A-65912-7

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JANET RODGERS and DOUGLAS CARL RODGERS,

Petitioners,

vs.

AFTER SCHOOL PROGRAMS, INC.,

Respondent.
_____/

CASE NO. SC12-564
DCA NO. 4D10-1037

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS[1]

A jury verdict determined that After School Programs, Inc. did not act negligently and did not cause any injury or damage to Shane Rodgers. (Opin. 44)

The evidence at trial showed that nine year old Shane was enrolled for after school care at the program run by After School Programs, Inc. at Chapel Trail Elementary School. When Shane began to have a headache one September afternoon, he left the playground and came inside to rest in the school cafeteria at approximately 3:30 p.m. The headache resolved.

At approximately 5:30 p.m., Shane suddenly began to have severe pain and other symptoms, paramedics were called, and a message was left on his mother's home answering machine. The child was rushed to the emergency room at Joe DiMaggio Children's Hospital and was admitted later into the hospital at 7:15 p.m. Approximately twelve hours later, a shunt was surgically inserted. Shane expired six days later. An autopsy showed that he suffered a ruptured aneurysm in his brain.

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[1] The district court's opinion that is an appendix to Rodgers' jurisdictional brief is found at 78 So.3d 42 (Fla. 4th DCA 2012), and citations to that opinion are referenced as "Opin." All emphasis is added unless noted to appear in the original.

Rodgers alleged that there was an improper delay in contacting either Shane's mother or medical personnel so that the "window of opportunity" (which Rodgers' own expert said was no more than two hours) to medically treat the aneurysm was missed. Whether this window was triggered by either the 3:00 p.m. headache that resolved or the 5:30 p.m. pain and other symptoms, the evidence was clear that the child could not be saved. Even when Shane arrived at the hospital under emergent conditions with active symptoms of his disease, the hospital did not diagnose the source of his problem until an autopsy was performed after Shane expired six days later – well after the close of the two hour opportunity to diagnose and surgically stop the brain bleed. The surgery to insert the shunt also occurred well beyond the two-hour window, and there was no evidence that surgeons would have considered shunting this child if he had presented to the hospital at 3:00 p.m. with a mere headache.

On appeal Rodgers attempted to argue that a post-verdict investigation of jurors should have provided a basis for a jury interview to determine whether any jurors failed to disclose prior litigation experience. The Fourth District determined that Rodgers ineffectively and insufficiently questioned the potential jurors during voir dire. (Opin 45) Because of this, Rodgers failed to meet one of the three prongs of the test announced in *DeLaRosa v.*

Zequeira, 659 So.2d 239 (Fla. 1995) and was not entitled to conduct a jury interview. (Opin. 45) The appellate court said that "Rodgers' attorney's questioning of the jurors was imprecise and not designed to elicit the type of information that was supposedly concealed." (Opin. 45) As to one juror in issue who had a common name, the court added that Rodgers' questions provided "insufficient proof that she was the same person who was involved in all of the prior civil cases" and a "differently phrased question may well have resulted in disclosure." (Opin. 46) The district court found no indication of any juror concealment of information and no basis for any jury interview because of Rodgers' failure to establish that the voir dire questions wer "straightforward and not reasonably susceptible to misinterpretation" and there was no follow up on any juror responses that were perhaps amabiguous. (Opin. 45)

ISSUE ON APPEAL

WHETHER THIS HONORABLE COURT LACKS JURISDICTION BECAUSE THE INSTANT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *STATE FARM MUT. AUTO. INS. CO. v. LAWRENCE*, 65 So.3d 52 (Fla. 2d DCA 2011)

ARGUMENT SUMMARY

This Court lacks jurisdiction because this case does not conflict with *State Farm Mut. Auto. Ins. Co. v. Lawrence*, 65 So.3d 52 (Fla. 2d DCA

2011). The instant opinion fully harmonizes with the *State Farm* case and other well settled law regarding the three factors that must exist before a party is entitled to conduct a post-trial jury interview.

ARGUMENT

THIS HONORABLE COURT LACKS JURISDICTION BECAUSE THE INSTANT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *STATE FARM MUT. AUTO. INS. CO. v. LAWRENCE*, 65 So.3d 52 (Fla. 2d DCA 2011)

Conflict certiorari is available only where there is a *direct* conflict between two decisions. *Ford Motor Co. v. Kikis,* 401 So.2d 1341 (Fla. 1981). Review is limited to situations of express and direct conflict because of the concern for uniformity in decisions as precedent rather than the adjudication of the rights of particular litigants. *Mystan Marine, Inc. v. Harrington,* 339 So.2d 200 (Fla. 1976). Because the case claimed to be in conflict is easily distinguishable on its facts, certiorari review on the grounds of conflict is not available. *Wilson v. Southern Bell Telephone & Telegraph Co.,* 327 So.2d 220 (Fla. 1976); *Dept. of Revenue v. Johnston,* 442 So.2d 930 (Fla. 1983). Jurisdiction does not exist here because there is no direct, express conflict between and among Florida's appellate decisions.

Much of Rodgers' brief impermissibly attempts to create an argument of conflict by impermissibly going outside of the four corners of the district

court's opinion. *Persaud v. State,* 838 So.2d 529, 532 (Fla. 2003); *Hill v. Hill,* 778 So.2d 967, 968 (Fla. 2001). This Court's discretionary jurisdiction exists only if there is express and direct conflict shown within the confines of the written opinions. *Id.*

The instant case fully harmonizes with the decision in *State Farm Mut. Auto. Ins. Co. v. Lawrence,* 65 So.3d 52 (Fla. 2d DCA 2011). Both cases cite to the *DeLaRosa, supra,* opinion and acknowledge that granting a juror interview and/or a new trial based on alleged juror nondisclosure of information requires record evidence of *all three* essential elements: (1) the undisclosed evidence was relevant and material, (2) the juror concealed the information, and (3) "*the concealment was not due to a lack of the moving party's diligence.*" *DeLaRosa,* 659 So.2d at 241. Unlike the instant case, the *State Farm* decision involved specifically tailored, precise questions to the jurors that were inaccurately answered.

Rodgers ignores the black-letter law that these three essential elements all must be met when a party seeks a juror interview and/or a new trial on the basis of alleged non-disclosure of information during voir dire. Even if Rodgers met the first two elements (and the record shows he did

not[2]), the district court correctly recognized that Rodgers' voir dire questioning of the jury was wholly insufficient to meet the third prong of the test. Rodgers gave no definition of "litigation" experience to the venire. Rather, as the district court's opinion notes, he asked only one general question to the entire venire: "Has anyone here been – this is a little different area – been sued in a civil case, for breach of contract or promissory note." (Opin. 44) The district court properly determined that all of the jurors' answers to this solitary question were accurate and did not conceal anything about their background or experiences. The challenged opinion specifically finds that Rodgers' "questioning of the jurors was imprecise and not designed to elicit the type of information that was supposedly concealed." (Opin. 44) The record gives no "indication that three of the jurors had been sued for breach of contract or promissory note,

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[2] The district court's opinion notes that the matters identified as the so-called undisclosed prior litigation experience are both stale and immaterial to this lawsuit that challenges the timeliness of an after school program's actions in seeking help for a child with a seemingly routine headache. Any juror's possible involvement in a mortgage foreclosure or a traffic ticket has no materiality or relevancy to the issues in controversy in this action. Such unrelated "litigation experience" does not affect a juror's ability to render a fair and impartial verdict on the facts and issues present in this suit. *Drew v. Couch,* 519 So.2d 1023 (Fla. 1st DCA 1988); *Lusk v. State,* 446 So.2d 1038 (Fla. 1984). Moreover, there was nothing in the opinion suggesting that any juror "knowingly concealed relevant litigation experience during voir dire." *Beyel Brothers Inc. v. Lemenz,* 720 So.2d 556, 557 (Fla. 4th DCA 1998).

the only type of civil case about which the jurors were specifically asked." (Opin. 45-46) The instant case therefore fully comports with the well settled law that a party's failure to ask clear, detailed, unambiguous questions during voir dire precludes a later claim of juror nondisclosure and also precludes any basis for a jury interview.

Because the case cited in Rodgers' jurisdictional brief is not in conflict with the instant opinion, it is respectfully submitted that this Honorable Court lacks jurisdiction to consider this matter.

CONCLUSION

For the reasons set forth herein, no direct and express conflict exists between or among the Florida decisions and this Honorable Court does not have jurisdiction to review this cause.

Respectfully submitted,
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was e-filed May 2, 2012 and mailed to Louis Thaler, Esq., Louis Thaler, P.A., Two Alhambra Plaza, Penthouse II - Suite C, Coral Gables, FL 33134.

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CERTIFICATE OF COMPLIANCE PURSUANT TO Fla. R. App. P. 9.210(a)(2); 9.100(1)

Counsel for the Respondent certifies the following:

Pursuant to Fla. R. App. P. 9.210(a)(2); 9.100(1), the attached brief for Respondent is printed using a proportionally spaced 14 point Times New Roman typeface.

Dated: May 2, 2012

/s/
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