

IN THE SUPREME COURT OF FLORIDA

GELERME METELLUS,

Plaintiff/Petitioner,

SUPREME COURT CASE NO.:

THIRD DISTRICT CASE NO.: 3D05-1989

v.

PUBLIC HEALTH TRUST OF
MIAMI-DADE COUNTY d/b/a
JACKSON MEMORIAL HOSPITAL
and JMH HEALTH PLAN,

Defendant/Respondent,

_____ /

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, Gelerme Metellus, seeks discretionary review from the Third District Court of Appeal's reversal of the trial court's order granting plaintiff's motion for a new trial based on juror concealment of litigation history. The facts of the case are set forth in the lower courts' statements as follows:

Statement of facts as set forth by the district court:

The defendants in a medical malpractice case appeal from an order granting a new trial after a defense verdict because a serving juror, in answer to a question on voir dire as to whether she had been involved in a "lawsuit," failed to reveal that she had been in a divorce and was the subject of collection efforts by creditors against her. See Appendix pages 1-5

Statement of facts as found by the trial court:

During the *voir dire* conducted by the Court, each of the jurors was asked, "have you or any family member ever been involved in a lawsuit as a party or witness?" Each of the jurors discussed below, as well as the other members of the venire, answered the question in the negative. Subsequent to the trial, Plaintiff's attorney filed a Motion for a New Trial identifying various grounds, including "juror misconduct," in that it was believed that three of the jurors actually chosen had not answered the foregoing question truthfully. The Court conducted an initial hearing on the motion and ordered that an evidentiary hearing be

held, where the subject jurors would be required to attend by subpoena.

At the interview, Plaintiff's attorney...questioned juror Evelyn Rickie as to her involvement in three prior lawsuits for money owed to creditors, resulting in a garnishment of her wages. Ms. Rickie stated that she had in fact been involved in the aforementioned proceedings and further admitted that she understood those claims to be lawsuits. However, she stated that she did not disclose them at the voir dire because she wanted to put behind her everything relating to those actions...

The Court finds that juror Evelyn Rickie concealed her prior litigation history during voir dire. Her intent in doing so is irrelevant because an intentional omission, just as an inadvertent omission, can prevent counsel from making an informed judgment about whether to challenge the juror...

...Ms. Rickie has five prior incidents of litigation, the likelihood of which might have influenced the moving party to peremptorily challenge the juror...

The failure to disclose the information was not attributable to Plaintiff's lack of diligence because Ms. Rickie stated under oath that she understood the term lawsuit to mean an action where one is seeking unpaid money from another, and further conceded that she understood that the three actions brought by creditors against her were lawsuits and that she had not disclosed their

existence because at the time she wanted to put "everything behind her." See Appendix pages 6-9.

SUMMARY OF THE ARGUMENT

The decision under consideration reversed the trial court's order granting a new trial because (1) "there was no deliberate misstatement by the juror which would justify relief under *De la Rosa*"; and (2) "there was no showing, as is also required, that counsel would have exercised a peremptory challenge against the juror had he been given the information in question." These holdings are expressly and directly in conflict with the holdings of this court in *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995), and *Roberts ex rel. Estate of Roberts v. Tejada*, 814 So.2d 334 (Fla. 2002), where this court held that (1) "a juror's nondisclosure need not be intentional to constitute concealment"; and (2) the omission of litigation history "prevented counsel from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge."

In addition, the Decision conflicts with the decisions of the Fourth District Court of Appeal in *Taylor v. Magana*, 911 So.2d 1263, 1267 (Fla. 4th DCA 2005) and *Wiggins v. Sadow*, 925 So.2d 1152, 1154 (Fla. 4th DCA 2006), where the Fourth District held that a trial court's order on a motion for new trial grounded on juror concealment of information is reviewed for an

abuse of discretion. Here, the Third District's Decision fails to allow any deference to the trial court's findings and thus expressly and directly conflicts with the Fourth District's decisions.

Hence, this court has discretionary jurisdiction to review this case under Fla. Const. Article V § 3(b)(3) and Rule 9.030(a)(2)(iv), Fla.R.App.P.

ARGUMENT

I.

THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH *DE LA ROSA v. ZEQUEIRA* AND *ROBERTS EX REL. ROBERTS v. TEJADA* BY HOLDING THAT A DELIBERATE MISSTATEMENT BY A JUROR IS NECESSARY TO JUSTIFY RELIEF BASED ON CONCEALMENT

The Decision expressly and directly conflicts with the principle expressed in *De la Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995), and *Roberts ex rel. Estate of Roberts v. Tejada*, 814 So.2d 334 (Fla. 2002), to wit, that there is no need to show that a juror providing false information on voir dire had an "intention of misleading counsel."

In *De la Rosa*, this court pointed out that even if a juror had no intention of misleading counsel, "the omission nonetheless prevented counsel from making an informed judgment--which would in all likelihood have resulted in a peremptory challenge." *De La Rosa v. Zequeira*, 659 So.2d 239, 242 (Fla.

1995), quoting with approval Judge Baskin's dissenting opinion in *Zequeira v. De La Rosa*, 627 So.2d 531, 533-34 (Fla. 3d DCA 1993).

Similarly, in *Roberts*, this court again quoted with approval Judge Baskin's dissenting opinion in *Zequeira v. De La Rosa*, 627 So.2d 531, 533-34 (Fla. 3d DCA 1993), and stated: "As we have emphasized, a juror's nondisclosure need not be intentional to constitute concealment." *Roberts*, 814 So.2d at 343.

In this case, the Third District reversed the Trial Court's order granting a new trial because "*there was no deliberate misstatement by the juror which would justify relief under De la Rosa...*"

In effect, the Third District turned the *De la Rosa* rule on its head by requiring a "deliberate misstatement" by the juror in order to justify relief. The *Roberts* Court makes it clear that there is no such requirement. Therefore, the Decision expressly and directly conflicts with *De la Rosa* and *Roberts*.

II.

THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH *DE LA ROSA v. ZEQUEIERA AND ROBERTS EX REL. ROBERTS v. TEJADA* BY HOLDING THAT THE MOVING PARTY MUST SHOW THAT IT "WOULD HAVE EXERCISED" A PREEMPTORY CHALLENGE IN ORDER TO JUSTIFY RELIEF BASED ON CONCEALMENT

As a second reason for reversing the trial court's Order Granting Plaintiff's Motion for a New Trial, the Decision states that "there was no showing as is also required, that counsel would have exercised a peremptory challenge against the juror had he been given the information in question." As authority for this statement, the Decision cites *Freedman v. De La Cuesta*, 929 So.2d 25, 26 (Fla. 3d DCA 2006), where the Third District had held that "there was no showing that the nondisclosure was 'substantial and important' so that had the facts been known, plaintiffs *would have exercised* a peremptory challenge on the jurors." As authority for this statement, the Freedman court cited *Roberts v. Tejada*, 814 So.2d 334, 341 (Fla.2002). See, *Freedman*, 929 So.2d at 26.

However, the *Roberts* Court did not require the moving party to show that it *would have exercised* a peremptory challenge. Rather, the *Roberts* Court observed that the omission of litigation history "prevented counsel from making an informed judgment--which would in all likelihood have resulted in a

peremptory challenge." See, *Roberts*, 814 So.2d at 344, citing *De la Rosa*, 659 So.2d at 242.

Hence, the Decision expressly and directly conflicts with *De la Rosa* and *Roberts* by imposing a requirement that the movant show that "counsel would have exercised a peremptory challenge against the juror had he been given the information in question," as opposed to the standard set by this court, to wit, that the omission of the juror's litigation history "prevented counsel from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge.

Here, the trial court had specifically found that juror Rickie's incidents of prior litigation are material because, when examined individually or collectively, "the prior incidents of litigation are substantial and important, such that if the facts had been known, either attorney would have been entitled to challenge the juror. [citations omitted]." The trial court continued: "Here, similar to *De La Rosa*, Ms. Rickie has five prior incidents of litigation, the likelihood of which might have influenced the moving party to peremptorily challenge the juror." However, by requiring a "showing that counsel would have exercised a peremptory challenge" the Decision set a standard for reversal of the trial court which directly and expressly conflicted with the standard set by this court in *De la Rosa*.

III.

THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOURTH DISTRICT'S DECISIONS IN *TAYLOR v. MAGANA* AND *WIGGINS v. SADOW* BY FAILING TO REVIEW THE TRIAL COURT'S FACTUAL FINDINGS IN GRANTING A NEW TRIAL FOR ABUSE OF DISCRETION

Pursuant to the law of the Fourth District, a trial court's order on a motion for new trial grounded on juror concealment of information is reviewed for an abuse of discretion. *Taylor v. Magana*, 911 So.2d 1263, 1267 (Fla. 4th DCA 2005); *Wiggins v. Sadow*, 925 So.2d 1152, 1154 (Fla. 4th DCA 2006). Furthermore, "[a]s articulated by the court in [*Roberts v. Tejada*, [814 So.2d 334, 345 (Fla.2002)]], due deference is to be granted to the trial judge because it is at the trial level 'that the dynamics and context of the entire trial process can best be evaluated.'" *Id.*

"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." *Brown v. Estate of Stuckey*, 749 So.2d 490, 497-498 (Fla. 1999) [emphasis supplied]. In other words, the appellate court needs to explain why the trial court's determination was "arbitrary, fanciful or unreasonable," or why "no reasonable

person would take the view adopted by the trial court." *State v. Coney*, 845 So.2d 120, 137 (Fla. 2003).

Here, the Decision failed to address such analysis, or, as expressed by the *Roberts* Court, this Decision "arrived at the wrong conclusion, simply substituting its determination for that of the trial judge on this factual question." *Roberts*, 814 So.2d at 343. Moreover, *despite the trial court's finding that "juror Evelyn Rickie concealed her prior litigation history during voir dire,"* App. 2; R. 221, the Decision held that "there was no deliberate misstatement," without explaining or addressing how the trial court's finding had constituted an abuse of discretion. Hence, the Decision expressly and directly conflicts with the decisions of the Fourth District and of this court.

CONCLUSION

Petitioner respectfully requests that this court grant discretionary review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief On Jurisdiction has been mailed to Counsel for Appellant, Craig E. Leen, Assistant County Attorney, MURRAY A. GREENBERG, MIAMI-DADE COUNTY ATTORNEY, Stephen P. Clark Center, Suite 2810, 111 N.W. 1st St., Miami, Florida 33128, this 12th day of March, 2007.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief has been generated in Courier New 12-point font, which complies with the font requirements of Rule 9.210(a), Fla.R.App.P.

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