, 405 So. 2d 418 (Fla. 1981). *See also State v. Loftin*, 534 So. 2d 1148, 1149 (Fla. 1988) (same); Rule 9.030(a)(2)(A)(vi), Fla.R.App.P.

The Second District's decision falls squarely within the "*Jollie*" jurisdiction that this Court has long recognized as constituting *prima facie* express conflict. Dr. Kanarek contended below that Respondent had waived its motion for new trial by failing to move for a mistrial during trial.[2] (Op. p. 4). The Second District expressly rejected Dr. Kanarek's argument based on *City of Tampa v. Companioni*, 26 So. 3d 598 (Fla. 2d DCA 2009). In *Companioni*, the Second District held that to preserve a trial error under the "prejudicial" standard as opposed to fundamental error, it is not necessary for the moving party to request a mistrial during trial, so long as the error is raised in a motion for new trial. *Id.* at 599.

As noted, this Court granted review in *Companioni*, and the case is currently pending in this Court. If this Court holds that *Companioni* was wrongly decided, it

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[2] *See, e.g., Walt Disney World Co. v. Althouse*, 427 So. 2d 1135, 1136 (Fla. 5th DCA 1983) ("Had Althouse requested a mistrial...perhaps he would have been entitled to one. However, counsel for Althouse elected to let the trial proceed. This decision must be given its due consequences. Althouse cannot be allowed to proceed on a 'heads I win; tails you lose' basis."); *Weise v. Repa Film Int'l, Inc.*, 683 So. 2d 1128, 1129 (Fla. 4th DCA 1996) ("An argument on appeal that opposing counsel's remarks were so egregious as to [warrant a new trial] will generally be sorely lacking in credibility where there is no objection, or, if an objection is sustained, there is no motion for mistrial.").

would mandate a different result in the instant case. Dr. Kanarek thus submits that this Court should accept review of the Second District's decision below pending its resolution of *Companioni*.

II. THE SECOND DISTRICT'S DECISION CONFLICTS WITH CASE LAW FROM OTHER DISTRICT COURTS HOLDING THAT STATEMENTS (*i.e.*, FACTUAL FINDINGS) BY A DISQUALIFIED JUDGE MAY NOT BE GIVEN CONSIDERATION IN SUBSEQUENT RULINGS.

The Second District's reliance on *Companioni* in ordering a new trial constitutes a *prima facie* express conflict for purposes of this Court's jurisdiction, and thus Dr. Kanarek need not demonstrate any additional conflict in order to establish this Court's jurisdiction.

Nonetheless, it should be noted that the Second District's decision, which based its reversal not on the trial record but solely on the statement of the disqualified presiding judge, is in express and direct conflict with decisions of other district courts holding that factual findings by a disqualified judge may not be considered when ruling on a motion. Thus, this Court has jurisdiction on this basis as well. Rule 9.030(a)(2)(A)(vi), Fla.R.App.P.

Where a judge has been disqualified based on a legally sufficient motion asserting prejudice or bias of the judge, the judicial disqualification rule allows the litigants to have the successor judge reconsider the disqualified judge's "[p]rior factual or legal rulings." *See* Rule 2.330(h), Fla.R.Jud.Admin. "The purpose of

reconsideration is to remove the taint of prejudice where rulings might be perceived as so tainted." *Rath v. Network Mktg., L.C.*, 944 So. 2d 485, 487 (Fla. 4th DCA 2007).

Both the Fourth and Fifth Districts have applied this rule literally to mean that after disqualification, "the successor judge may reconsider any prior factual or legal rulings." *Blackpool Assocs., Ltd. v. SM-106, Ltd.*, 839 So. 2d 837, 838 (Fla. 4th DCA 2003) (e.s.). *See also Goolsby v. State*, 948 So. 2d 965 (Fla. 5th DCA 2007) (after presiding judge was disqualified, successor judge was not permitted to consider or base decision on motion for post-conviction relief on transcript of evidentiary hearing conducted by first judge).

Contrary to the Judicial Administration Rule and the above-cited case law, the Second District held below that the taint of prejudicial remarks made while post-trial motions are pending cannot be removed, even in the face of a contrary record. Under the Second District's opinion, instead of Rule 2.330 operating to remove the taint of the judge's remarks, when invoked post-trial it has the effect of rendering the disqualified judge's remarks incontrovertible.

Thus, the Second District decision also conflicts with decisions of the Fourth and Fifth Districts on the issue of whether Rule 2.330(h) of the Florida Rules of Judicial Administration permits a court to reverse a judgment based solely on judicial statements that provided grounds for disqualification.

III. THE SECOND DISTRICT DECISION IS 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.

Finally, the Second District's opinion is directly contrary to the settled principal of law that a trial judge's observation cannot provide grounds for a new trial in the face of a contrary record. *Dailey v. Hendricks*, 213 So. 2d 600 (Fla. 1st DCA 1968); *Manes v. Rowley*, 218 So. 2d 487 (Fla. 4th DCA 1969); *Zimmerman v. Langlais*, 248 So. 2d 694 (Fla. 4th DCA 1971).

In *Dailey*, after a jury rendered a verdict for plaintiffs in a personal injury action, the trial judge entered a judgment notwithstanding the verdict and an order granting defendants a new trial in the event the judgment notwithstanding the verdict was reversed on appeal. 213 So. 2d at 600. After this Court quashed the original decision of the First District based on the standard of review applied, the First District issued an opinion reversing the trial court's judgment notwithstanding the verdict, as well as the order alternatively granting a new trial, explaining:

> It is well settled that a trial judge's finding that 'the verdict is contrary to the manifest weight of the evidence' must find a basis in the record to sustain the granting of a new trial. An observation by a trial judge that the verdict is contrary to the manifest weight of the evidence does not make such a finding an absolute fact; it must be found from a basis in the record. An appellate court does not review a trial judge's conscience – it reviews the record upon which a trial judge bases his conscience. If the record does not support the finding, it necessarily follows that an abuse of discretion is indicated on the part of the trial judge.

Id. at 602 (e.s.). The First District reversed the order granting a new trial based on its conclusion that "the record in this cause does not support the trial judge's finding that the verdict was contrary to the manifest weight of the evidence…." *Id.*

The Fourth District has applied *Dailey* to find an order granting a new trial to constitute an abuse of discretion where "it does not find a basis in the record…." *Zimmerman*, 248 So. 2d at 696. *See also Manes*, 218 So. 2d at 488 (although an order granting a new trial may not be overturned absent a clear showing of an abuse of discretion, "[t]he exercise of such discretion must, however, find support in the record.").

The successor judge was in the identical situation as the First and Fourth Districts in *Dailey*, *Manes* and *Zimmerman*, and in fact the Second District below even directly analogized the circumstances of the instant case to a court reviewing an order finding a verdict to be contrary to the manifest weight of the evidence. (Op. p. 8). However, in contrast to the above-cited cases, the Second District held that even on remand it would not be sufficient for a successor judge to review the trial record and determine whether the trial court's stated observation was supported by the record. Rather, <u>according to the Second District, the trial judge's post-trial statement automatically requires a new trial notwithstanding the record</u>.

The Second District attempted to justify this novel holding by comparing the instant situation to cases where a successor judge must consider an argument that

the verdict was against the manifest weight of the evidence based on witness credibility. (Op. pp. 7-8). On its face, however, that argument makes no sense. A witness' demeanor cannot be seen on the record, and there is generally no reason to state it on the record. In contrast, it is implausible that the alleged worst attorney conduct a judge has ever witnessed, causing the judge "grave concern as to the fairness of this trial" (Op. p. 3), would not appear on the trial record, either through defense counsel's own statements or an admonishment by the court. In fact, the Second District assumed without any record basis that the successor judge who was presented with the trial record ordered a new trial because he "felt constrained" to do so, and not because the record affirmatively disproved the presiding judge's statements.

The Second District's opinion cannot be reconciled with the above-cited line of cases holding that a trial court's statement may not provide grounds for a new trial in the face of a contradictory record. This Court should grant review to resolve this conflict as well.

CONCLUSION

Based on the foregoing, MARK DAVID KANAREK, M.D. and NADAL PEDIATRICS, respectfully submit that this Court has conflict jurisdiction pursuant to Article V, section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(vi), Fla.R.App.P., and that review should be granted.

By: /s/Dinah Stein
DINAH STEIN
Florida Bar No. 98272

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail this **23rd** day of **June, 2010**, to: C. Steven Yerrid, Esq., Tammy J. Judge, Esq., The Yerrid Law Firm, 101 E. Kennedy Blvd., Suite 3910, Tampa, FL 33602 and George A. Vaka, Esq.**,** George A. Vaka, Esq., Vaka Law Group, P.L., 777 South Harbour Island Boulevard, Suite 300, Tampa, FL 33602.

CERTIFICATE OF COMPLIANCE

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

By: /s/Dinah Stein
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