IN THE

Supreme Court of Florida

Case No. SC09-149
District Court Case No. 3D08-2447

JOAN HALL-EDWARDS,
as Personal Representative of the Estate of Lance Crossman Hall,

Plaintiff/Petitioner,

vs.

FORD MOTOR COMPANY,
a foreign corporation,

Defendant/Respondent.

On Review from the Third District Court of Appeal

BRIEF ON JURISDICTION OF RESPONDENT FORD MOTOR COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF THE CASE AND FACTS

Plaintiff does not even purport to constrain herself to the four corners of the Third District's decision on review in stating her "facts," as required by this Court's longstanding precedent. See Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986). Instead, Plaintiff's three-plus page "Statement of the Case and Facts" cites the Third District's opinion only once, see Pet. Br. at 4, and then only to identify it as the order on review. Most of Plaintiff's selective facts cannot be found anywhere on the face of the Third District's decision. While Ford does not agree with Plaintiff's characterization of the record facts, Ford will rely strictly upon the Third District decision.

Lance Crossman Hall was a passenger in a Ford Explorer when the driver fell asleep and lost control of the vehicle, which resulted in his death. (App. at 2). Plaintiff, Joan Hall-Edwards, as personal representative of Hall's estate, filed a lawsuit against Ford. (App. at 2). The jury returned a verdict for Plaintiff. (App. at 2). The Third District reversed and remanded for a new trial, based upon errors relating to the admission of evidence about other rollover accidents. (App. at 3).

On remand, discovery disputes arose. The Third District's decision detailed Ford's efforts to comply with its discovery obligations. (App. at 3-6). Despite those efforts, the trial court entered the two Orders at issue, the "Sanction Order," "which grants access to all of Ford's databases," and the "Suspension Order,"

which "requires Ford to produce claimed attorney-client and work-product privileged suspension orders, i.e., documents in which Ford attorneys provide legal advice to Ford employees about document retention matters." (App. at 7-8). Both Orders were entered over Ford's privilege objections. (App. 7-8).

Prior to entering the "Sanction Order," the trial court ordered Ford to produce expert reports "within twenty-four (24) hours of this hearing" without any prior motion or discovery request pending. (App. at 4). At a later hearing that led to the Sanction Order, the trial court "made no finding that Ford had failed to find or produce any expert reports in its possession." (App. at 7). It also "refused to examine the boxes that Ford brought into the courtroom, which contained its production to plaintiff with regard to the seventy eight cases at issue." (App. at 7). Moreover, the trial court denied Ford the opportunity "to call plaintiff's expert, Dr. Renfroe, to the stand to testify regarding information which might be missing," even though he was in the courtroom. (App. at 7). Notably, "Plaintiff presented no evidence to challenge any of the facts established by the sworn affidavits and testimony of Ford's counsel [and] the evidence was undisputed that the [Litigation Matters Management System (LMSS)] database is privileged." (App. at 12). And, the trial court expressly stated "that, at this time, it was not finding that plaintiff was prejudiced in her ability to prove her case." (App. at 7).

Ford petitioned for a writ of certiorari on both Orders. The Third District determined the Orders "depart from the essential requirements of law and would result in irreparable harm, appropriately reviewable by certiorari jurisdiction." (App. at 1). In particular, the Third District concluded:

> the LMMS database was used as a mechanism for Ford's inside and outside counsel to communicate among each other, exchanging thoughts, opinions, strategies, mental impressions and advice regarding the defense of lawsuits and claims. These communications are made solely for the purpose of, and in furtherance of, the rendition of legal services to Ford and fall within the scope of the job duties of Ford's in-house counsel. Thus, the evidence established that LMMS qualifies as confidential communications that are immune from discovery under the attorney-client privilege. (App. at 11-12).

As to the Suspension Order, the Third District concluded "the Ford suspension orders were created by Ford's attorneys in anticipation of litigation and thus constitute work product." (App. at 14). It also concluded that, "because revealing the documents identified by Ford's counsel as those that need to be kept in anticipation of litigation would reveal the mental impressions of counsel, suspension orders fall within the absolute immunity protecting opinion work product." (App. at 14). "Further, the suspension orders constituted legal advice given by Ford's Office of the General Counsel to its client concerning the scope of documents which should be retained for purposes of pending or anticipated litigation [and] they are protected under the attorney-client privilege." (App. at 14).

Both Orders were quashed and Plaintiff filed a notice seeking discretionary review in this Court.

SUMMARY OF ARGUMENT

Plaintiff boldly asserts that the Third District created five express and direct conflicts in its decision. In fact, the Third District's decision does not conflict with any decision of this Court or other district courts of appeal. It properly applies the legal standard for certiorari in Florida and enforces well-recognized legal privileges.

The facts Plaintiff recites in support of its arguments are selectively drawn from transcripts, affidavits, and orders in the trial court record. But, almost without exception, they are not drawn from the four corners of the decision on review. This is wholly inappropriate in a discretionary review briefing, and the approach underscores that the Third District's decision does not create express and direct conflict on its face. Plaintiff is transparently seeking a plenary appeal rather than a conflict review. This Court should decline that invitation. There is no reasonable probability that a practitioner will read the Third District's decision next to any other decision Plaintiff cites and become confused.

Review should be denied.

ARGUMENT

I. STANDARD OF REVIEW.

This Court has the discretion to review a district court decision "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const.; accord Fla. R. App. P. 9.030(a)(2)(iv). When deciding whether there is a true conflict, this Court confines itself to the four corners of the district court's decision. "The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict . . . [and] we are not permitted to base our conflict jurisdiction on a review of the record. . . ." Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986).

Plaintiff ignores this basic precept in her jurisdictional briefing, relying almost exclusively on selected portions of the trial court record that do not appear on the face of the Third District's decision. In any event, none of the five alleged conflicts exists. The Third District wrote a thoughtful decision that is true to longstanding standards for certiorari and to existing precedent on legal privileges.

II. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT ON THE APPROPRIATE STANDARD OF REVIEW.

Plaintiff argues that the Third District used the wrong standard of review in quashing the Sanction Order and the Suspension Order. Not so.

First, the Third District set forth the proper standards for certiorari in Florida. And, in doing so, it ruled that the Orders "depart from the essential requirements of law and would result in irreparable harm." (App. at 1). Certiorari review is proper when a discovery order compels production of privileged materials. See Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987).

Second, the two cases Plaintiff cites, Ham v. Dunmire, 891 So. 2d 492 (Fla. 2004) and Farish v. Lum's, Inc., 267 So. 2d 325 (1927), do not involve situations in which the trial judge erred as a matter of law in adjudicating legal privileges. Plaintiff ignores that a trial judge does not have discretion to make an error of law.

Third, the Third District's decision did not break any new ground. Rather, it is perfectly consistent with cases that grant writs of certiorari to quash trial court orders that invade legal privileges as a sanction. See, e.g., Bankers Sec. Ins. Co. v. Symons, 889 So. 2d 93 (Fla. 5th DCA 2004); Marcus & Marcus, P.A. v. Sinclair, 731 So. 2d 845 (Fla. 3d DCA 1999).

III. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL ON THE RIGHT OF CROSS-EXAMINATION.

Plaintiff next argues the Third District decision creates conflict by "barr[ing] Mrs. Hall-Edwards' right to fully and fairly cross-examine Ford's experts, thus rewarding Ford for withholding probative evidence with the intent to ambush Mrs. Hall-Edwards at trial." Pet. Br. at 6. Putting aside the unpredicated hyperbole,

Ford notes that the face of the Third District decision says nothing about the right of cross-examination or the limitation of such a right.

The rules of law at issue in the Third District decision are principles of certiorari, work-product privilege, and attorney-client privilege. Knight v. State, 97 So. 2d 115 (Fla. 1957), a criminal appeal, and AT&T Wireless Services, Inc. v. Castro, 896 So. 2d 828 (Fla. 1st DCA 2005), a workers' compensation appeal, have nothing at all to do with certiorari, work-product privilege, or attorney-client privilege.

IV. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT ON THE APPROPRIATE ANALYSIS OF PRIVILEGE ISSUES.

Plaintiff next argues the Third District created express and direct conflict by failing to conduct any factual analysis. The premise of this argument is wrong, as the Third District did analyze the factual record. For instance, it explained as follows:

> Plaintiff presented no evidence to challenge any of the facts established by the sworn affidavits and testimony of Ford's counsel [and] the evidence was undisputed that the [Litigation Matters Management System (LMSS)] database is privileged. The trial court never found to the contrary. Accordingly, the LMMS database is protected by the attorney-client privilege.

(App. at 12). These facts are on the face of the decision. The selective facts that Plaintiff relies upon are not on the face of the decision.

In any event, Plaintiff attempts to piece together snippets from various dissimilar cases to create an issue where there is none. Mercer v. Raine, 443 So. 2d 944 (Fla. 1983) is neither a certiorari case nor a case involving legal privileges. In fact, no controlling legal principle in the Third District decision is even mentioned in Mercer. Likewise, the Third District decision says nothing inconsistent with the tests set forth in Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 1377 (Fla. 1994) for the trial court (not the appellate court) to apply in evaluating privilege issues. And, contrary to Plaintiff's characterization of Travelers Indemnity Co. v. Fields, 262 So. 2d 222 (Fla. 1st DCA 1972), that case nowhere creates an "obligation" on the trial court, much less on an appellate court, to adjudicate privileges in a given way.

V. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL IN QUASHING THE SUSPENSION ORDER.

Plaintiff then concedes that the Third District set forth the law of work product privilege correctly, but argues that it applied that law incorrectly: "But after so correctly delineating the applicable parameters, the Third District oversteps those very boundaries by extending the work-product privilege to lists of documents which the record proves (a) apply universally, not selectively[;] and (b) are not prepared in reference to specific, pending or anticipated litigation." Pet. Br. at 9. By resorting to what Plaintiff says "the record proves," she reveals the

weakness in this conflict argument. That is, the face of the Third District decision does not contain what Plaintiff says "the record proves." See Reaves, 485 So. 2d at 830 n.3. There is no basis for express and direct conflict.

VI. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL IN RELATION TO THE HARDSHIP EXCEPTION.

Plaintiff's final argument, that "when there is evidence in the record that [the hardship] exception applies, it is reversible error to ignore that evidence," Pet. Br. at 10, is unavailing for multiple reasons. Specifically, as in the previous argument, Plaintiff relies upon her view of the record facts, rather than pointing to facts on the face of the Third District opinion. Under Reaves, that alone is fatal.

Further, the Third District expressly stated what Plaintiff would have to do (and did not do) to qualify for an exception, citing a case from the Second District as support: "Once Ford established that the databases were privileged, plaintiff had the burden to prove facts which would make an exception to the privilege applicable. See Quarles and Brady, LLP v. Birdsall, 802 So. 2d 1205, 1206 (Fla. 2d DCA 2002)." (App. at 12). Nothing the Third District said on Plaintiff's failure to carry that burden, citing the very same district court as support, conflicts with Florida Power Corp. v. Dunn, 850 So. 2d 655 (Fla. 2d DCA 2003).

CONCLUSION

Ford respectfully requests that the Court decline to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing brief on jurisdiction and accompanying appendix was furnished via U.S. mail this 27th day of February, 2009 to: **Richard L. Denney, Esquire**, Denney & Barrett, P.A., *Counsel for Petitioner*, 870 Copperfield Drive, Norman, Oklahoma 73072; **Bruce Kaster, Esquire**, *Counsel for Petitioner,* 125 N.E. First Ave., Suite 3, Ocala, Florida 34470; **Gustavo Gutierrez, Esquire**, Law Office of Gustavo Gutierrez, *Counsel for Petitioner*, 2964 Aviation Avenue, Coconut Grove, Florida 33133; **Kimberly L. Boldt, Esquire**, Alters, Boldt, Brown, Rash & Culmo, P.A., *Counsel for Petitioner*, 21 SE 5th Street, Suite 200, Boca Raton Florida 33432; and **Henry Salas, Esquire**, Cole Scott & Kissane, *Co-Counsel for Respondent*, 6301 Sunset Drive, Miami, Florida 33143.

By:_____
Joseph Hagedorn Lang, Jr.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

_____

Joseph Hagedorn Lang, Jr.

APPENDIX

Index

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