IN THE SUPREME COURT OF THE STATE OF FLORIDA

LAWRENCE T. NEWMAN
DR. BEVERLY R. NEWMAN,
Appellants

v.

IN RE: GUARDIANSHIP OF
AL KATZ
Appellee

Fla. Supreme Ct. Case No.: SC11-1117
District Court Case No: 2D10-1946
Lower Court Case No.: 2009-GA-1171

JURISDICTIONAL BRIEF OF APPELLANTS

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STATEMENT OF THE FACTS AND OF THE CASE

Al Katz ("Katz") was born on July 12, 1920, in Germany, survived the Holocaust as a slave laborer for seven years, and immigrated to Indiana in 1946, where he was domiciled. He spent winters in Bradenton, Florida.

Beverly Newman, Katz's daughter, filed for guardianship of her Father in the Indiana Probate Court in December 2008, which guardianship case was still open at the time Katz went into guardianship in Florida. On September 18, 2009, the public guardian for Manatee County filed for guardianship of Katz in the Circuit Court for Manatee County, Probate Division in File No. 2009 GA-1171, without notice to Newman; and the Circuit Court held the initial temporary guardianship hearing, after which the public guardian became temporary guardian and Ernie Lisch became Katz's court-appointed attorney. Despite many irregularities at the hearing, Lisch took no steps to advocate for or protect the rights of his client, Al Katz, who was put into a nursing home against his advance directives.

Pursuant to the Baker Act (§394.451, Fla. Stat.), on September 24, 2009, Katz was put into involuntary inpatient placement, never opposed by Lisch, where Katz remained for three weeks without hearing. Lisch never visited his 89-year-old client and never advocated for him.

On October 26, 28, and 30, 2009, the Circuit Court held the

permanent guardianship hearing for Al Katz, during which Lisch opposed Beverly Newman's petition for appointment as guardian of her Father. In the intervening three weeks, Katz was repeatedly hospitalized and near death. On November 23, 2009, the Circuit Court issued its Order appointing Beverly Newman as Plenary Guardian of the Person of Al Katz. She also became his full-time caretaker at home.

On January 5, 2010, Lisch filed his Petition for Order Authorizing Payment of Attorney's Fees and Expenses, which was opposed by Beverly Newman, requesting $24,354.15. On March 22, 2010, the Circuit Court issued its Order granting Lisch attorney fees for the full amount.

On April 23, 2010, Beverly Newman and Lawrence Newman filed their pro se Notice of Appeal. The Second District Court of Appeals affirmed the District Court by Order dated March 23, 2011, and denied the Newmans' Motion for Rehearing on April 28, 2011.

SUMMARY OF ARGUMENT

This Court has jurisdiction because the Second District Court of Appeals decision expressly and directly conflicts on the same questions of law with (1) *Miller v. American Bank and Trust*, 607 So.2d 483 (Fla.App. 4 Dist. 1992) concerning the duty of an appellate court to reverse an attorney fee award "which is so obviously contrary to the manifest justice of the

case," and with (2) *Jones v. State*, 611 So.2d 577 (Fla.App. 1 Dist. 1992) and *Handley v. Dennis*, 642 So.2d 115 (Fla.App. 1 Dist. 1994), regarding Lisch's failure to provide any legal representation or advocacy with respect to Al Katz's Baker Act commitment.

ARGUMENT

This Court has jurisdiction because the Second District Court of Appeals decision dated March 23, 2011, and its denial of Motion for Rehearing dated April 28, 2011, both expressly and directly conflict on the same questions of law with the Fourth District Court of Appeals decision in *Miller v. American Bank and Trust*, 607 So.2d 483 (Fla.App. 4 Dist. 1992).

The Second District's decisions further expressly and directly conflict with the decisions in *Jones v. State*, 611 So.2d 577 (Fla.App. 1 Dist. 1992) and in *Handley v. Dennis*, 642 So.2d 115 (Fla.App. 1 Dist. 1994), regarding Ernie Lisch's failure to provide any legal representation or advocacy with respect to Al Katz's Baker Act commitment.

The Second District's affirmation of the order of the Manatee County Circuit Court awarding attorney fees to Ernie Lisch in the full-requested amount of $24,354.15 presents a direct conflict with two holdings in *Miller v. American Bank and Trust*. First, *Miller* holds that an appellate court should never approve of an attorney fee judgment which is "obviously

contrary to the manifest justice of the case." *Id*., at 484. Second, *Miller* holds that an appellate court should reverse such a fee judgment even if the record does not contain a transcript of the fee hearing, and even though there is some evidence tending to support the trial court's fee order. *Id*., at 484.

The present case concerns the same factors which compelled the *Miller* court to reverse and remand the lower court's attorney fee order. Given the consonant factors present in both cases, the Second District's one-word affirmation in this case herein speaks volumes in its express, direct rejection of the analysis and the holdings of *Miller*.

In *Miller*, the attorneys requested and were granted fees of $242,550.15, based upon 1600 "reasonable hours" purportedly expended to foreclose on a large mortgage. Since there was essentially no defense, the case resolved, without trial or depositions, by summary judgment. The appeal, in which there was no oral argument, ended in a *per curiam* affirmation. Despite the limited nature of legal services required, the attorneys were granted nearly one-quarter million dollars. *Id*., at 483-484.

In discussing its reasons for reversal, the *Miller* court set forth a detailed holding and analysis:

> We cannot permit this award to stand.
>
> **The appellees claim that, in effect, we have no choice but to affirm the judgment** as within the trial court's

discretion, **particularly since the fact that the record contains no transcript of the fee hearing** requires the conclusion that the order is supported by competent evidence. See *Applegate v. Barnett Bank*, 377 So.2d 1150 (Fla.1979). **We strongly disagree** ....

("[I]f a decree is manifestly against the weight of the evidence, or contrary to the legal effect of the evidence, then it becomes the duty of the appellate court to reverse the same."); *Newman v. Smith,* 77 Fla. 633, 650, 82 So. 236, 241 (1918) ("Where the finding of a trial judge is contrary to the legal effect of the evidence on the issues made the appellate court should reverse the finding even though … there was some evidence tending to support the finding."). (Citations omitted).

This is especially true with respect to attorney's fees, with which the profession and the courts must be particularly concerned, see *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla.1985), and even more so since the case involves the **notorious "billable hours" syndrome**, with its **multiple evils of exaggeration, duplication, and invention**. (Citations omitted) …. **The existence of such evidence does not require that we abandon our own expertise, much less our common sense** ….

Similarly, in *Mercy Hospital, Inc*., 431 So.2d at 688, the court stated:

In deciding upon amounts to be awarded as attorney's fees, a trial court must consider not only the reasonableness of the fees charged but the appropriateness of the number of hours …. Johnson's failure to present detailed evidence of his services is fatal to his claim. **The opinion of an expert witness does not constitute proof that the facts necessary to support the conclusion exist** ….

Without further belaboring the obvious, we are content to rest our conclusion upon the judgment below and Justice Stewart's famous concurrence in *Jacobellis v. Ohio,* 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793, 804 (1964),

> which is directly on point as to both subject matter and method of analysis. REVERSED and REMANDED.

Miller v. First American Bank and Trust, 607 So.2d 483, 484-486 (Fla.App. 4 Dist. 1992). (Emphasis added).

In the present case, attorney Lisch's only argument to the Second Circuit in his Appellee's Brief was that the Circuit Court's fee order must be affirmed because the appellate record did not contain the transcript of the fee hearing, but the *Miller* court disagreed, holding that:

> We strongly disagree. On the face of it, the order embodies an unacceptable, even incredible result. **No court is obliged to approve a judgment which so obviously offends even the most hardened appellate conscience** and which is so obviously contrary to the manifest justice of the case. **Indeed, it is obliged not to.** *Miller*, 607 So.2d at 484.

Thus, to the extent the Second District's affirmance herein was based upon the lack of a hearing transcript, its Opinion directly conflicts with *Miller*.

Attorney Lisch's fee award was "obviously contrary to the manifest justice of the case" due to his ineffective representation, as follows:

a. Most of Lisch's billable time was spent in unsuccessfully opposing Beverly Newman's efforts to obtain visitation with and guardianship of her Father, notwithstanding Florida's statutory scheme which gives preference to family members, and the lack of any other interested family member willing to care for Al Katz.

b. Lisch never made a single filing for his helpless client but billed excessive hours for document reviews, as in multiple billable entries to review a single document.

c. Lisch provided no benefit to his client and no effective assistance or advocacy, especially during the three weeks Mr. Katz was put into involuntary inpatient placement. Lisch's billable hours were spent opposing Newman's guardianship and advocating for Mr. Katz to be put into a nursing home permanently, in direct contradiction of Mr. Katz's long-standing written and oral directives. Predictably, Mr. Katz's health status drastically deteriorated from stable to near-death in just a few weeks' time.

d. Lisch never advocated for Mr. Katz at the initial hearing on September 18, 2009, by which Mr. Katz was put into emergency temporary public guardianship, and refused to object to: substantial hearsay at the hearing, upon which his client was put into public guardianship; the public guardian's false assertion that Mr. Katz was domiciled in Florida; and the overlooking of the open guardianship case in Indiana filed 10 months earlier. Instead, Lisch acted as a "neutral party," allowing the Public Guardian free reign, without challenge, to obtain guardianship over his client and to put his client into a nursing home, against his client's advance directives. Had Lisch advocated for his client at the initial hearing, Mr. Katz would not have been put into the public

guardianship for which he was ineligible since he was neither indigent nor unwanted by his family.

e. Lisch did not request or show up to any Baker Act hearing; took no actions to protect Mr. Katz's legal rights; and made no attempt to **halt the mistreatment of his helpless client trapped in prolonged involuntary inpatient placement with a no-contact order**. For these three weeks, Lisch charged Mr. Katz nearly $7,000.00, but did not visit him even once, contact him, file any motions to have Mr. Katz released, or perform any advocacy for Mr. Katz, all required duties for a patient's attorney per §394.467(4), Fla. Stat.:

> Any attorney representing the patient shall have access to the patient, witnesses, and records relevant to the presentation of the patient's case and **shall represent the interests of the patient**, regardless of the source of payment to the attorney (Emphasis added).

Despite the statute, Lisch never presented the patient's case to anyone.

f. Lisch charged for meetings, phone calls, document reviews, and legal research for which there was no follow-up and for which no benefit accrued to his client. Other than his petition for fees, Lisch never filed a single document, denying due process to Al Katz by ineffective representation.

Jones v. State, 611 So.2d 577 (Fla.App. 1 Dist. 1992) holds that any-one subject to involuntary placement must be afforded due process of law:

> At a minimum, this due process contemplates reasonable notice, a hearing, and the rights to effective assistance of counsel at all significant stages of the proceedings … at which a decision could be made which might result in a detrimental change to the **subject's liberty** (Emphasis added). *Id*., at 579.

Handley v. Dennis, 642 So.2d 115 (Fla.App. 1 Dist. 1994) holds that:

> The State's power to order the involuntary civil commitment of a mental patient is limited by the constitutional rights of the patient …. The [legal counsel for the patient] serves as an independent advocate for the patient, **not as a neutral party** …. By assuming jurisdiction over citizens pursuant to Chapter 744, the State of Florida bears a great responsibility to ensure that these persons are adequately cared for (Emphasis added). *Id*., at 116-118.

The Second Circuit's decision, which affirmed the award of $24,354.15 to Lisch, directly conflicts with the holdings in *Jones* and *Handley*, because Lisch was awarded extraordinary fees although he provided **no** representation of his client in the Baker Act proceeding, which denied him due process, resulting in dire deprivations of the liberty interests of Al Katz and in severe violations of Al Katz's Constitutional rights. As a Holocaust Survivor, the deprivations of liberty by involuntary confinement were especially devastating, causing him to suffer debilitating flashbacks to the Holocaust.

§394.467(4), Fla. Stat., and attorney protocol demand visiting the patient, reviewing medical records, interviewing staff, informing the patient of his rights, representing the patient in court, and being available by

telephone, all of which Lisch abdicated as "a neutral party." Consequently, the public guardian violated Al Katz's liberty interests by keeping him in involuntary placement for three weeks, without Lisch providing any advocacy for his helpless client. The *Handley* court concluded that:

> **a liberty interest asserted on behalf of an involuntary mental patient in a Baker Act hearing is superior to any conflicting right that could be asserted on behalf of the patient under the guardianship law**. *Handley*, 642 So.2d at 118.

Despite Lisch's complete abandonment of his client in the Baker Act proceeding, the Second District's decision permitted Lisch to receive exceptional compensation for his representation of Al Katz.

CONCLUSION

Appellants respectfully request that this Court accept review of the instant case and order briefs on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served by First Class U.S. Mail this 3rd day of June, 2011, upon the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Jurisdictional Brief of Appellants complies with Rule 9.210(2) of the Florida Rules of Appellate Procedure, and is printed in Times New Roman 14 point font.

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