

SUPREME COURT OF FLORIDA

CASE NO.: SC10-408

**Lower Tribunal No(s): 1D09-961
16-2008-CA-969**

**Paradise Pines Health
Care Associates, Etc.**

v.

**Helen Bruce and Glen
Benekin, Etc.**

Petitioner(s),

Respondent(s).

RESPONDENTS BENEKIN'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Benekin, the Respondent/Plaintiff below hereby supplements the statement of the case and facts supplied by Petitioner/Heart's Harbor Nursing Home. The Respondent herein was Plaintiff in a nursing home claim brought against Heart's Harbor. The deceased Plaintiff resided in the Heart's Harbor Nursing Home from February 1, 2005, through February 13, 2006. App. A. Heart's Harbor records show that the Plaintiff suffered from dementia. App. B. During her stay at the nursing home there were numerous violations of the Plaintiff resident's rights including at least nine documented falls with one of the falls resulting in a fractured right hip on February 13, 2006. App. C. Thereafter the Plaintiff passed away. App. D.

Petitioner Heart's Harbor Nursing Home conceded it's nursing home personnel completed internal incident reports for each of the nine documented falls consisting of approximately 38 pages of incident reports specifically relating to the Plaintiff Betty Jean Benekin. App. E. In the proceedings below, the Petitioner Nursing Home did not contest that there was a need for information regarding the repeated falls because the deceased Plaintiff, Betty Jean Benekin, was demented and then passed away and was therefore unable to communicate regarding these events. App. F.

There was never a claim that the incident reports involved attorney opinion work product or adjusters' involvement. The incident reports contained fact work product created by nursing home staff personnel. The incident reports contain such fact work product as the events surrounding the falls, the witnesses to the falls, the reasons the falls occurred, and medical/nursing planning to prevent future falls.

At the hearing on the Motion to Compel, the Trial Court's focus was on undue hardship and Plaintiff's ability to obtain the substantial equivalent information. App. G pp. 41 and 42. Among the arguments presented, the Nursing Home's position was that the Plaintiff should be forced to undergo other extensive discovery to see whether they could obtain equivalent information to that which was succinctly contained in the incident reports. App. G pp. 41 – 43.

The Trial Court ordered the reports produced for an in-camera inspection, confirmed that there was no opinion work product contained within the reports and then ordered the production of the reports. App. H. Petitioner Heart's Harbor appealed the Trial Court's decision. The parties submitted briefs and appeared at oral arguments. Thereafter, the parties entered into negotiations with a tentative agreement to settle on November 10, 2009, however the terms of the settlement

were not finalized because Defendant insisted on a lengthy period of time to make payments for the settlement and insisted settlement terms that were not acceptable to Plaintiff. Negotiations went on for a period of time and ultimately, final terms were agreed to. Petitioner's Brief and App. I. Under the agreement, settlement payments were to be paid over many months thereafter.

On December 22, 2009, the First District Court of Appeal issued its opinion in this case. Petitioner Heart's Harbor Nursing Home thereafter filed a belated Stipulation of Dismissal of Case dated January 5, 2010. App. I. The First District Court of Appeal denied the Stipulation as moot because the opinion had already issued. App. J. On February 4, 2010, the First District Court of Appeal denied all of the Petitioner Nursing Home's pending motions including motions for rehearing, rehearing en banc, certification and a motion to withdraw the opinion. App. K. On February 22, 2010, the First District Court of Appeal issued Mandate. App. L. On March 4, 2010, the Petitioner Nursing Home served a Notice to Invoke Discretionary Jurisdiction of the Supreme Court.

In the spring of 2010, the Petitioner Nursing Home completed all payments under the terms of the underlying settlement and upon receipt of the last payment, the Respondent/Plaintiff filed with the lower Court and this Court a Notice of Dismissal of the Underlying Action with Prejudice. It was dated March 23, 2010. Thus all of the related proceedings have been dismissed with prejudice. App. M.

SUMMARY OF THE ARGUMENT

There is no proper basis for this Court to invoke its jurisdiction and, if there is a proper basis, the Court should decline to invoke its discretionary jurisdiction. The underlying matter has been rendered moot and lacks justiciability. These matters have been resolved and dismissed with prejudice. The Court will only be resolving hypothetical issues.

The Florida Constitution now requires express and direct conflict in decisions. The Petitioner Nursing Home identifies nothing but generalized statements of the law, all of which were acknowledged and agreed to in the majority opinion herein. The Petitioner Nursing Home failed to identify any single case with a specific statement of law to which there is express and direct conflict enunciated in the District Court's opinion below. This opinion is a plurality opinion with the majority opinion written by one Judge, a concurring opinion written by a second Judge, and a third, dissenting opinion.

Finally, on the merits this case does not warrant review. The First District applied longstanding principals regarding exceptions to fact work product. It found that the Plaintiff met the burden of showing both "need" and "undue hardship in obtaining substantially similar information". That is a sufficient basis to overcome a fact-based work product privilege.

JURISDICTIONAL STATEMENTS

The Florida Supreme Court has discretionary jurisdiction to review decisions of the District Court that expressly and directly conflict with a decision of either the Supreme Court or a District Court on the same point of law. See Rule 9.030(a)(2)(a)(iv), Florida Rules of Appellant Procedure. However, for reasons discussed below, Petitioner Nursing Home fails to meet these standards and never identifies any express and direct conflict.

ARGUMENT

I. THERE IS NO JUSTICIABLE ISSUE FOR THE COURT TO DECIDE

Because the parties herein resolved their disputes and the case below was dismissed with prejudice, there is no justiciable controversy for the Court to decide. There are no longer parties before the Court who have a real dispute. In *Sarasota – Fruitville Drainage District v. Certain Lands Within Said District Upon Which Drainage Taxes for the Year 1952 Have Not Been Paid*, 80 S.2d 335 (Fla. 1955), the Florida Supreme Court explained that its jurisdiction may only be used to resolve justiciable controversies between real parties. Petitioner is asking the court to resolve hypothetical issues between parties who no longer have a dispute.

II. THE ISSUES ARE MOOT

As a result of the settlement in this case, the issues are moot. Mootness does

not defeat the Court's jurisdiction, however, mootness is a discretionary ground to discontinuance of the exercise of any jurisdiction. *Steve Merkle v. Guardianship of Jacoby*, 912 S.2d 593 (Fla. 2d DCA 2005). In this case, Respondents/Plaintiffs gave this Court notice that all the underlying matters were dismissed with prejudice, however, Petitioner proceeded forward and thus a stipulation for dismissal could not be submitted. See Rule 9.350(a) Fla. R. App. Proc. However, a dismissal with prejudice was submitted to the First District Court of Appeal and the Trial Court below. Thus, the issues raised in this appeal are rendered fully moot and a judicial determination can have no actual affect.

The Petitioner Nursing Home seeks to defeat the underlying First District Court of Appeal decision for the purpose of protecting itself in future litigation, not from the effects on this litigation. That is not a proper basis for jurisdiction before this Court.

III. THERE IS NO EXPRESS AND DIRECT CONFLICT IDENTIFIED HEREIN

By definition, for Petitioner Nursing Home to have a basis for appeal, there must be some direct expression of legal grounds supporting the decision under review which expressly and directly conflicts with an identifiable statement of law in an opinion of this Court or another District Court. See *Jenkins v. State*, 385 S.2d

236 (Fla. 1980). The Supreme Court explained that one of the tests of express and direct conflict is whether the two opinions are "irreconcilable". See *Aravena v. Miami – Dade County*, 928 S.2d 1163 (Fla. 2006). In this case, the petitioner nursing home identifies numerous generalized statements of Florida law, but it failed to specifically identify any case or any prior holding with which the underlying opinion directly conflicts and which thereby created an irreconcilable dilemma for litigants in this state. Thus, in this case, the standard for express and direct conflict is not met.

IV. THIS PLURALITY DECISION DOES NOT WARRANT FINDING EXPRESS OR DIRECT CONFLICT

In general, discretionary jurisdiction should not be based on a plurality opinion. See *Kennedy v. Kennedy*, 641 S.2d 408 (Fla. 1994). In this case, there was a majority opinion written by one Judge, a second concurring opinion written by the second Judge and a dissenting opinion written by the third Judge. Thus, this opinion does not lend itself to a proper basis for express or direct conflict.

V. THE MAJORITY OPINION DOES NOT CREATE A BASIS FOR EXPRESS AND DIRECT CONFLICT WITH OTHER CASES

The majority opinion expressly follows longstanding precedence, by requiring that the Plaintiff had to make a showing of "need" and then had to make a

showing that Plaintiff could not "obtain substantially equivalent information about undue hardship". This has been the longstanding standard for overcoming a work product privilege in this State for many years. See generally *Surf Drugs, Inc. v. Vermette*, 236 S.2d 108, 112 (Fla. 1970); Rule 1.280, Florida Rules of Civil Procedure and *Southern Bell Telephone and Telegraph Company v. Veason*, 632 S.2d 1377, 1384 (Fla. 1994). In truth, Petitioner Nursing Home simply disagrees with the factual analysis followed by the two Courts below. In assessing whether or not a party can obtain "substantially equivalent information" without "undue hardship" the Court must necessarily analyze the facts of the case.

Black's Law Dictionary defines "undue" as "more than necessary". It was the Petitioner Nursing Home's position that the Plaintiff should be subjected to extensive and expensive discovery techniques, before the Plaintiff should be permitted to have access to fact work product information which was readily available and had been created by nursing personnel in the nursing home. The Florida Rules of Civil Procedure state that the rules must be interpreted to "...secure the just, speedy and inexpensive determination of every action...." See Rule 1.010, Fla. R. Civ. Proc. After weighing the facts, the Trial Judge determined that the Plaintiff made an adequate showing to gain access to this fact based work product information, which was created by the witnesses to the repeated falls. Two

of the three Appellate Judges in the First District Court of Appeal agreed that Plaintiff met the long standing standard of showing in the record “undue hardship in obtaining substantially equivalent information” of this fact based work product. It would be impossible for a Court to assess how much hardship is undue (in other words – "more than necessary") in obtaining "substantially equivalent information" without assessing the amount of time and expense that a party must undergo in pursuing the “substantially equivalent” information through other discovery, as compared to the expense of the discovery if the opposing party produces the easily obtainable fact work product which contains the "substantially equivalent" information.

Nothing about this opinion conflicts with the opinions of other cases. Unfortunately, Petitioner disagrees with the conclusions reached by the Trial Judge and two of the three Appellate Judges below. Thus, there is no express and direct conflict with other cases because the opinion below is not “irreconcilably inconsistent” with any identifiable opinion of another Court.

CONCLUSION

Petitioner acknowledges in its own brief at Page 6 that "this particular case has been resolved and is technically moot". For the reasons stated above, this Court should deny jurisdiction.

Dated this _____ day of June, 2010.

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CERTIFICATE OF SERVICE

The original of the foregoing has been filed with the Clerk of Court and a copy furnished via U.S. Mail to Harold R. Mardenborough, Esquire, P. David Brannon, Esquire, and Matthew Scanlan, Esquire, Carr Allison, 305 South Gadsden Street, Tallahassee, Florida 32312, attorneys for the Petitioner, and Deborah L. Moskowitz, Esquire, Quintairos, Prieto, Wood & Boyer, P.A., 255 South Orange Avenue, Suite 900, Orlando, Florida 32801, this _____ day of June, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the Rule's font requirements.

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