

A-37763-7
IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1080

FIELDNAMES(LUCILLE ROBERTS, personally and as Personal Representative of the Estate of Frederick Roberts,

Petitioner,

vs.

FRANCISCO TEJADA, M.D., FRANCISCO TEJADA, M.D., F.A.C.P.,P.A.,and FRANCISCO TEJADA, M.D., F.A.C.P.,P.A., d/b/a American Oncology Centers Inc.,

Respondents.

_____/ENDFIELD
ENDRECORD

RESPONDENTS' BRIEF ON THE MERITS

FIELDNAMES(

;

Shelley H. Leinicke

Florida Bar No. 230170

WICKER, SMITH, TUTAN, O'HARA,

McCOY, GRAHAM & FORD, P.A.

Attorneys for Respondents

Post Office Box 14460

Fort Lauderdale, FL 33302

Phone: (954) 467-6405

Fax: (954) 760-9353

ENDFIELD

ENDRECORD

CERTIFICATE OF TYPE SIZE AND STYLE

Respondents, Francisco Tejada, M.D., Francisco Tejada, M.D., F.A.C.P.,P.A. and Francisco Tejada, M.D., F.A.C.P., P.A., d/b a American Oncology Centers, Inc., certify that the jurisdictional brief of Respondents was printed in Courier New font 12 points of no more than 10 characters per inch pursuant to Fla. R. App. Pro. 9.210(a)(2) (2000).TABLE OF CONTENTS

PAGE	
CERTIFICATE OF TYPE SIZE AND STYLE	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	3
ISSUE ON APPEAL	
WHERE THERE IS NO EVIDENCE OF INTENTIONAL JUROR MISCONDUCT AND NO EVIDENCE OF KNOWING CONCEALMENT OF INFORMATION, SHOULD A LOSING PARTY STILL BE ABLE TO SUCCESSFULLY SEEK A NEW TRIAL SIMPLY BECAUSE A JUROR – WHETHER THROUGH FAILED RECOLLECTION, MISUNDERSTANDING OF THE INQUIRY, OR LACK OF DILIGENCE BY COUNSEL – FAILED TO DISCLOSE INVOLVEMENT IN NONMATERIAL LITIGATION.	14
ARGUMENT SUMMARY	15
ARGUMENT	
WHERE THERE IS NO EVIDENCE OF INTENTIONAL JUROR MISCONDUCT AND NO EVIDENCE OF KNOWING CONCEALMENT OF INFORMATION, A LOSING PARTY SHOULD NOT BE ABLE TO SUCCESSFULLY SEEK A NEW TRIAL SIMPLY BECAUSE A JUROR – THROUGH FAILED RECOLLECTION, MISUNDERSTANDING OF THE INQUIRY, OR LACK OF DILIGENCE BY COUNSEL – FAILED TO DISCLOSE INVOLVEMENT IN NONMATERIAL LITIGATION	18
CONCLUSION	36
CERTIFICATE OF MAILING	38

TABLE OF AUTHORITIES

PAGE	
Bernal v. Lipp, 580 So.2d 315, 316 (Fla. 3d DCA 1991)	25,26
Beyel Brothers, Inc. v. Lemenze,	

720 So.2d 556, 557 (Fla. 4th DCA 1998)	23,26,27
Birch v. Albert, 761 So.2d 360, 361 (Fla. 3rd DCA 2000)	1,27,28,29
Canty v. State, 597 So.2d 927 (Fla. 3d DCA 1992)	22
Castenholz v. Bergmann, 696 So.2d 954 (Fla. 4th DCA 1997)	25
Chester v. State, 737 So.2d 557 (Fla. 3rd DCA 1999)	25,30
De La Rosa v. Zequiria, 659 So.2d 239 (Fla. 1995)	2,15,19,25,31,35,36
Drew v. Couch, 519 So.2d 1023 (Fla. 1st DCA 1988)	21
Forbes v. State, 753 So.2d 709 (Fla. 1st DCA 2000)	25,30
Ford Motor Co. v. D'Amario, 732 So.2d 1143 (Fla. 2d DCA 1999)	1
Garnett v. McClellan, 767 So.2d 1229, 1230 (Fla. 5th DCA 2000)	19
Gavin v. State, 259 So.2d 544, 546-547 (Fla. 3d DCA 1972)	20
Hagerman v. State, 613 So.2d 552 (Fla. 4th DCA 1993)	22

TABLE OF AUTHORITIES (CONTINUED)

PAGE
Henry v. State,

86 So.2d 1335 (Fla. 3d DCA 1991)	22
Insurance Co. of North America v. Pasakarnis, 451 So.2d 441 (Fla. 1984)	33
Judah v. State, 654 So.2d 994 (Fla. 1s DCA 1995)	21
Leavitt v. Krogen, 752 So.2d 730 (Fla. 3rd DCA 2000)	1,27,29
Loftin v. Wilson, 67 So.2d 185, 192 (Fla. 1953)	18
Lonschein v. Mount Sinai of Greater Miami, Inc., 717 So.2d 566 (Fla. 3d DCA 1998)	26,27
Lowrey v. State, 705 So.2d 1367 (Fla. 1998)	23
Lusk v. State, 446 So.2d 1038 (Fla. 1984)	22
Mills v. State, 462 So.2d 1075 (Fla. 1985), cert. denied 473 U.S. 911	22
Mitchell v. State, 458 So.2d 819, 821 (Fla. 1st DCA 1984)	28
Mobil Chemical Co. v. Hawkins, 440 So.2d 378 (Fla. 1st DCA 1983)	22,25
Moore v. State, 299 So.2d 119 (Fla. 3d DCA 1974)	20
Murphy v. Florida, 421 U.S. 794 (1975)	20
Murphy v. International Robotic Systems, Inc., 766 So.2d 1010 (Fla. 2000)	34

TABLE OF AUTHORITIES (CONTINUED)

PAGE	
Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996)	33
Rouede Construction Co. v. First National Bank of Eau Gallie, 177 So.2d 375 (Fla. 2d DCA 1965)	27
Seay v. K-Mart Corp. 493 So.2d 542 (Fla. 3d DCA 1986)	25
Silva v. Lazar, 766 So.2d 341 (Fla. 4th DCA 2000)	1
Skiles v. Ryder Truck Lines, Inc., 267 So.2d 79 (Fla. 2nd DCA 1972)	22,23
Smiley v. McCallister, 451 So.2d 977 (Fla. 4th DCA 1984)	25
State v. Hamilton, 574 So.2d 124 (Fla. 1991)	35
Tejada v. Roberts, 760 So.2d 960, 962 (Fla. 3d DCA 2000)	1,2,22
Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978)	33
Young v. State, 720 So.2d 1101 (Fla. 1st DCA 1998)	23

INTRODUCTION

Roberts asks this Court to encourage a recent trend that is based on “a widespread misimpression that a losing litigant can obtain an automatic new trial if he or she can show that one of the jurors failed to disclose prior litigation history, regardless of the circumstances. The practice appears to be developing that where there is a loss in a large case, be it by plaintiff or defendant, the losing litigant scours the public record to try to find evidence of a litigation non-disclosure.” *Tejada v. Roberts*, 760 So.2d 960, 962 (Fla. 3rd DCA 2000). This “has become the losing litigant’s trump card to be played immediately after the return of a trial jury’s adverse verdict. This practice has led to a serious undermining of the integrity of jury verdicts and the finality, at least at the trial level, which they are supposed to bring to the litigants.” *Birch v. Albert*, 761 So.2d 355, 359 (Fla. 3d DCA 2000).

In less than two years, at least five appellate decisions have been published where the losing party in a “clean” trial has conducted a post-verdict scavenger hunt of courthouse records to find irrelevant or long forgotten claims to wave in a last-ditch effort to prevent conclusion of a suit. *Birch*, supra; *Ford Motor Co. v. D’Amario*, 732 So.2d 1143 (Fla. 2d DCA 1999); *Leavitt v. Krogen*, 752 So.2d 730 (Fla. 3d DCA 2000); *Silva v. Lazar*, 766 So.2d 341 (Fla. 4th DCA 2000); *Tejada v. Roberts*, supra. These appeals come at great cost to crowded dockets and the pocketbooks of the vindicated opposing parties (whether plaintiff or defendant). This new practice is rapidly expanding.

If Roberts succeeds, trial dockets will become even fuller as more and more losing parties re-litigate the merits of well-decided cases solely because of juror’s imperfect memories on superfluous, non-material matters.

The decisions of this state, as led by this Court’s opinion in *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995), should not be expanded in this fashion. The district courts’ decisions allow *De La Rosa* to remain intact so that a new trial is required only where a juror conceals facts that are material despite diligent inquiry by the complaining party.

STATEMENT OF CASE AND FACTS

Robert’s claim

After Frederick Roberts died of liver cancer, Roberts sued Dr. Tejada alleging that a less aggressive therapy regime could have extended the decedent’s life expectancy by a matter of months. (SR. 287,860)¹

Dr. Everett Sugarbaker, a highly credentialed and well-respected cancer surgeon, had performed a major liver resection on Roberts in 1990. (SR. 573, 832, 839) In this surgery, three of the four lobes of the liver were removed because of advanced cancer throughout. The doctors all agreed that

¹ The symbol “R” refers to the Index to the Record on Appeal. The symbol “T” refers to the transcript of voir dire of June 29, 1998, that is found at R. 350-512. The symbol “SR” refers to the transcript of the trial. The symbol “A” refers to transcripts of two post-trial proceedings (October 28, 1998 and April 30, 1999) that were inadvertently omitted from the Index to the Record on Appeal and were attached to Dr. Tejada’s Initial Brief filed in the District Court. All emphasis is added unless noted to appear in the original.

Roberts' liver was cirrhotic and damaged from longstanding use of Dapsone.² Dr. Sugarbaker testified the surgery was so extensive that Roberts was "on the margin" for survival in 1990. (SR. 832) The remaining lobe of the liver (which was still cirrhotic and cancerous) regenerated and Roberts returned to his normal activities. (SR. 251) Feeling good, however, did not indicate that he was "beating" the disease. (SR. 573, 584)

Roberts was closely followed by his treating doctors after this initial surgery. A 1992 CAT scan and x-ray showed malignant nodules in the cirrhotic liver. (SR. 251) Because Roberts felt well, he was told by Dr. Sugarbaker not to seek treatment at that time. (SR. 846, 886-892) Dr. Sugarbaker explained that chemotherapy has little effect on recurrent liver cancer and that surgical removal of further liver tissue was impossible. (SR. 846, 877) Dr. Sugarbaker told Roberts that any further treatment would be palliative at best and would not cure his disease. (SR. 843) He suggested that Roberts delay any treatment until he was in pain.³

Roberts continued to be closely monitored. One measure of the cancer's growth is the AFP marker. While the AFP remained relatively constant after his first surgery, an increase from 10.3 to 13 in September, 1993, signaled a reactivation of the disease. (SR. 842) Between November, 1993, and mid-January, 1994, a two and one-half month period, the AFP marker doubled.

² This medication was prescribed for treatment of a severe, high-risk skin condition where the skin fills with blisters. (SR. 836)

³ The liver has no pain fibers but the capsule does. As the tumor grows to the size of the capsule, the condition becomes very painful. (SR. 887)

(SR. 847) In the next three weeks the AFP doubled again. (SR. 467, 583) This rapid rise indicated the time was ripe to commence chemotherapy on this aggressive cancer. (SR. 847) The evidence showed that without chemotherapy, Roberts had no more than a two to three month life expectancy. (SR. 479, 498, 884) With the administration of chemotherapy, there was a potential for six months of life, assuming no complications. (SR. 891) Dr. Sugarbaker told the jury that with any setbacks, Roberts could not live even six months despite the administration of chemotherapy. (SR. 860, 892) Neither party's expert contradicted this testimony. Dr. Sugarbaker then referred Roberts to Dr. Tejada. (SR. 848)

Dr. Tejada is well trained in his specialty. He received his internal medicine training at Johns Hopkins University. (SR.433) Thereafter, Dr. Tejada worked at the National Institutes of Health. (SR. 435) He was then invited to work at the National Cancer Institute and remained there for three years. (SR. 436) Dr. Tejada taught at the Georgetown and George Washington medical schools until he was recruited by the AMC Cancer Research Center at Denver. (SR. 437, 438) Even Roberts' expert testified that he was "not here to say that Dr. Tejada is a bad doctor." (SR. 700)

Dr. Tejada began with a course of chemotherapy administered while Roberts was in the hospital over the course of a week. (SR. 276, 476) Roberts did not want to spend one week of every three or four of his last weeks in the hospital. (SR. 285, 276, 588) Roberts was therefore offered the option of the surgical insertion of a hepatic port through which a chemotherapy agent, FUDR, could be administered by a pump. (SR. 286-287) FUDR can be administered continuously because it has an extremely short (seven minute) half life. (SR. 313, 587)

All the medical witnesses agreed that Dr. Tejada prescribed and administered an appropriate dosage of FUDR. (SR. 309, 698, 699, 855) While all chemotherapy agents are highly toxic, FUDR is the safest alternative because 90% to 95% is absorbed directly by the liver. (SR. 301, 308, 698, 702)

Dr. Sugarbaker agreed to do the surgery for insertion of the port because, if all went well, there was a potential for Roberts to have six more months of life. (SR. 287, 860) During the surgery to install the port, Dr. Sugarbaker removed Roberts' spleen because it was five times the normal size as a result of systemic problems related to the cancer. (SR. 590) Approximately six pounds of spleen tissue was removed. (SR. 323)

Roberts was constantly supervised after the port was installed and chemotherapy began. (SR. 327) As the result of the tumor growth, the systemic degeneration it caused, and a suspected bowel obstruction, Roberts developed severe diarrhea. (SR. 315, 413, 492, 604, 644) This was reported by his wife on May 19th. (SR. 393, 949) Roberts was hospitalized, but he expired. Although Roberts' wife alleged that the FUDR caused the diarrhea and death, her belief was not supported by the evidence. (SR. 365, 596)

The jury returned a verdict finding no malpractice in the care and treatment of this terminally ill cancer patient. (SR. 1210-1211)

Jury selection

During voir dire, Roberts asked each prospective juror if he or she had ever been party to a lawsuit. (T. 7, 10, 15, 18, 20, 22, 24, 26, 28, 30, 31, 34, 36, 38, 41, 70, 71, 72, 73) One prospective panel member that Roberts did not challenge had been a plaintiff in a suit which settled. (T. 18, 70) Another prospective juror, who Roberts also failed to challenge, first stated she had never been involved in litigation then later changed her statement to acknowledge that said she was divorced. (T. 20, 71)

At least five jurors who sat on this case (including Fornell and Guerrero) had relevant personal history. Juror Castro's father is a physician and his uncle was dying of Hodgkin's Disease and undergoing chemotherapy treatments at the time of the trial. (T. 56, 102, 103, 141, 142) Juror Martinez's mother had recovered from cervical cancer and her grandfather had metastatic cancer. (T. 98-100) Juror Nojaim's grandmother had suffered from cancer. (T. 102) Despite this history of personal experience with cancer victims, these individuals were all allowed to sit on the jury, as was the alternate (Sanchez) whose cousin suffered from cancer. (T. 107-108) Roberts did not seek to challenge any of these jurors at trial, including Fornell or Guerrero, apparently believing that their experience with cancer and doctors would not adversely affect their impartiality.

Juror Fornell stated during voir dire that she is married to a banker. (T. 34) She volunteered that there are five doctors in her family because she wanted everyone to know potentially relevant information about her. (T. 34, 35) She added that she is not particularly partial to doctors, but felt that it was only fair to disclose this fact. (T. 55) While both Roberts and Dr. Tejada had exhausted all peremptory challenges by the time Fornell was in a position to sit on the jury, Roberts did not ask for any additional challenge for Fornell or otherwise raise any objection to this juror's impartiality and ability to fairly consider the case. (T. 158, 159, 160)

Juror Guerrero, who also denied any involvement in a prior lawsuit, told Roberts' attorney that her grandfather had cancer when she was small. (T. 104-105) The trial court specifically noted that "I don't believe there's a challenge for cause" as to juror Guerrero based on her background. (T. 158)

Following the jury verdict in favor of Dr. Tejada, Roberts filed a Motion for New Trial and two amendments thereto. (R. 273-322, 331-333, 513-516; A. 1-58) In the amended motions, Roberts claimed that Thelma Fornell, Paula Guerrero and Jessica Martinez had failed to disclose prior involvement in litigation. By the time of the hearing, Roberts agreed that the "Jessica Martinez" identified in an Auto Trak search was not the woman who served as a juror. (A. 3-4)

While the Auto Trak search identified a 1996 case involving a "Paula C. Guerrero" and two others in 1995 identifying "Paula Guerrero", no civil litigation was shown by the search, nor was there any confirmation that the juror was the same person identified in Roberts' search. (R. 820-867; A. 1-49) The evidence showed that a preliminary name search using the Auto Trak system identified six licensed Florida drivers with the name "Paula Guerrero", five of whom were registered as Miami-Dade County residents. (R. 820-867; A. 1-49) The evidence established only that someone named "Paula C. Guerrero" signed a Petition For Injunction For Protection at the Metro Justice Center on June 16, 1996, and that this petition was dismissed at the petitioner's request nine days later. (R. 820-867; A. 18-25) The petition described an incident of beating by an abusive ex-boyfriend. At the time the petition was signed, the proposed respondent was in jail. Nothing was presented to relate this event or claim to the juror who sat in the instant trial. The evidence further established that the 1995 case involving "Paula Guerrero" could not possibly be the juror in this case because of different birth dates.

As to Thelma Fornell, Roberts asserted that this juror had failed to disclose involvement in three civil litigation cases filed in 1973, 1975 and 1994. (R. 331-333, 513-515) The record contradicted these assertions. (R. 820-867; A. 1-49) The evidence established that the 1994 action was definitely not brought by juror Fornell because of inconsistent birth dates of the plaintiff. (A. 25, 26) As to the 1975 and 1973 actions, certified copies of the docket sheet showed that the 1975 action was brought jointly by Eddie Fornell, Thelma Fornell, and Thelma V. Fornell against Florida Ranch Enterprises. (R. 820-867; A. 1-49) No evidence was introduced to conclusively establish that juror Fornell was the same individual involved in this 22 year old litigation, or (assuming, arguendo, it was the same person) that she had been a real party in interest rather than merely a nominal party to litigation brought more than two decades earlier. (R. 820-867; A. 7-10, 18) The docket sheet introduced at the post trial hearing showed that a 1973 small claims case styled Biscayne Title Company v. Eddie and Thelma Fornell was resolved by stipulation approximately six months after it was filed and no final judgment was ever entered. (A. 28) Dr. Tejada therefore argued to the court that, in the absence of an adverse judgment, no reasonable person could be expected to remember a small claims case of six months duration which concluded more than two decades prior to the voir dire even if one assumed that the juror was the person in that long-ago litigation. (A. 7-10)

In sum, Dr. Tejada argued in opposition to the Motion for New Trial that (1) the domestic violence action allegedly brought by juror

Guerrero was clearly distinguishable from a civil lawsuit or litigation that was the subject of voir dire questioning and (2) as to juror Fornell, the two short lived cases from 20 plus years ago were sufficiently unremarkable, remote, and distinguishable to have no relevance to this action. Dr. Tejada further argued that Roberts' amendment to her post-trial motion was clearly a grasp at straws in light of the fact that Roberts had freely agreed to allow at least three individuals to sit on the jury who had relevant, recent experience with cancer victims and were far more likely to be swayed, however unintentionally, from their oath of neutrality.

The trial court reluctantly granted Robert's motion for new trial because the judge felt constrained to do so by the case law. When ruling, the trial court specifically said that there was no intentional concealment of prior litigation history by any juror, there was no prejudice from these immaterial events, and that, in any event, there was ample evidence to support the verdict:

I disagree with the Third District's rationale in this entire line of cases, that whether there was prejudice is basically irrelevant, and that whether there was ample evidence supporting a verdict is essentially irrelevant.

They have pretty much states – and I have to follow a rule that if there was – that juror information on prior litigation history is relevant, and if there is an adequate inquiry and the information is not revealed, regardless of why, whether it's lack of knowledge, lack of truthfulness, just inaccuracy or forgetfulness, those reasons are irrelevant. The failure to reveal it is automatically grounds for a new trial.

MR. MCCOY: Are you making a finding with respect to the relevance of this information; first with respect to Paula Guerrero and the petition for injunction in domestic violence court?

THE COURT: I personally wouldn't find that to be of such moment, that in and of itself, that it would fall under this litigation history gathered ...

* * *

I can't find any particular fault by either juror. I'm not attributing any bad motives to them, but the fact is that it's irrelevant.

Hopefully, the Third District – I mean, we talk about opening a can of worms. I think the Third District is opening a can of worms, subjecting virtually every verdict that comes out to a subsequent investigation and challenge by the unsuccessful party. This works for the benefit of either side, as long as they're the loser, and I think it's wrong to do that without some showing of prejudice in the actual conduct of the trial, but that's the way the law stands right now, and I don't think I have a choice.

(A. 37-39) The trial court specifically declined to find that there was any concealment of information by the jurors because "concealment implies a conscious action by the juror, ... and I'm not finding it to be a conscious action." (A. 41) At the conclusion of the hearing, the trial court confirmed his reluctance in making this ruling and said that "I hope that the Third District sends it back." (A. 44)

ISSUE

WHERE THERE IS NO EVIDENCE OF INTENTIONAL JUROR MISCONDUCT AND NO EVIDENCE OF KNOWING CONCEALMENT OF INFORMATION, SHOULD A LOSING PARTY STILL BE ABLE TO SUCCESSFULLY SEEK A NEW TRIAL SIMPLY BECAUSE A JUROR – WHETHER THROUGH FAILED RECOLLECTION, MISUNDERSTANDING OF THE INQUIRY, OR LACK OF DILIGENCE BY COUNSEL – FAILED TO DISCLOSE INVOLVEMENT IN NONMATERIAL LITIGATION.

ARGUMENT SUMMARY

Without question, a trial court must order a new trial where a juror fails to disclose information that meets a three-part test: (1) the fact is material; (2) the fact is concealed in voir dire examination; and (3) the failure to discover the concealed fact is due to lack of diligence by the complaining party. *De La Rosa v. Zequirá*, 659 So.2d 239, 241 (Fla. 1995). *De La Rosa's* three-part test is well-established, and it was specifically recognized and followed by the District Court in this instance.

Roberts wants *De La Rosa* to be so strictly interpreted that any omission is automatically considered a material concealment. Under this interpretation, the baby is thrown out with the bath water and a new trial must be ordered in every instance. Such interpretation impermissibly restricts the trial court's discretion to rule on a motion for new trial.⁴

Losing parties' attempts to enforce this rigid standard have created an alarming trend. Anyone unwilling to accept an adverse jury verdict in a "clean" case is now encouraged to scour courthouse records for some indication a juror "concealed" any information during voir dire, then triumphantly pull this "rabbit out of the hat" during post-trial motions for – presto chango! – a new trial and another bite at the apple.

Roberts falls squarely within this group of litigants that the district courts have described as being unwilling to concede they lost a fair fight. By "scouring the public records to find evidence of a [juror's] litigation non-disclosure," Roberts and other losing parties then cry "foul" if the dusty tomes from the bowels of the courthouse show that a juror "lied" about litigation history when, in all reality, the juror simply forgot about an irrelevant, small claim (or never knew of it in the first place), or did not understand the breadth of a question about "litigation participation."

To put a stop to this post-trial "gotcha," the Third District proposed a reasonable, rational procedure: do a quick search of records before the jury is sworn. With the omnipresence of computers in the courtroom, judges' chambers, clerks' offices, and attorney's laptops, this is a simple task. If a juror's name (or a similar name) pops up, the juror can be asked if he or she is the person identified in the prior action. This innocuous inquiry, which could be conducted privately with each juror, will either refresh a recollection or elicit a denial. Appropriate follow-up questions can be asked, the juror will be accepted or challenged, and the case will then proceed in an economical manner without "error in the pocket" for the eventual losing party.⁵ This

⁴ Roberts acknowledges that a trial court's ruling on a motion for new trial is reviewed from an abuse of discretion standard. (Petitioner's brief p. 11)

⁵ Without the Third District's suggested procedure, there is nothing to prevent a party with a tenuous position from conducting a juror investigation during voir dire then simply holding the results in reserve as an "insurance policy" against a loss.

procedure is not burdensome; the Third District's decision points out that Robert's counsel had independently developed and used this identical procedure even before oral argument in the instant case. It is also important to note that this procedure does not prohibit a further investigation post-trial. If a subsequent search shows that, indeed, a juror knowingly misrepresented litigation history in response to a specific question during voir dire, then there would be a truly well-founded basis for a new trial motion.

ARGUMENT

WHERE THERE IS NO EVIDENCE OF INTENTIONAL JUROR MISCONDUCT AND NO EVIDENCE OF KNOWING CONCEALMENT OF INFORMATION, A LOSING PARTY SHOULD NOT BE ABLE TO SUCCESSFULLY SEEK A NEW TRIAL SIMPLY BECAUSE A JUROR – THROUGH FAILED RECOLLECTION, MISUNDERSTANDING OF THE INQUIRY, OR LACK OF DILIGENCE BY COUNSEL – FAILED TO DISCLOSE INVOLVEMENT IN NONMATERIAL LITIGATION.

Roberts' brief reads like an objectionable closing argument: it is full of speculation, conjecture, and inferences that cannot be drawn from either the instant record or the cited case law. A fair reading of the record and case law fully supports the instant ruling of the Third District and the similar rulings of its sister courts.

As this Court has explained:

it is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals, a material fact relevant to the controversy, is guilty of misconduct, and such misconduct, is prejudicial to the party, for it impairs his right to challenge.

Loftin v. Wilson, 67 So.2d 185, 192 (Fla. 1953). Without proof of all three elements of juror misconduct, a trial court errs as a matter of law if a new trial is ordered. In the instant case, the Third District correctly determined that none of these three elements were present and determined that the verdict and final judgment should be affirmed – which is what the trial court clearly wanted to do.

Roberts' argument for conflict review in this Court stems from an assertion that De La Rosa's has an inviolate holding that a juror's statement of prior litigation is material as a matter of law and that the Third District impermissibly measured the materiality of the particular lawsuits allegedly relating to the two juror. Roberts' argument is without merit and the claimed conflict does not exist, for two reasons. First, as to each claim of non-disclosure, materiality was only one basis for the court's decision and the ruling is sustainable on two alternate grounds that the information was not knowingly concealed and that any failure to disclose was due to Roberts' lack of diligence. Secondly, Roberts wrongly assumes that De La Rosa imposes a *per se* rule.

Any prior litigation history is not material.

"Nondisclosure is considered material if it is substantial and important so that if the facts were known, [a party] may have been influenced to peremptorily challenge the juror from the jury." *Garnett v. McClellan*, 767 So.2d 1229, 1230 (Fla. 5th DCA 2000).

The instant lawsuit concerns issues of alleged medical malpractice in the aggressive treatment of Roberts' advanced liver cancer. The parties interrogated then approved other jurors with specific knowledge of this subject matter through their own families' experiences with cancer and relatives who are doctors. (T. 56, 98-100, 102-103, 107-108, 141-142) Roberts did not raise any objection to either Fornell or Guerrero or request additional challenges so either one could be disqualified with good reason: their background and knowledge of the relevant subject matter was no different than any other potential juror. (T. 34-35, 55, 104-105, 158-160)

Assuming that either Guerrero or Fornell had the contact with the courts of this state as described in the court documents introduced, such exposure is completely irrelevant to the proper and fair resolution of the instant case. Even the trial court described this as "remote." (A. 36) The minimal potential involvement in prior litigation shows no bias or prejudice or undue familiarity with the court system. "An impartial jury is not required to be 'totally ignorant of the facts and issues involved' and may 'have formed some impression or opinion as to the merits of the case.'" *Gavin v. State*, 259 So.2d 544, 546-547 (Fla. 3d DCA 1972); *Moore v. State*, 299 So.2d 119 (Fla. 3d DCA 1974); *Murphy v. Florida*, 421 U.S. 794 (1975). Given the widespread, general knowledge of litigation in news media, television, and everyday contact with members of the community, the two jurors in question had no special insights or bias based on any prior personal involvement with the legal system. Because both of these jurors agreed to listen to the evidence, that they would not form any opinions about the case until all the evidence was presented, and that they had no preconceived opinions regarding entitlement to pain and suffering damages or to limits of damages, they clearly expressed an ability and agreement to consider this case fairly and impartially. (T. 111, 116-117, 120, 122) The omission, apparently innocently, of reference to involvement in any lawsuits was simply immaterial to the consideration of this case and cannot serve as a basis for ordering a new trial. See also: *Judah v. State*, 654 So.2d 994 (Fla. 1s DCA 1995) (dismissal of certain venire was improper where others had similar familiarity with parties or witnesses).

There is no rational difference between the facts of the instant case and the facts presented in the case of *Drew v. Couch* 519 So.2d 1023 (Fla. 1st DCA 1988) in which the court held that a new trial was not warranted even though the juror failed to reveal that the senior partner of the law firm representing the plaintiff had represented her husband in a divorce action some fifteen years earlier. As the instant trial court should have decided, the appellate court in the *Drew* case determined that the undisclosed information was not material and that the incident would not affect the juror's ability to render a fair and impartial verdict.

This court should follow the rationale in such cases as *Lusk v. State*, 446 So.2d 1038 (Fla. 1984), in which it was determined that a juror who was in a prison correctional office who heard conversations about facts of case should not be disqualified because he, like the instant jurors, gave no indication that he would not render his verdict solely upon the evidence presented at trial. See also: *Mills v. State*, 462 So.2d 1075 (Fla. 1985), cert. denied 473 U.S. 911 (no abuse of discretion in refusing to strike juror who was distantly related to victim's family and was acquainted with defendant and his family where juror declared impartiality).

The facts of the instant case cannot compare to the material bias and prejudice in cases such as *Canty v. State*, 597 So.2d 927 (Fla. 3d DCA 1992)(potential juror who was burglarized was later deposed by one of the counsel in the case where he was on the panel), *Hagerman v. State*, 613 So.2d 552 (Fla. 4th DCA 1993)(juror worked in state attorney's office and knew prosecuting attorney), *Henry v. State*, 586 So.2d 1335 (Fla. 3d DCA 1991)(juror was legal secretary in state attorney's office and knew prosecuting attorney); *Mobil Chemical Co. v. Hawkins*, 440 So.2d 378 (Fla. 1st DCA 1983)(juror was related to parties and had been a client of the judge); *Skiles v. Ryder Truck Lines, Inc.*, 267 So.2d 79 (Fla. 2nd DCA 1972)(juror related to plaintiff's attorney); *Lowrey v. State*, 705 So.2d 1367 (Fla. 1998)(juror failed to reveal he was under criminal prosecution at time of jury service); *Young v. State*, 720 So.2d 1101 (Fla. 1st DCA 1998)(juror in sexual abuse case had been a victim too). Because the instant jurors had no intimate familiarity with any party, witness or attorney – and particularly where the jurors had agreed to consider the instant case solely on its merits after hearing

all of the evidence – there is no basis for ordering a new trial.

There is no evidence of juror concealment.

Roberts repeatedly describes the two venire as “concealing jurors.” This inflammatory label is wholly undeserved. The concept of “concealment” carries with it an implication of intentionally hiding something. *Beyel Brothers, Inc. v. Lemenze*, 720 So.2d 556, 557 (Fla. 4th DCA 1998) (“there was no evidence presented at the hearing on the motion that the juror had knowingly concealed relevant litigation experience during voir dire”). Nothing in the record suggests that there was concealment of any information by any juror in this case. Indeed, the record affirmatively establishes that the jurors went out of their way to offer any information that could possibly be relevant or of any interest to counsel; just one example is Fornell’s voluntary disclosure of the number of her relatives who are doctors so that she “would be fair” to the litigants. (T. 55) The trial judge specifically declined to find that these jurors were intentionally untruthful. (A. 37, 42)

The record is abundantly clear that neither juror had any ulterior motive or desire to conceal any remotely relevant personal background. Juror Fornell volunteered, with no question pending, there are five doctors in her family because “I just want everybody to know.” (T. 36) Juror Guerrero said that her grandfather died of bone cancer in his legs. (T. 107) Any juror with an “agenda” would not have disclosed this information for fear of disqualification on the grounds of bias.

The record contains nothing other than Roberts’ rank speculation and conjecture on the issue of whether Fornell even knew about these decades old lawsuits. There is an equal or greater likelihood that Fornell never knew that her husband included her in the suit against Florida Ranch Enterprises or that Biscayne Title Company initiated a small claims action against the Fornells. Contrary to Roberts’ assertion, it is most probable that Fornell’s husband (again assuming that the litigation even related to this juror) fully handled these matters without her involvement or knowledge.

The facts of the instant case are readily unlike those decisions where a juror obviously and deliberately failed to disclose litigation history. See, for example: *Seay v. K-Mart Corp.*, 493 So.2d 542 (Fla. 3d DCA 1986) (no disclosure of involvement in at least twenty lawsuits plus an additional personal lawsuit against a condominium developer); *Castenholz v. Bergmann*, 696 So.2d 954 (Fla. 4th DCA 1997) (failure to disclose involvement in five distinct legal actions); *DeLaRosa v. Zequeira*, 639 So.2d 239 (Fla. 1995) (failure to divulge participation in numerous prior lawsuits); *Mobil Chemical Co. v. Hawkins*, supra, (juror failed to disclose relationships to the party and the judge); *Smiley v. McCallister*, 451 So.2d 977 (Fla. 4th DCA 1984) (juror acknowledged similar accidents and injuries of family members after trial was concluded); *Chester v. State*, 737 So.2d 557 (Fla. 3rd DCA 1999) (juror’s own sexual abuse was material in criminal case alleging lascivious assault on a minor); *Forbes v. State*, 753 So.2d 709 (Fla. 1st DCA 2000) (juror had prior friendship with defendant). It also bears noting that in each of these decisions, there was no indication that anyone disputed that it was the juror, not some other person, who was involved in the prior lawsuits.

The case law suggesting that a juror makes a knowing misrepresentation or concealment where the juror has recent litigation experience can be easily distinguished from the facts relating to juror Guerrero. See, for example: *Bernal v. Lipp*, 580 So.2d 315, 316 (Fla. 3d DCA 1991) (participation in a personal injury lawsuit one year earlier). While the *Bernal* case was cited by Roberts as support for the assertion that juror Guerrero concealed prior litigation experience, Roberts’ reliance is misplaced. In the instant case, unlike the *Bernal* action, there is no clear indication that the juror is the same person that was involved in the prior court proceedings. It is questionable whether either the 1996 and 1995 cases that Roberts referenced really involve juror Guerrero. As the trial court was advised, the problems with Roberts’ assertion are many: (1) Case number 96-14547FC04(51) references Paula C. Guerrero, which is not the name given for the instant juror; (2) the microfilm case index and the Permanent Injunction for Protection from case number 95-28658FC04(54) also identifies a person with a middle initial of “C;” (3) there are at least six licensed drivers in Florida with the name “Paula Guerrero,” five of which reside in Metro-Dade County; (4) the Hialeah Police Department records which are part of the 1995 case in question identify the victim’s birth date as May 21, 1968, which further suggests that the prior litigation did not involve the instant juror. The case law is clear that where there is uncertainty as to whether the juror is truly the litigant from the prior litigation, it is improper to order a new trial. *Beyel Brothers, Inc. v. Lemenze*, supra; *Lonschein v. Mount Sinai of Greater Miami, Inc.*, 717 So.2d 566 (Fla. 3d DCA 1998). Without a juror interview, it is impossible to determine if the juror is the same individual as the prior litigant so as to determine if there has been any misconduct that would support a new trial. *Lonschein*, supra.

Even if one assumes, for purposes of argument, that the records did relate to juror Guerrero, the petition for injunction protection could easily be understood by a layman not to constitute litigation or a lawsuit within the scope of counsel’s voir dire questions. *Birch v. Albert*, 761 So.2d 360, 361 (Fla. 3rd DCA 2000); *Leavitt v. Krogen*, 752 So.2d 730 (Fla. 3rd DCA 2000) (laymen are often unaware that “litigation” is broader than appearance at trial).

While it appears that the two remote, decades-old claims that Fornell neglected to mention probably did involve her, there is still no basis to determine that there was a knowing misrepresentation or withholding of information during voir dire. Precisely as in the *Beyel Brothers*, supra, case, the record suggests that Fornell was merely sued as a co-owner of property in the 1973 small claims court action, and a nominal party in the 1975 case which was in suit for only a matter of months before it was dismissed. Just as in the *Beyel Brothers*, supra, case, it is likely that Fornell was never aware of either of these old matters. See also: *Rouede Construction Co. v. First National Bank of Eau Gallie*, 177 So.2d 375 (Fla. 2d DCA 1965) (new trial properly denied where juror unintentionally failed to disclose that he knew the partner of plaintiff’s counsel because he was unaware of the fact).

No diligence by Roberts’ counsel in voir dire inquiry

The Third District correctly disputed Roberts’ diligence in asking jurors about any “litigation” background. The Third District correctly determined that Roberts’ counsel did not act with due diligence in questioning the jurors on prior litigation. See for example, *Mitchell v. State*, 458 So.2d 819, 821 (Fla. 1st DCA 1984) (a party can only rely on answers where there was a straight forward question that is not reasonably susceptible to misinterpretation).

While Roberts continually recites that jurors were asked if they had ever been a party to “any kind” of lawsuit, no definition of a “lawsuit” was given. Roberts never told the jury that a “lawsuit” is not limited to a trial or a courtroom proceeding. As explained in the *Birch v. Albert*, supra, case:

The word “litigation” can be misleading. Potential jurors are often asked, “have any of you ever been involved in any type of litigation?” Under the legally acknowledged meaning of the word, every person who has been divorced would have to answer such a question affirmatively. Yet, a person who has gone through a totally amicable, uncontested divorce may not believe that he or she has been involved in “litigation” because there were no disputed issues for the court to resolve. The fact that a pleading was filed and that a judge had to “rubber stamp” the paperwork can easily lead some uneducated in the law to believe that all issues being agreed to, there was no need to “litigate” anything.

Likewise, people who, like [juror] Ms. Ferrer-Young, have had a debt referred for collection and have actually been sued in small claims court, will probably not consider that experience, “litigation,” where they immediately paid the claim and never went to court. Nevertheless, if such a person answered the prior question in the negative, he or she might be “concealing” information.

In order to avoid these misunderstandings, it is imperative that questions propounded to potential jurors be absolutely clear. This includes explaining the meanings of all legal terms contained within the questions. Our juries are composed of people from all segments of the community. Miami-Dade

County in particular enjoys a racial and ethnic diversity which is unique in the State of Florida. Potential jurors can be from a variety of countries and may have learned English as a second or even third language. Even the simplest of legal terms can be confusing to people born and raised in foreign countries.

Additionally, potential jurors possess differing levels of education. Thus, a typical jury may be composed of people with doctoral degrees and others who are barely literate. The latter may not only have difficulty understanding sophisticated language, they may also be too embarrassed to acknowledge their limitations in open court.

Birch v. Albert, 761 So.2d at 360-361.

Similarly, a juror in *Leavitt v. Krogen*, supra, was unaware that a suit had actually been filed, in part because she was never called to testify at any proceeding.

Roberts' brief is replete with a series of "what if" questions. The rhetoric is an interesting flight of fancy. To ask "what if Mrs. Fornell's mother was treated by Dr. Tejada 20 years ago and was either saved or killed?" is a far cry from the reality of the facts of this case. A glaring flaw in Roberts' brief is the attempt to bootstrap this speculative, hypothetical question into a "fact" when citing to case law such as *Chester v. State*, 737 So.2d 557 (Fla. 3rd DCA 1999)(disclosure of juror's sexual abuse was material in criminal case alleging lascivious assault upon a minor) or *Forbes v. State*, 753 So.2d 709 (Fla. 1st DCA 2000)(juror's prior friendship with defendant's family was material).

It is grossly unfair to compare Robert's counsel's fondness for the Dolphins, or Mr. Brown's potential bias against the Board of Education to this case where Fornell clearly served as a truthful, unbiased juror based on her voluntary disclosure of relevant information (such as the number of doctors in her family). Fornell simply failed to recall (or never knew) of minor property claims more than 20 years earlier.

If a juror inadvertently does not discuss some unrelated or minor prior lawsuit, then clearly that juror has no bias toward or against either party as a result of that inconsequential event. Roberts' pages of "what if" questions have a fatal gap

of logic.⁶ The questions mistakenly assume that an “evil” juror plotting to “submarine” one side of a case will give honest, candid answers about their subjective view of past litigation. In reality, a juror who wants “payback” because of a personally unsatisfactory litigation experience is highly unlikely to candidly answer such questions. A juror with an “agenda” would categorically deny any bias or prejudice to avoid compromising the ability to sit on a jury and “get even.” Should everyone who has ever had contact with the courts be precluded from jury duty?

The procedure outlined by the Third District in the instant case serves the ends of justice, promotes both the spirit and letter of De La Rosa, and satisfies Roberts’ concerns and “what ifs”: perform a quick check of court records before the jurors are sworn. If any possible litigation history is discovered, the parties question the juror. Either they will learn that the lawsuit involved a different person with a similar name, the

⁶ Roberts tries to argue that “how can they say that a juror, formerly a plaintiff, will have sympathy for a plaintiff, and bias against a defendant? What if the juror got a raw deal as a plaintiff? What if she thinks her case was better than the case being considered? Would she think, ‘I got nothing, so this plaintiff gets nothing’? Who knows? Only she does. And the same may be true of a concealing former defendant . . . why wouldn’t that juror think, ‘if I had to pay \$1 million for doing nothing, this defendant should pay \$2 or \$3 million’.” (Petitioner’s brief p. 26)

juror's recollection will be refreshed, or they will have the opportunity to observe the "body English" of a juror with an "agenda" or "grievance."⁷ Importantly, such procedure does not hamper a further background check that may continue after the jury is sworn and the case proceeds. If counsel's "vibes" suggest that a juror may have answered dishonestly, further investigation can still proceed. A party who can establish that a juror lied about litigation history after a direct confrontation during voir dire would have a significantly stronger claim of juror misconduct in a post-trial motion because there would be clear evidence of concealment rather than mistake or inadvertence.

Mixed into Roberts' brief is a curious diversion that questions the efficacy of post-trial juror interviews and calls this procedure "convenient, revisionist history." (Roberts' Initial Brief, p. 28) Roberts also strays well beyond the pale when speculating that any juror who is called back for a post-trial interview "must have known that she may have done something wrong." Roberts' colorful description of the judge's "angered and watchful eye" are equally unsupportable.

Roberts also asserts that she has been burdened with an ex post facto law and that court-made "hurdles" should not apply to her. Ridiculous. Roberts' own attorney admitted during oral argument in the district court that he had independently started to use this identical practice that was being contemplated. *Tejada v. Roberts*, 760 So.2d at 966. What better evidence of a lack of burden!

Courts frequently apply procedural modifications to pending cases. As this Court stated in *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978), changes to procedure do not fall within a constitutional prohibition against retroactive litigation and may be immediately applicable to pending cases. See e.g., *Insurance Co. of North America v. Pasakarnis*, 451 So.2d 441 (Fla. 1984)(new seatbelt defense applicable in pending case.); *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996)(modification of affirmative defense relating to non-party or third party liability is instantly applicable in pending litigation.)

The burden of conducting a brief background check of jurors is miniscule when compared with the alternative. There is a terrible strain on the judicial system when a case that is well tried, error free, and properly decided on its merits cannot be concluded. The ability to have a "do over" should end on the grade school playground. This Court should not countenance the developing trend espoused by Roberts. A party who refuses to accept the fact that a jury disbelieved his case should not be able to comb courthouse records in an attempt to find some speculative suggestion of possible juror error for a "Custer's last stand." Roberts should not be successful in urging this Court to issue a decision that mandates a new trial each and every time a juror makes a mistake in recollecting some portion of his background, no matter how frivolous. This manipulation of the judicial system is an indescribable waste, expense, and burden. Now that this Court has ended the "when all else fails" type of appeal stemming from unchallenged closing arguments, *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010 (Fla. 2000), this new practice of post-trial jury challenges threatens to fill the void and more.

This Court should not modify Jury Instruction 1.0 to add Roberts' proposed threats. Roberts' suggested admonishment to the jury is illusory at best, and irreparably harmful at worst. Threats that "big brother" will conduct a background investigation to insure that the juror's answers are complete and truthful will never convince a juror with a deep-seated "agenda" to make an honest disclosure of both his prior litigation history as well as his feelings about it. Rather, this admonishment will serve only to create animosity with potential jurors. Roberts' proposed threat will frighten and deter citizens from any interest in performing their civic duty of jury service. Jury service already takes you away from your daily work and routine, causes great inconvenience, and often causes a loss of salary. Who would want to participate in a proceeding that now will scare these good citizens with the threat that a wrong answer (whether caused by nervousness, inattention, misunderstanding, oversight, poor memory, or other innocent reason) is subject to contempt or perjury charges. Roberts' position is simply unsupportable.

Roberts' approach to the law and interpretation of *De La Rosa* would make all jury verdicts vulnerable and would establish a per se rule mandating reversal whenever a juror makes any mistake, however inconsequential, in answering questions during voir dire. *De La Rosa* does not establish this per se rule. Rather, *De La Rosa* permits the trial court to consider both remoteness and materiality of the purported omission or misstatement by the jury. This is consistent with the way this Court has reviewed other alleged acts of juror misconduct. See, e.g., *State v. Hamilton*, 574 So.2d 124 (Fla. 1991)(while the presence of improper material in jury room constitutes misconduct, it does not always require new trial).CONCLUSION

The rule of law announced in *De La Rosa* is alive, intact, and properly interpreted by the District Courts. The instant decision of the Third District, and the other recent appellate decisions on this precise issue strictly follow the *De La Rosa* rule that a new trial is mandated where a juror has concealed information that is material despite diligent inquiry by counsel. None of those three prongs are met in the instant case. The trial court and the Third District correctly noted that there is no evidence of a knowing, intentional lack of disclosure by any juror. Both the trial court and Third District agreed that there is no suggestion that any prior litigation history was relevant or material. Further, counsel's inquiry was vague and failed to explain to these laymen that "litigation" is not limited to a courtroom setting.

The trial court clearly believed there was ample evidence to support the verdict and final judgment in this case and only reluctantly granted a new trial because of a perceived constraint based on an overly narrow interpretation of the case

⁷ This could lead to a challenge for cause, in appropriate circumstances. It should again be noted that Roberts had *no* preemptory challenges available when Fornell was seated as a juror.

law. The decision of the Third District that reinstating the jury verdict is correct and should be affirmed by this Court.
FIELDNAMES(

;

Respectfully submitted,

WICKER, SMITH, TUTAN, O'HARA, McCOY, GRAHAM & FORD, P.A.

Attorney for Respondents

1 East Broward Blvd.

South Trust Tower, Suite 500

P.O. Box 14460

Ft. Lauderdale, FL 33302

Phone: (954) 467-6405

Fax: (954) 760-9353

By: _____

Shelley H. Leinicke

Florida Bar No. 230170**ENDFIELD**

ENDRECORD

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was mailed this ____ day of December, 2000, to David Kleinberg, Esq., Gaebe, Murphy, Mullen & Antonelli, Attorneys for Petitioner, 420 South Dixie Highway, Third Floor, Coral Gables, Florida 33146.

FIELDNAMES(

;

WICKER, SMITH, TUTAN, O'HARA, McCOY, GRAHAM & FORD, P.A.

Attorney for Respondents

1 East Broward Blvd.

South Trust Tower, Suite 500

P.O. Box 14460

Ft. Lauderdale, FL 33302

Phone: (954) 467-6405

Fax: (954) 760-9353

By: _____

Shelley H. Leinicke

Florida Bar No. 230170ENDFIELD

ENDRECORD

)))