

THE SUPREME COURT OF FLORIDA

S. Ct. Case No.: 01-793
4DCA CASE NO.: 00-221

METISSIA RICKS,
Petitioner,

vs.

RENE LOYOLA, M.D.,
Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

Respectfully submitted,

Tilghman & Vieth, P.A.
One Biscayne Tower, Suite

2 South Biscayne Boulevard
Miami, Florida 33131

-and-

Lauri Waldman Ross, Esq.
(Fla. Bar No.: 311200)
Lauri Waldman Ross, P.A.
Two Datran Center, Suite

1612

9130 S. Dadeland Boulevard
Miami, Florida 33156
(305) 670-8010

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ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN GRANTING A NEW TRIAL FOR CONDUCT VIRTUALLY IDENTICAL TO THAT DISAPPROVED IN ED RICKE & SONS, INC. V. GREEN.

Petitioner Ricks adheres to the "Statement of Case and Facts" in her Initial Brief. Dr. Loyola's Answer Brief at pp. 4-5, deals with a host of irrelevancies which have nothing to do with this appeal. Instead, Dr. Loyola has *sub silentio* attempted to inject a cross-appeal (by his third issue), without filing any notice to invoke this Court's jurisdiction.

In its decision, the Fourth District chose to write "to discuss two issues on appeal that require reversal." Ricks v. Loyola, 777 So. 2d 423, 424 (Fla. 4th DCA 2000). Dr. Loyola now requests a remand for the Fourth District to consider a different issue, in the event that its decision here is quashed. Dr. Loyola's request is based on the erroneous assumption that silence on the issue in the Fourth District's opinion means that it was "not resolved." (Answer Brief at pp. 29-30). This is incorrect. Where a case is reversed on a stated point, it is assumed that the remaining points were examined and found to be lacking in merit, unless stated otherwise by the district court. See Shayne v. Saunders, 129 Fla. 355, 176 So. 495, 496 (1937); Pinnock v. Sugar Cane Growers Co-op of Florida, 791 So. 2d 1135,

1137 (Fla. 4th DCA 2001); Bueno v. Bueno de Khawly, 677 So. 2d 3 (Fla. 3d DCA 1996). On appeal to the Fourth District from an order granting a new trial, Dr. Loyola previously urged that his pretrial motion for summary judgment was erroneously denied. Most courts considering the issue have held that a pretrial denial of summary judgment is **not** reviewable on appeal following a full trial (and judgment on the merits). See Lind v. United Parcel Service, Inc., 254 F.3d 1281 (11th Cir. 2001) (and cases collected). The Fourth District's decision not to write on the issue also indicates that the issue was found to be meritless. See Shayne v. Saunders, 176 So. at 496. Petitioner thus returns to the legal issue at hand - the District Court's misapplication of Ed Ricke & Sons v. Green, 468 So. 2d 908 (Fla. 1985).

According to Dr. Loyola, this Court has no jurisdiction to address the issue. That is **not** the case. Dr. Loyola concedes that this Court has jurisdiction to review a District Court decision which applies the "wrong legal standard" as established by this Court. (Answer Brief pp. 14). This includes a district court's reading of this Court's decisions, which is "too restrictive." Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1274 (Fla. 2000); Rosen v. Florida Ins. Guaranty Assn., 26 Fla. L. Wkly S611 (Fla. 2001) (district court's expansive reading of a Supreme Court holding which was "a narrow one"); Florida Dept.

of Transportation v. Juliano, 26 Fla. L. Wkly. S784 (Fla. 2001)
(same).

Jurisdiction is also properly invoked where a rule of law produces a different result in cases involving substantially the same controlling facts as a prior case disposed of by this Court. Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960).¹

The offending comment in Ed Ricke was:

Now, there's going to be come other person responsible. I would like for you to ask them some questions. I would like for you to ask him [w]hy Dade County is not a defendant in this litigation. Ed Ricke, 468

So. 2d at 909.

Here, in contrast, Dr. Loyola's counsel told the jury that the absence of other health care providers:

[W]ill not be something that you need to consider as to why they aren't in this courtroom, **although you might want to ask yourself that question. I assure you though that Miss Ricks and her attorney aren't going to tell you why they aren't here.** Ricks v. Loyola, 777 So. 2d at 424. (emphasis added).

The latter statement was far worse **because it inferred that**

¹ Dr. Loyola argues that Nielsen "predates the 1980 constitutional amendment which narrowed this Court's jurisdiction," implying that it no longer represents good jurisdictional law. (Answer Brief p. 19). This Court's adherence to Nielsen negates this argument. See Crossley v. State, 596 So. 2d 447, 449 (Fla. 1992); Combs v. State, 436 So. 2d 93 (Fla. 1983).

the Plaintiff and her counsel were conspiring to keep evidence from the jury. See Wolcott v. State, 774 So. 2d 954 (Fla. 5th DCA 2001).²

In Ed Ricke & Sons, 468 So. 2d 908, this Court explicitly held that "the trial court has the power to wait until the jury returns its verdict before ruling on a motion for mistrial" and that "A motion for a mistrial coupled with a request that the Court reserve ruling until after the jury deliberates is simply a motion for mistrial" deserving full consideration at all levels. In contrast, the Fourth District held that the trial court abused its discretion *inter alia* "by reserving ruling on the Plaintiffs' [mistrial] motion..." Ricks v. Loyola, 777 So. 2d at 425. This Court has jurisdiction because the district court reached an opposite conclusion from this Court on controlling facts which even more strongly warranted a new trial. See Crossley v. State, 596 So. 2d 447, 449 (Fla. 1992).

The only real distinction between the two cases is at to what point, during the course of trial, the offending remarks were made. In Ed Ricke, the offending remarks were made during closing argument, while here they were made during opening statement. Dr. Loyola claims that this is "an incredibly

² Dr. Loyola ignores the long line of cases condemning these type of challenges. (See Initial Brief pp. 20-21, and cases collected).

significant factual distinction" precluding the exercise of jurisdiction (Answer Brief p. 13). He seizes on this Court's language in Ed Ricke that:

The trial court judge may, in his or her sound discretion, determine whether to rule on a motion for mistrial immediately or reserve ruling until after the jury deliberates. **However, this discretion must be exercised in accordance with precepts of judicial economy.** Id. at 910.

In Ed Ricke, however, this Court did not address what it meant by "judicial economy." In other contexts, this Court has squarely held that practicality and efficiency could **not** outweigh the right to a fair trial. Crossley v. State, 596 So. 2d at 450; State v. Vazquez, 419 So. 2d 1088, 1091 (Fla. 1982) ("prejudice to the Defendant will outweigh judicial economy").

Dr. Loyola also claims that there "is no other basis for jurisdiction." (Answer Brief p. 13). Petitioner begs to differ. This Court's decision in Brown v. Estate of Stuckey, 749 So. 2d 490 (Fla. 1999) arose from a district court's failure to apply the "broad discretion standard" in reviewing orders granting motions for new trial. This Court granted review and reiterated that:

When reviewing the order granting a new trial, an appellate court must recognize the broad discretionary authority of the trial

judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion. **If an appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion....**(Id. at 497-98, emphasis added).

In granting a new trial here, the trial court concluded that the defense remarks in opening statement were "improper, prejudicial and incurable." The District Court did not even pretend to apply the reasonableness test to the trial court's decision. Instead, looking at a cold record, it made a *de novo* determination that the defense remarks were "harmless". In so holding, "the district court failed to recognize the trial court's broad discretion in ruling on a motion for new trial, [and] failed to recognize the trial judge's broad discretion in ruling on the motion for new trial..." Brown v. Estate of Stuckey, 749 So. 2d 498.

Dr. Loyola also contends that "There was no defense theme of misconduct" (Answer Brief p. 28), and that the comments his counsel made in opening were "innocuous" (Answer Brief p. 25). The record is to the contrary.

During opening statement, the defense first engaged the jury's attention with an argument regarding the Plaintiff's purported misconduct during pretrial proceedings, arguing:

Now, Dr. DeSantis (Plaintiff's expert - I went up and took testimony - sworn testimony - from him on not one occasion, but two occasions ...

* * *

[s]o I asked him the question. Are you able to tell us that she suffered additional injury because of the delay? **And his answer to me was no.**

And I went up - I took testimony from him twice. Now, they have to show that. They have to show that in their lawsuit. **And when they didn't, I filed a motion with the Court. I filed a motion with the Court to have their case thrown out. And, at that point, guess what? Dr. DeSantis changed his opinion, and Dr. DeSantis did an affidavit and he now says that gosh, Dr. Loyola caused this lady some injuries. And I guess we're going to have to wait and see how he reconciles that changed opinion when he comes in to testify. Dr. DeSantis makes 40 to \$50,000. a year from testifying, and I'm sure we'll have to concede that he changed his opinion so that she has her day in court.** (T. 46, 47, emphasis added).

It was immediately following this charge of changed, i.e., perjured testimony, that the defense challenged the jury to ask the question why other persons weren't in the courtroom, and assured them that "Ms. Ricks and her attorney aren't going to tell you why they [were]n't here." (T. 49). This prompted Ricks' motion for mistrial, based *inter alia* on the intimation Ricks "and her attorney" were hiding evidence from the jury. (T. 50-51).

In line with its theme of impropriety and trying Plaintiff's counsel, instead of the case, during the cross-examination of Dr. DeSantis, the defense later implied that Plaintiffs' counsel had conspired with his expert to obtain perjured testimony. This was the defense cross-examination:

Q. Did Mr. Vieth (Plaintiff's counsel) tell you, after I took your deposition on two occasions, that he needed you to do that affidavit because I have filed a motion seeking to have this case thrown out of court? Did he tell you that?

A. No; he told me that he wanted to qualify the answer. (T. 469, emphasis added).

In closing, the defense then argued that "Unlike Dr. DeSantis, I didn't pick up the phone and call Dr. Williams, and say can I clarify your opinion? No. Dr. Williams told you. We sent him materials as they became available, we sent them out. He called my office to say" - (T. 1273-74). This drew a sustained objection, and the trial court's instruction to the jury to disregard.

These remarks were **not** the basis for Ricks' new trial motion. However, they supported the trial court's holding that that opening statement was improper, **prejudicial** and incurable. Dr. Loyola's "defense" was to portray the Plaintiff and her counsel in the worst possible light. This included accusations of hiding evidence, followed by insinuations that the

Plaintiff's lawyer and expert were in cahoots to adduce perjured testimony.

Respondent spends an entire page outlining his counsel's subjective thought processes in making the offending remarks. (Answer Brief, p. 22). However, appellate courts cannot review the internal thought processes of counsel - but only the record of their actions. The **record** reveals that Dr. Loyola identified no third party Fabre³ defendant when he was asked to do so by way of interrogatory in March 1999. (R. 368). Only after Ricks settled with his partner, Dr. Wengler, and within 10 days of the trial, did Dr. Loyola amend his answer to disclose he would be blaming Dr. Wengler. (T. 593; 611-612). In opening, the defense conceded that Ricks' medical treatment at the hospital was "shocking" and "appalling," but urged that all of the damage to Ricks was done by other health care providers before Dr. Loyola arrived on the scene. (T. 43-45).

Accusations that Plaintiff and "her counsel" were hiding evidence and would not be able to explain the absence of nonparties from the courtroom, did not merely go to an apportionment issue that the jury failed to reach, as suggested. (Answer Brief p. 26). Since Dr. Loyola's defense was that the nonparties were the **only** ones negligent, his opening statement

³ Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

clearly reflected on Ricks' credibility on all issues, **including liability.**

Nor can the trial court be faulted for finding that the impact of Dr. Loyola's insidious remarks remained undissipated by subsequent events - including Plaintiffs' attempt to give **some** explanation in closing (Answer Brief p. 27, citing T. 1247). See generally Sheffield v. Superior Ins. Co., 26 Fla. L. Wkly S706 (Fla. 2001) (no waiver of error where a party attempts to mitigate harm and diffuse situation by introducing prejudicial evidence herself, after an improper legal ruling on same evidence).

Respondent also claims that it is up to circuit courts, in the exercise of their discretion, to determine when, in the course of a trial, the Ed Ricke procedure is available. (Answer Brief pp. 20-21). However, that is precisely what the trial court did here. Ricks' motion for mistrial came immediately after the defense opening. The trial court took the motion under advisement, in accordance with this Court's dictate to minimize the opposing party's incentive to make prejudicial remarks, and to preclude the wrongdoer from profiting by intentional misconduct. Ed Ricke & Sons, 468 So. 2d at 910. The District Court then set aside the trial court's order *inter alia* because the trial court abused its discretion by reserving

ruling.

To the extent that Respondent urges an *ad hoc* application of Ed Ricke by trial courts, it is "the responsibility of the appellate courts to provide ... frameworks to assist the trial courts within their jurisdiction." See Kozel v. Ostendorf, 603 So. 2d 602, 603 (Altenbernd, J., dissenting), dissent approved in Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993).

In the absence of the Ed Ricke procedure, Plaintiff would have been:

[f]orced to make a motion for mistrial. The trial judge [would] then order a new trial. Thus, the offending counsel has a second opportunity to try the case and **the aggrieved party has little solace but the afforded remedy of beginning all over again.** Ed Ricke & Sons, Inc. v. Green, 468 So. 2d at 909. (emphasis added).

This rewards the sinner to the detriment of the sinned against. Taking the motion under advisement at **all** stages of the proceeding has great deterrent value. If the motion is ultimately granted, the offending counsel will have to answer to its own client for the time and expense of the proceeding, while the aggrieved party may be able to overcome the offending remarks, but will not be penalized, if unable to do so. Plaintiffs submit that use of this procedure throughout the trial proceedings gives the trial court another quiver in its

arsenal to control the proceedings, if they go awry. The District Court simply read Ed Ricke & Sons too narrowly.

At the end of the day, the trial judge who was in the best position to observe the impact of defense counsel's remarks, did precisely what he should have done: granted a new trial to prevent a miscarriage of justice. Since reasonable persons could differ on the propriety of that new trial order, it should be reinstated.

CONCLUSION

For all of the foregoing reasons, the District Court's decision should be quashed, and the case remanded for a new trial.

Respectfully submitted,

Mark Vieth, Esq.
Tilghman & Vieth, P.A.
One Biscayne Tower, Suite 2410
2 South Biscayne Boulevard
Miami, Florida 33131

-and-

Lauri Waldman Ross, Esq.
Lauri Waldman Ross, P.A.
Two Datran Center, Suite 1612
9130 S. Dadeland Boulevard
Miami, Florida 33156
(305) 670-8010

By: _____
Lauri Waldman Ross, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this _____ day of February, 2002 to:

William T. Viergever, Esq.
Sonneborn Rutter Cooney & Klingensmith, P.A.
1545 Centrepark Drive North
P.O. Box 024486
West Palm Beach, Florida 33402-4486

By: _____
Lauri Waldman Ross, Esq.

—

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Lauri Waldman Ross, Esq.

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