IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-439
(Lower Tribunal Case No. 3D05-1989)

GELERME METELLUS,

Petitioner,

vs.

PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY etc.

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM A
DECISION OF THE THIRD DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner asserted a medical malpractice claim against the Public Health Trust of Miami-Dade County (the "Trust"). The Trust obtained a defense verdict following a jury trial. The circuit court granted a new trial, however, because a juror did not disclose a divorce and certain collection actions in response to a question during voir dire. The Third District reversed the new trial order and required that judgment be entered in accordance with the verdict. Petitioner now seeks to invoke the discretionary conflicts jurisdiction of this Court.

The relevant jurisdictional facts are straightforward and are recited by the Third District in its Opinion. See Public Health Trust v. Metellus, 948 So. 2d 4, 5 (Fla. 3d DCA 2007). During voir dire, jurors were asked whether they had been involved in a "lawsuit." Id. The term "lawsuit" was not defined by the trial court or the Petitioner in a manner that complied with Florida law. Id. (discussing the "absence of any definition" complying with applicable precedent). In response, a particular juror did not mention a divorce and certain collection actions. Id. Because the term "lawsuit" was not defined in a way that included such proceedings, the Third District held that there was no basis to grant a new trial. Id. The Third District expressly relied on the Florida Supreme Court's decisions in Roberts v. Tejada, 814 So. 2d 334 (Fla. 2002) and De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995) in reaching its decision.

Furthermore, the record was devoid of any showing by the Petitioner that the non-disclosure of these actions was somehow material to the juror's service in this medical malpractice case.[1] In particular, the Third District expressly held that there was no showing that the disclosure of these cases would have been likely to cause Petitioner to use a peremptory challenge. Metellus, 948 So. 2d at 5 ("[T]here was no showing . . . that counsel would have exercised a peremptory challenge . . . had he been given the information in question."). This holding served as an independent ground for the Third District's decision.

Petitioner now contends that the Third District's decision in Metellus expressly and directly conflicts with the Florida Supreme Court's decisions in Roberts and De La Rosa. The Third District, however, expressly cited and relied on Roberts and De La Rosa in the Metellus decision.

Petitioner also contends that the Metellus decision conflicts with the Fourth District's decisions in Taylor v. Magana and Wiggins v. Sadow, arguing that these decisions apply an abuse of discretion standard of review to new trial orders. The Third District, however, did not state that it was applying any different type of standard in Metellus.

[1] The trial court itself recognized that these were "cases of a different nature." Pet's Appx. at p. 8.

SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate that the decision below directly and expressly conflicts with the Supreme Court's decisions in Roberts and De La Rosa. After all, the Third District cited and followed both of these decisions in the Metellus opinion. For example, Roberts expressly requires that terms such as litigation and lawsuit be defined to potential jurors during voir dire. Here, both the circuit court and the Petitioner failed to follow Roberts and failed to provide the required definition. Thus, it is Petitioner's position -- not the Third District decision -- that conflicts with Florida Supreme Court precedent.

Likewise, Petitioner has failed to demonstrate that the decision below directly and expressly conflicts with the Fourth District's decisions in Taylor and Wiggins. These cases stand for the general proposition that new trial orders are reviewed for abuse of discretion. Here, there is no possibility of an express conflict as the Third District decision in Metellus does not state that it applied any different standard. Moreover, because the Trust raised an issue of law in contesting the new trial order, it would have been appropriate for the Third District to apply a de novo or other less deferential standard under well-established law.

STANDARD OF REVIEW

The Florida Constitution permits the Supreme Court to exercise its discretionary "conflict jurisdiction" only when a lower court's decision "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. Const. art. V, § 3(b)(3); accord Fla. R. App. P. 9.030(a)(2)(A)(iv). Accordingly, this Court has consistently refused to sit as a second court of appeal, selectively reversing decisions of the district courts with which it disagrees. See Mystan Marine, Inc. v. Harrington, 339 So. 2d 200, 201 (Fla. 1976) ("Time and again we have noted the limitations on our review and we have refused to become a court of select errors.").

Rather, this Court recognizes that its jurisdiction is constitutionally limited to a "concern with decisions as precedents as opposed to adjudications of the rights of particular litigants." Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958). Thus, before this Court will "set aside the decision of a Court of Appeal on the conflict theory [it] must find in that decision a real, live and vital conflict." Nielsen v. City of Sarasota, 117 So. 2d 731, 734-35 (Fla. 1960).

ARGUMENT

A. The Roberts Case Supports Denial Of Jurisdiction

As an initial matter, the Petitioner's jurisdictional brief suffers from a basic logical flaw. Petitioner relies extensively on Roberts v. Tejada in arguing for jurisdiction even though it is Petitioner's own failure to adhere to Roberts that required the Third District to reverse the new trial order.[2]

Roberts expressly stands for the proposition that the term "litigation" -- or a "similar" term such as lawsuit -- must be defined (along with examples) to potential jurors when used in a question during voir dire. Roberts v. Tejeda, 814 So. 2d 334, 343-44 (Fla. 2002) (determining that counsel must take "special care" to describe "in a lay person's terms all the types of legal actions which may be encompassed by the term 'litigation,' or other similar words commonly used by attorneys") (emphasis added).[3]

Here, both the trial court and Petitioner violated the Roberts rule by not providing an adequate definition with examples to the venire. See Metellus, 948 So. 2d at 5 (expressly noting the "absence of any definition" complying with

[2] Indeed, the Third District's decision was expressly based on Petitioner's failure to provide an adequate definition as required by Roberts. Metellus, 948 So. 2d at 5.

[3] Moreover, although the quote above discusses the term "litigation," the actual question in Roberts was whether each prospective juror had been "a party to a lawsuit." Roberts, 814 So. 2d 336 (emphasis added). Thus, Roberts is directly on point and supports this Court's decision.

Roberts). Accordingly, the "prior lawsuit" question in Metellus cannot form the basis of any finding of concealment (whether intentional or not) because the question did not "squarely ask" for the information that was withheld. Birch v. Albert, 761 So. 2d 355, 357-58 (Fla. 3d DCA 2000).

Because the circuit court's "prior lawsuit" question was deficient, Roberts required Petitioner's counsel to take "special care" and provide examples of lawsuits if he wished to rely on the question. Roberts, 814 So. 2d at 344. Indeed, if Petitioner's counsel had followed Roberts, he would have told the venire that lawsuits included "a divorce" and "a collection of a debt," and would then have squarely asked for the information sought. Roberts, 814 So. 2d at 344. Petitioner's counsel, however, did not define the term "lawsuit" to the venire.[4] Petitioner cannot now rely on an ambiguous and legally deficient question to obtain a new trial.

Furthermore, Petitioner has failed to demonstrate any conflict with De La Rosa for the same reason there is no conflict with Roberts. The De La Rosa case involved actual concealment of previous litigation by a juror. 659 So. 2d at 241.

[4] It is well-established that a party moving for a new trial must demonstrate "that the failure to disclose the information was not attributable to the complaining party's lack of diligence." De La Rosa v. Zequeira, 659 So. 2d. 239, 241 (Fla. 1995) (emphasis added). Here, however, Petitioner did not provide an adequate definition of lawsuit to the venire. Accordingly, De La Rosa is also not in conflict with Metellus because Petitioner's lack of diligence caused the purported non-disclosure.

("The concealment prong of the test was also met in this case: the juror failed to respond truthfully to counsel's questions concerning his litigation participation."). Here, however, there was no concealment at all by the juror because the term "lawsuit" was not defined. Once again, Roberts (the most recent precedent from this Court) makes clear that there can only be concealment where the term "lawsuit" is defined to include the type of information being sought. This did not occur so there is no conflict and consequently no jurisdiction.

B. The Peremptory Challenge Requirement Is Consistent

Second, Petitioner quibbles with the Third District's statement that "there was no showing . . . that counsel would have exercised a peremptory challenge against the juror had he been given the information in question." Metellus, 948 So. 2d at 5. This language, however, is consistent with the Florida Supreme Court's repeated statements that Petitioner must show the non-disclosure of information "prevented an informed judgment" and "would in all likelihood have resulted in a peremptory challenge." Roberts, 814 So. 2d at 344; De La Rosa, 659 So. 2d at 242. The language used by the Third District and the Florida Supreme Court is consistent and is certainly not in express conflict.

C. There Is No Conflict Regarding Standard Of Review

Third, Petitioner tries to create a conflict where none exists. Petitioner argues that the Fourth District applies a general "abuse of discretion" standard

when reviewing orders granting a new trial.[5] There is no indication in Metellus that the Third District departed from this standard; accordingly, there is no possible express conflict and this is not an issue that can support jurisdiction

Furthermore, no conflict would exist even if the Third District had applied a de novo or other less deferential standard of review. After all, the circuit court made fundamental errors of law, which were challenged on appeal and which significantly limited or eliminated the circuit court's discretion in this case. As stated by the Second District, "[t]he closer an issue comes to being purely legal in nature, the less discretion a trial court enjoys in ruling on a new trial motion. This discretion is significantly reduced when the motion concerns a purely legal question. This is so because an error involving a purely legal question can be as accurately reviewed from an appellate record as from the trial judge's bench." Tri-Pak Machinery v. Hartshorn, 644 So. 2d 118, 119-20 (Fla. 2d DCA 1994) (citations omitted).

Here, the circuit court made at least two significant errors of law by (i) failing to apply the clearly applicable Roberts rule to the undefined "prior lawsuit" question (discussed above) and (ii) taking the flawed position that all litigation history is material. Pet's Appx. at 8 (stating generally that "[l]itigation history of

[5] Petitioner cites Taylor v. Magana, 911 So. 2d 1263, 1267 (Fla. 4th DCA 2005) and Wiggins v. Sadow, 925 So. 2d 1152, 1154 (Fla. 4th DCA 2006).

the jurors is relevant and material"). This second position is directly contrary to the Third District's decision in Birch -- and, more importantly, this Court's decision in De La Rosa -- which indicates that "[t]he test is not simply whether information is relevant and material in general, but whether it is 'relevant and material to jury service in the case.'" Birch, 761 So. 2d at 359 (quoting De La Rosa. 659 So. 2d at 241) (emphasis added). Petitioner never demonstrated, and the circuit court never found, that the prior divorce and collection actions were material to this medical malpractice case.

Accordingly, the circuit court's decision to grant a new trial was legally erroneous and had to be reversed, no matter whether an abuse of discretion or de novo standard was applied. In short, there can be no conflict that supports jurisdiction on this issue.

CONCLUSION

Because Petitioner has failed to demonstrate that the Third District's decision below directly and expressly conflicts with Roberts, De La Rosa, or the Fourth District decisions, this Court lacks jurisdiction and must deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express on April 6, 2007 on counsel for Appellees, Carl H. Hoffman, Esq., Hoffman & Hertzig, P.A., 901 Ponce de Leon Blvd., Suite 500, Coral Gables, Florida, 33134.

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Assistant County Attorney

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been generated in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a) of the Florida Rules of Appellate Procedure.

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Assistant County Attorney