

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

**CASE NO. SC12-564**

DISTRICT COURT OF APPEAL CASE NO. 4D10-1307

BROWARD CIRCUIT CASE NO. 00-010425 (04)

JANET RODGERS and DOUGLAS  
CARL RODGERS, as Co-Personal  
Representatives of the Estate of  
CARL SHANE DOUGLAS  
RODGERS, deceased,

Plaintiffs/Petitioners,

vs.

AFTER SCHOOL PROGRAMS, INC.,

Defendant/Respondent.

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**PETITIONERS' AMENDED BRIEF ON JURISDICTION**

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### **FLORIDA RULES OF CIVIL PROCEDURE:**

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## **STATEMENT OF THE FACTS AND CASE**

The case below was a wrongful death action filed by Janet and Douglas Rodgers against After School Programs, Inc., which operated an after school care program at an elementary school. The Rodgers claimed that the defendant was negligent in its failure to properly handle their son's complaint of a headache. *Rodgers v. After School Programs, Inc.*, 78 So.3d 42, 44 (Fla.App. 4th 2012)[**Appendix Exhibit A**].

Pursuant to the Joint Pretrial Stipulation in this case, a Concise, Impartial Statement of the Facts is as follows:

"On or about the afternoon of September 14, 1998, Carl Shane Douglas Rodgers (hereinafter referred to as "Shane"), age 9-years-old, was under the care of Defendant After School Programs, Inc., which operated an after school care program at Chapel Trail Elementary School in Pembroke Pines, Florida, located in Broward County.

At some time during that afternoon, Shane was playing outside and developed a headache. Shane was brought inside the school facility to the cafeteria by employees of Defendant.

Sometime thereafter, Shane's symptoms increased, and an employee of the Defendant called 911 for rescue.

Upon his admittance to Hollywood Memorial Hospital, it was determined that Shane had suffered a cerebral aneurysm, and he underwent emergency surgery. Shane died six (6) days later, on September 20, 1998. Plaintiffs have alleged that the Defendant was negligent in handling the above-described situation. The Defendant has denied all liability in regard to same."

The case would proceed to trial November 16-19, 2009 before the Honorable Robert Carney (since retired) resulting in a defense jury verdict. Final

Judgment was entered November 24, 2009. On November 25, 2009, Plaintiffs timely served a Motion for New Trial and/or Jury Interview. On November 30, 2009, Appellants' Supplemental Motion for New Trial and/or Jury Interview was timely served. Thereafter, transcripts of the voir dire and certain proceedings and relevant documents of the involved proceedings were filed with the lower court.

Due the retirement of presiding Judge Robert Carney in December 2009, an issue arose as to which judge was going to hear the post-trial motions. After several unsuccessful inquiries, Petitioners' counsel sent a letter of February 16, 2010 on that subject to Broward Circuit Court Administrative Judge Jack Tuter (this letter is of record below):

"I represent the Plaintiffs in the above case which went to jury trial November 16-19, 2009 before Judge Robert Carney, now retired/senior status, and resulted in a defense verdict. Division (04) is now Judge Eileen O'Connor. I was directed to write to you on a procedural matter by Chief Judge Victor Tobin's J.A. because you are the Administrative Judge for Circuit Civil.

I have timely served Plaintiffs' Motion for New Trial and/or Jury Interview dated November 25, 2009 and Plaintiffs' Supplemental Motion for New Trial and/or Jury Interview dated November 30, 2009, copies attached. I have obtained and filed related transcripts and now need a hearing date.

The first question is: Which Judge hears the above motions? I would presume it would be Judge Carney, who presided over the trial, and if it is, then my second question is: how do I set a hearing before Judge Carney?"

Thereafter, lower court Judge Carney, without a hearing, in retired status,

entered an Order dated February 23, 2010 denying Plaintiff's Motion for New Trial and/or Jury Interview served November 25, 2009. That Order, which simply stated "the motion for new trial is denied," was docketed February 25, 2010 and did not address the Appellant's Supplemental Motion for New Trial and/or Jury Interview served November 30, 2009. Petitioners' then sought clarification by letter of March 1, 2010 to Judge Tuter which stated (this letter is of record below):

"I have just received an Order on Plaintiffs' Motion for New Trial and/or Jury Interview stating "The motion for new trial is denied" and dated February 23, 2010, signed by Judge Carney (which is barely visible - enhanced copy attached). No hearing was set as requested nor occurred.

In my letter to Judge Tuter of February 16, 2010, I also included Plaintiffs' **Supplemental** Motion for New Trial and/or Jury Interview. Another copy is attached. It appears from the Order of February 23, 2010 that the request for jury interview in the first Motion and the **Supplemental** Motion for New Trial and/or Jury Interview were not addressed. As Judge Carney is in retired/senior status and has no motion calendar or way to directly reach him, I am writing to request clarification as to whether all motions have been considered. I hereby again request a hearing (and/or rehearing).

Finally enclosed is a copy of Plaintiffs' Notice of Filing Copy of Court File pertaining to Juror Timothy J. Hillman. Thank you for your attention."

Judge Tuter's office then requested the Voir Dire transcript which had actually been filed on February 9, 2010. On March 9, 2010, another copy of the transcript was sent to Judge Tuter (for Judge Carney who no longer had an "office" at the courthouse) with a letter which stated (this letter is of record below):

"As discussed today with Mercedes, J.A. to Judge Tuter, as requested by Judge Carney, enclosed please find the transcript of the Voir Dire

proceedings in the above matter pertaining to Plaintiffs' Supplemental Motion for New Trial and/or Jury Interview. Please note same had been sent for filing already with a Notice of Filing on February 1, 2010."

Not having had a response to this series of letters, Petitioners timely filed an appeal in the Fourth District on March 25, 2010 of the Order denying motion for new trial dated February 23, 2010.

On May 4, 2010, Judge Carney, again without a hearing, entered an Order denying the Supplemental Motion for New Trial and/or Jury Interview.

Accordingly, on May 13, 2010, Petitioners filed a Motion to Amend Notice of Appeal in this Court which was granted by the Fourth District Court of Appeal on May 27, 2010. Therefore, both the February 23, 2010 and May 4, 2010 Orders of Judge Carney were at issue in the appeal to the Fourth District Court of Appeal.

On January 11, 2012, the Fourth District Court of Appeal rendered its decision in this case. *Rodgers v. After School Program, Inc.*, 78 So.3d 42 (Fla.App. 4th 2012). On January 25, 2012, Petitioners filed a Motion for Rehearing and/or Certification in the Fourth District which was denied on February 17, 2012.

### **SUMMARY OF ARGUMENT**

Petitioners seek to invoke the discretionary jurisdiction of this Court because there is an express and direct conflict between decisions of the Fourth District Court of Appeal, *Rodgers v. After School Programs, Inc.*, 78 So.3d 42 (Fla.App.4th 2012)[**Appendix Exhibit A**], and the Second District Court of

Appeal, *State Farm v. Lawrence*, 65 So.3d 52 (Fla.App.2d 2011), as well as with a Rule of Civil Procedure [1.431(h)], on the same issue of law which amounted to a denial of due process and an essential departure from the requirements of the law.

### **ARGUMENT**

The appeal issues presented by Petitioners below involved the denial, without hearing, of two timely post-trial motions for new trial and/or juror interviews which were made after a timely post-verdict investigation of the jurors was conducted. The impetus for the investigation not only had to do the adverse verdict, but, with a bizarre manner in which the verdict was returned.

Undersigned trial/appellate counsel for Petitioners will briefly represent that the record below indicates that during deliberations the jury sent a note to the judge asking "Is this all the evidence or exhibits, financial damage charts, life expectancy?" After appropriately conferring with counsel, the Judge appropriately brought the jurors into the courtroom and read an appropriate agreed response:

"The evidence in this case consists of the answers of witnesses who have testified under oath. The evidence consists of physical items that have been introduced and all physical items that have been introduced and submitted back to you. And the evidence -- additionally, Mr. Thaler had read to you mortality tables, his recitation of the mortality tables is evidence also. That is the evidence."

The Judge then directed the jury back to the jury room for further deliberations. The Foreperson, immediately announced that the jury, without going back to the jury room and therefore without further deliberating and



therefore without considering the Judge's answer to the jury's own question, had reached a (defense) verdict and had already filled out and signed the verdict form.

The Petitioners theory on appeal below involved an interplay between this bizarre manner in which the verdict was returned, which was raised below but not addressed by the Fourth District, and a perception that the trial judge had imparted on the record his personal opinions of the facts and causation issues which Petitioners contend clouded him during trial and in post-trial proceedings, also raised below but not addressed by the Fourth District.

The juror concealment issues were addressed by the Fourth District which set forth some pertinent facts in a simplified manner as follows:

After a defense verdict, the Rodgers moved, *inter alia*, for leave to interview jurors # 4, # 8, # 9, and # 16 on the ground that they had concealed prior involvement with the court system during voir dire. As grounds, the motion alleged that (1) juror # 9 had failed to disclose that he had been convicted of two misdemeanors over 10 years before and that he was a plaintiff in a county court case which was dismissed for lack of prosecution; (2) juror # 4, a woman with a common name, had been involved in five civil cases, and at the time of the trial, was a defendant in two mortgage foreclosures; (3) juror # 8 had failed to reveal that she was a plaintiff in a civil case, was a trustee in a probate proceeding, and had a traffic infraction in 2009; and (4) juror # 16 had been a defendant in an indebtedness case. 78 So.3d at 44.

The Fourth District found that the Petitioners were not diligent in asking questions during voir dire. Two (perceived by the Fourth District as insufficient) questions were identified by the Fourth District in its decision, 78 So.3d at 44:

1. Q: You had indicated before that you had been in court before. Was that in a civil matter?

A: No. Traffic.

[Note: This was juror #9 who had filed his own civil lawsuit, pro se]

2. "Has anyone here been—this is a little different area—been sued in a civil case, for breach of contract or promissory note."

[Note: This was an open question coming after the first question to juror #9]

Petitioners relied on and cited below the Fourth District Case of *Sterling v. Feldbaum*, 980 So.2d 596 (Fla.App.4th 2008), which held, inter alia, that "... Broward docket search results may provide reasonable grounds to believe that juror misconduct has occurred..." citing *Roberts v. Tejada*, 814 So.2d 334 (Fla. 2002 and *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995).

Suffice it to say for purposes of this brief on jurisdiction, Petitioners, post-trial, filed dockets and/or court filings of the four jurors which indicated they were indeed or highly likely to be undisclosed civil litigants.

Despite the efforts described in the above Statement of Facts and Case to obtain a hearing date from the trial judge who retired a month after the trial (but was still acting in retired status), no hearing ever occurred on the two timely motions for new trial and/or juror interviews.

The Fourth District actually overlooked this requirement of the Rules of Civil Procedure in its decision at issue when it cited Rule 1.431(h) in this exact

manner:

A party who believes that grounds for legal challenge to a verdict exist may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge ... If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview. 78 So.3d at 44.

The pertinent sentence ("...") that is missing from this citation is:

**"After notice and hearing,** the trial judge shall enter an order denying the motion for permitting the interview."

The Second District Court of Appeal in *State Farm v. Lawrence*, 65 So.3d 52 (Fla.App.2d 2011) noted that Florida Rule of Civil Procedure 1.431(h) requires that the trial judge hold a hearing before granting or denying a motion for juror interviews. 65 So.3d at 55. Suffice it to say for purposes of this brief on jurisdiction that the aforementioned motions, transcripts and post-trial filed dockets and/or court filings of the four jurors indicated they were indeed undisclosed civil litigants and therefore presented at the very least prima facie basis for a hearing (if that is an issue for this Court). Indeed, at Oral Argument in the Fourth District, there were several questions raised by the appellate judges as to these jurors, their identities, their names and the filings which were answered by counsel for Petitioners (paraphrased): "...that is why we needed a hearing..." Petitioners know this is not the time to argue facts, but, feels compelled to mention that "juror # 4, a woman with a "common name" (according to the Fourth District), had been involved in five civil cases, and at the time of the trial, was a defendant in two

mortgage foreclosures (as described above by the Fourth District), was the foreperson. This begs many questions, including whether the common name (Carol Ann Williams) was indeed the "correct" juror and why such a juror would not disclose, among other things, she was a defendant in two mortgage foreclosures when everyone of the jurors were asked collectively:

"Has anyone here been—this is a little different area—been sued in a civil case, for breach of contract or promissory note." 78 So.3d at 44.

Perhaps Petitioners' counsel was too idealistic in believing that, after a whole day of jury selection, the (eventual) foreperson should know what a civil case was (when it had been explained, *inter alia*, that it was different than a criminal case), that being sued by one's bank was both a breach of contract and a suit over a promissory note. However, that is not the point. The Fourth District's decision in the instant case expressly and directly conflicts with the Second District's decision in *State Farm v. Lawrence* and with Rule 1.431(h) of the Florida Rules of Civil Procedure, which was promulgated by this Court.

The Fourth District's decision can be viewed as having made judgments about the interplay at jury selection and as to such things as one juror having a common name and as to counsel's diligence which should have been made at a hearing before the trial judge. It is as if the Fourth District reviewed the record and conducted its own "hearing" and weighed the circumstances. However, it was the Fourth District's responsibility to make such determinations after a

hearing and ruling (either way) before the trial court.

Petitioners would additionally urge that the underlying issues involve the conduct and circumstances of four jurors, albeit in varying degrees, which also could not be reconciled by the record before the Fourth District. Also, a comparison of the facts and holdings of *State v. Lawrence* and the instant appellate opinion cannot be reconciled on the same issues of law. In addition to the hearing issue, one appellate court found there should have been interviews and the other that there was no basis for same. There is already much appellate litigation involving juror misconduct, but, two conflicting District Court positions may only add to this quagmire. The guidance of this Court is requested. *Custer Medical Center v. United Auto. Ins. Co.*, 62 So.3d 1086 (Fla. 2010).

### **CONCLUSION**

The trial court's denial of juror interviews without a hearing constitutes fundamental error and an essential departure from the essential requirements of the law. The Fourth District Court of Appeal substituted its own judgment of the record without an actual hearing of the underlying evidence. Further, the Fourth District's opinion conflicts with both a decision of the Second District Court of Appeal and a Rule of Civil Procedure which makes mandatory a duly noticed hearing of said motions. Discretionary jurisdiction should be exercised.

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21st day of April, 2012 to Shelley H. Leinicke, Esq. (*SHLeinicke@WickerSmith.com*), WICKER SMITH, 515 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, Florida 33301 [**FAX: (954)760-9353**] and to Eduardo J. Valdes, Esq. (*evaldes@hightowerlaw.net*), HIGHTOWER & POZO, 4770 Biscayne Boulevard, Suite 1200, Miami, Florida 33137 [**FAX: (305) 530-0661**].

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