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FLORIDA APPELLATE COURT DISQUALIFIES "FORK OVER THE MONEY" JUDGE

By: James P. Steele

On December 17, 2014, in *Great American Ins. Co. of New York v. 2000 Island Boulevard Condominium Association, Inc., et al.*, Florida's Third District Court of Appeal disqualified trial court Judge David C. Miller from presiding over a coverage dispute between a condominium association and its insurer. The most startling factor the appellate court cited was Judge Miller's declaration that Great American should, "fork over the money." However, the judge made several other comments that called his neutrality into question.

The coverage issue centered on whether Great American's "Difference of Conditions" policy covered the Association's claim for falling concrete and slab deflection. The Association filed suit in Miami-Dade County Circuit Court. In its Answer, Great American cited "various exclusions and conditions precedent," including that it was "unable to finalize its coverage position because the Association had failed to provide documents and refused to appear for an examination under oath."

Great American moved for a protective order to limit discovery of its pre-litigation, expert engineer. On October 15 and 22, 2014, Judge Miller presided over hearings on this motion. At the time of those hearings, the parties had deposed no witnesses, no witnesses had appeared in court, no parties had filed any motions for summary judgment and there were no affidavits, sworn testimony or other competent evidence before the Court.

At the October 15 hearing, Judge Miller expressed skepticism that Great American really had not yet decided its coverage position, telling counsel, "It strains all credulity for me to

believe that your carrier has not denied coverage based on information they know now." When counsel replied that the carrier had not, Judge Miller replied, "Then fork over the money."

The appellate court said that comment alone was enough to disqualify Judge Miller, but went on to discuss several other comments during the hearings that called into question whether the judge possessed, "the cold neutrality of an impartial judge." These included comments that displayed animosity towards Great American, gave the Association legal advice and indicated that he had already decided the coverage.

Rejecting Great American's contention that, per its reservation of rights letter, it had not yet decided its coverage opinion, Judge Miller, saying Great American, "can 'We're not sure' until the cows come home," and claim not to have decided the coverage question beyond the trial and appellate levels. "That's just the nature of litigation," said the judge, "That's how it works." The appellate court said these comments displayed a "palpable distrust of Great American's willingness to render a coverage determination," and expressed, "a contemptuous view of Great American (or its counsel's) willingness to accept judicial pronouncements." A court of law should not cast aspersions on a party's ability to accept appellate rulings and should not predict how a party would process those rulings. Elsewhere, Judge Miller displayed his hostility toward Great American when he characterized the reservation of rights letter as, "fancy talk for we're not paying you."

In considering Great American's motion to limit the Association's discovery of the pre-litigation engineer, Judge Miller told Great American's counsel, "if I were asked, I would sanction you for making a specious argument that [the engineer] shouldn't be deposed and opinions fully addressed." The appellate court noted that Great American had in fact made a

colorable argument that the engineer's activities were protected by the work product doctrine. More importantly, the appellant court found that the judge became, "an active participant in the adversarial process," when he signaled the Association to ask for sanctions.

The appellate court was troubled that Judge Miller had apparently already decided the coverage issue before there was any evidence before the court. The judge speculated that Great American told the engineer not to write a report, "because otherwise they do reports." The judge concluded that Great American was looking for additional experts in an attempt, "to keep a claim alive and a claim from being paid." To the appellate court, these comments showed that the judge had already concluded the claim was covered and that Great American was expert shopping in an attempt to avoid paying it.

Finally, the appellate court faulted Judge Miller for this declaration:

> It's doggone concrete spalling, up or down. This is not rocket science. This is something that construction's been dealing with for many, many, many years. Ever since they put a piece of steel inside concrete they've been having these issues. It's not a big deal . . . .

This statement showed that the judge had already decided the facts of the case and how an expert would view those facts. "When a court transforms itself into one of the litigants," wrote the appellate court," it creates a well-founded fear that a party will not be dealt with in a fair and impartial manner."

The record in the case satisfied the appellate court that, "the trial judge in this case has abandoned his post as neutral overseer of the dispute between the parties, compelling us to grant," Great American's request to disqualify Judge Miller.