

**IN THE SUPREME COURT  
STATE OF FLORIDA**

RYAN O'CONNOR,

Petitioner,

vs.

CASE NO. SC08-1412

DEAN C. McCAUSLIN,

Respondent.

---

ON DISCRETIONARY REVIEW FROM THE  
FIFTH DISTRICT COURT OF APPEAL  
FIFTH DCA CASE NO. 5D06-3177

**PETITIONERS' JURISDICTIONAL BRIEF**

ELIZABETH C. WHEELER  
Florida Bar No. 374210  
ELIZABETH C. WHEELER, P.A.  
Post Office Box 2266  
Orlando, Florida 32802-2266  
Telephone : (407) 650-9008  
Telecopier : (407) 650-9070  
Attorney for Petitioners

**TABLE OF CONTENTS**

TABLE OF CITATIONS ..... ii

STATEMENT OF THE CASE AND OF THE FACTS ..... 1

SUMMARY OF THE ARGUMENT ..... 3

ARGUMENT ..... 4

**THE DECISION IN THE INSTANT CASE CONFLICTS  
WITH PRIOR DECISIONS OF THIS COURT INVOLVING  
SUBSTANTIALLY SIMILAR FACTS AND QUESTIONS  
OF LAW.** ..... 4

CONCLUSION ..... 10

CERTIFICATE OF SERVICE ..... 11

CERTIFICATE OF TYPE SIZE AND STYLE ..... 11

## TABLE OF CITATIONS

### Cases

<i>Aravena v. Miami-Dade County</i> , 928 So. 2d 1163 (Fla. 2006).....	4
<i>Brown v. Estate of Stuckey</i> , 749 So. 2d 490 (Fla. 1999).....	5, 6, 10
<i>Castlewood International Corp. v. LaFleur</i> , 322 So. 2d 520 (Fla. 1975).....	5, 10
<i>Cloud v. Fallis</i> , 110 So. 2d 669 (Fla. 1959).....	5, 10
<i>Crossley v. State</i> , 596 So. 2d 447 (Fla. 1992).....	4
<i>De La Rosa v. Zequeira</i> , 659 So. 2d 239 (Fla. 1995).....	<i>passim</i>
<i>Ford Motor Co. v. Kikis</i> , 401 So. 2d 1341 (Fla. 1981).....	4
<i>Mancini v. State</i> , 312 So. 2d 732 (Fla. 1975).....	4
<i>Roberts v. Tejada</i> , 814 So. 2d 334 (Fla. 2002).....	8-9
<i>Tejada v. Roberts</i> , 760 So. 2d 960 (Fla. 3d DCA 2000) .....	7-8
<i>Zequeira v. De La Rosa</i> , 627 So. 2d 531 (Fla. 3d DCA 1993) .....	6-7, 9

**Other**

Fla. Const., Art. V, §3(b)(3) (1980).....4, 6, 8

## **STATEMENT OF THE CASE AND OF THE FACTS**

McCauslin sued O'Connor for damages claimed to have been caused by a motor vehicle accident. (A.1) O'Connor admitted negligence but denied that the accident caused injury to McCauslin. (A.1-2) The jury returned a verdict in favor of McCauslin in the sum of \$889,531.77. (A.2)

O'Connor moved for new trial on multiple grounds, including juror misconduct. (A.2) O'Connor moved to interview several jurors because accident reports showed that persons with the same names and birth dates had been involved in one or more motor vehicle accidents with injuries and had failed to reveal that information during voir dire. (A.2) Finding that McCauslin's counsel posed multiple "clear and unambiguous" questions on whether any one had been injured in any kind of accident, the trial judge granted the motion as to Jurors Mitchell and Rivers. (A.2)

Juror Mitchell testified he was injured in an accident in 1996 when a truck pulled across the road in front of him. (A.2) He had a lawyer and filed an insurance claim for that accident. (A.3) Juror Rivers testified he was injured in a 1991 accident for which he filed a worker's compensation claim. (A.3) He received physical therapy for about six months following the accident. (A.3) Both jurors were sure they remembered these accidents at the time of trial. (A.3)

The trial court determined that a new trial was warranted because these two jurors did not disclose during voir dire that they had been injured in motor vehicle accidents. (A.3) The judge found that the fact that Jurors Mitchell and Rivers had been in past accidents would have been important to O'Connor's consideration in determining which jurors to strike. (A.3) The majority noted that the trial court mistakenly found that O'Connor used peremptory challenges to strike jurors who had been in past accidents.<sup>1</sup> (A.3)

On appeal, McCauslin argued the trial court abused its discretion in granting a new trial. (A.3) According to the Fifth District majority, McCauslin contended the information was not material and that O'Connor's counsel did not use due diligence in the selection of the jury. (A.3-4) Noting the "usual standard of review" of a trial court's order granting a new trial because of juror concealment is abuse of discretion (A.4), the majority conducted its own analysis of the three prongs of the test set forth in *De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995). (A.5)

The majority acknowledged that counsel for McCauslin asked at least three times whether anyone had ever been injured in any way, including in a car

---

<sup>1</sup>The Fifth District failed to report additional findings by the trial court as well as relevant facts in the record, including the actual jury selection process and

accident. (A.8) The majority observed that McCauslin’s counsel argued on appeal that his own questions were not clear, but “the questions did not appear to be ambiguous or misleading.” (A.8) The majority recognized that, “the cold record” did not reveal the dynamics of the courtroom event. (A.9) Based on the cold record, the majority determined that Jurors Rivers and Mitchell did not so much conceal their prior accidents as fail to appreciate that disclosure was required. (A.9) The majority noted it was a “close question on this record” whether defense counsel should have followed up with more questions or more targeted questions. (A.9)

Expressing no doubt that the requested information was relevant, the Fifth District majority stated it was “far less clear” that the information not disclosed was material. (A.10) The majority noted the record did not suggest deliberate concealment. (A.11) The majority’s conclusion was stated as follows:

Given the doubtful results of application of *De La Rosa’s* three-prong test and the erroneous factual finding on which the trial court clearly relied, we cannot sustain the trial court’s exercise of discretion to grant defendant a new trial.

(A.11)

### **SUMMARY OF THE ARGUMENT**

---

how that process might have affected the parties’ peremptory challenges.

The Fifth District's opinion expressly and directly conflicts with multiple decisions of this Court which recognize the trial court's superior vantage point in ruling on a motion for new trial. This Court has repeatedly emphasized the deference which appellate courts must give to a trial court's grant of a new trial, and the Fifth District's opinion expressly and directly conflicts with those decisions. The Fifth District's opinion also expressly and directly conflicts with decisions of this Court in cases involving juror nondisclosure. This Court should exercise its jurisdiction to resolve these conflicts and clarify the appropriate standard of review.

### **ARGUMENT**

This Court has jurisdiction under Article V, § 3(b)(3) of the Florida Constitution to review any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court or appeal or of the supreme court on the same question of law." Direct conflict occurs when a court announces a rule of law which conflicts with a previous announcement or when a court applies a rule of law so as to produce a different result in a case with facts substantially similar to those in a previous case. *Mancini v. State*, 312 So. 2d 732 (Fla. 1975). The requirement for express conflict is satisfied if the opinion sought to be reviewed contains a discussion of the legal principles applied by the court, and it is not necessary that a district court explicitly identify conflicting decisions.

*Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981). One of the tests for determining express and direct conflict is whether the decisions are irreconcilable. *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006). Decisions are irreconcilable when the courts reach opposite results on controlling facts which are at least substantially similar. *See Crossley v. State*, 596 So. 2d 447, 449 (Fla. 1992).

**THE DECISION IN THE INSTANT CASE CONFLICTS WITH PRIOR  
DECISIONS OF THIS COURT INVOLVING SUBSTANTIALLY SIMILAR  
FACTS AND QUESTIONS OF LAW.**

In *Brown v. Estate of Stuckey*, 749 So. 2d 490, 496 (Fla. 1999), this Court recognized the superior vantage point of the trial judge in ruling on a motion for new trial:

When a motion for new trial is made it is directed to the sound, broad discretion of the trial judge, who because of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based is better positioned than any other one person fully to comprehend the processes by which the ultimate decision of the triers of fact, the jurors, is reached.

The *Brown* Court reiterated the principles set forth in *Cloud v. Fallis*, 110 So. 2d 669 (Fla. 1959), and *Castlewood International Corp. v. LaFleur*, 322 So. 2d 520 (Fla. 1975), which emphasized the deference which appellate courts must give to a trial court's grant of a new trial:

[A] grant of a new trial is of such firmness that it should not be disturbed except upon a *clear* showing of abuse. . . . [A]n appellant seeking to overturn such a ruling has a *heavy burden* and *any abuse of discretion by the trial court must be clear from the record*.

*Brown*, 749 So. 2d at 496. (Emphasis supplied.) In both *Cloud* and *Castlewood*, this Court stressed that a stronger showing is required to upset an order *granting* a new trial than is required for an order *denying* a new trial. 110 So. 2d at 673, 322 So. 2d at 522 n.2. This Court made it clear that an appellate court’s mere disagreement with the ruling is insufficient *as a matter of law* to overturn a trial court on the need for a new trial. *Castlewood*, 322 So. 2d at 522 (emphasis supplied). This Court has instructed that appellate courts must employ a “reasonableness test” in determining whether or not there has been 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.

*Brown*, 749 So. 2d at 497-98. (Emphasis supplied.)

In *De La Rosa*, this Court exercised its jurisdiction under Article V, § 3(b)(3) to review the Third District’s decision in *Zequeira v. De La Rosa*, 627 So. 2d 531 (Fla. 3d DCA 1993). In *Zequeira* the Third District reversed an order granting the plaintiff a new trial on grounds that a juror had not responded to voir

dire inquiries about “lawsuits,” although he had been involved in six cases involving debt collection and the dissolution of his marriage. 627 So. 2d at 531. Concluding that the record did not show either that the juror deliberately concealed anything at all during voir dire or that what he did not say was relevant to his ability to be fair and impartial, *id.* at 532, the Third District majority reversed the order granting a new trial and remanded the case with directions to enter judgment for the defendant on the jury verdict. *Id.* at 533.

Dissenting, Judge Baskin did not agree with the majority’s conclusion that the trial court abused its broad discretion in granting the motion for new trial. *Id.* As to the materiality issue, Judge Baskin observed that a person involved in prior litigation may sympathize with similarly situated litigants or develop a bias against legal proceedings in general. *Id.* As to the concealment prong, Judge Baskin criticized the majority’s holding that a juror’s failure to answer counsel’s question did not constitute concealment, because it precluded collective questioning of jurors and would compel attorneys to obtain individual oral or written responses in order to show concealment. *Id.* at 533-34. As for due diligence, Judge Baskin noted the prospective jurors were questioned in different ways regarding involvement in prior lawsuits. *Id.* at 534. She concluded these efforts were sufficient. *Id.*

In its review, this Court noted that the Third District majority appeared to be particularly concerned that the juror's prior litigation history did not include a case like the one being tried and that, since the juror remained silent, there was no certainty that he heard and understood the questions. 659 So. 2d at 241. This Court noted that Judge Baskin's dissent responded to these concerns, and this Court expressly approved and adopted her response as its own. *Id.* This Court quashed the Third District's decision with instructions on remand to affirm the trial court's order for a new trial. *Id.* at 242.

Purporting to follow *De La Rosa*, the Third District subsequently quashed an order granting a new trial based on juror concealment in *Tejada v. Roberts*, 760 So. 2d 960 (Fla. 3d DCA 2000). As to Juror Guerrero, the Third District determined there was no concealment because the voir dire questions in Roberts' medical malpractice action did not call for disclosure of a domestic violence petition. *Id.* at 964. As to Juror Fornell, the Third District concluded that her nondisclosure as to involvement in two lawsuits over twenty years prior to jury selection was not material. *Id.* at 965. Although not even raised by the appellant, the Third District also concluded that the diligence requirement was not satisfied because counsel had not checked the jurors' names against the clerk's lawsuit index at the conclusion of jury selection. *Id.* at 966.

Noting that *Tejada* expressly and directly conflicted with its opinion in *De La Rosa*, this Court exercised its jurisdiction to review *Tejada* under Article V, § 3(b)(3). *Roberts v. Tejada*, 814 So. 2d 334, 336 (Fla. 2002). This Court noted that *De La Rosa* recognized that a prospective juror’s litigation history did not necessarily have to involve an action similar to the one in which he or she may be required to serve, because a person involved in prior litigation “may sympathize with similarly situated litigants or develop a bias against legal proceedings in general.” 814 So. 2d at 341, citing *De La Rosa*, 659 So. 2d at 241. As to Juror Guerrero, this Court noted that the Third District’s opinion in *Tejada* failed to address that the record disclosed that the voir dire questions elicited information from four potential jurors, none of whom was selected to sit on the jury, regarding their involvement in domestic disputes.<sup>2</sup> 814 So. 2d at 343. This Court determined that the Third District simply substituted its determination for that of the trial judge. *Id.*

The *Roberts* Court quashed the Third District’s decision. *Id.* at 345. The Court emphasized that a juror’s nondisclosure need not be intentional to constitute concealment, because the omission nonetheless prevents counsel from making an informed judgment. *Id.* at 343-44. Noting there is no per se rule that involvement

---

<sup>2</sup>Should this Court exercise its jurisdiction to review this case, the record will show, as in *Roberts*, that the Fifth District majority failed to address facts in

in any particular prior legal matter is or is not material, this Court again stated the respective roles of the trial and appellate courts:

This is a decision that should primarily be made at the trial level because materiality is fact intensive, and it is there that the dynamics and context of the entire trial process can best be evaluated. . . . *[A]ppellate review must recognize the field of operation for determinations involving factual elements.*

It is clear that nondisclosure along with partial or inaccurate disclosure is concealment in the voir dire process. . . . *It is the trial judge who must stay involved in and be attentive to the process to make this factual determination.*

*Id.* at 345-46.

The decision in the instant case conflicts with the foregoing decisions. In fact, the majority's opinion in this case was strikingly similar to the Third District's decision in *Zequeira*, which this Court quashed in *De La Rosa*. The majority's finding that the concealment was not deliberate (A.11) conflicts with this Court's determination in *Roberts* that a juror's nondisclosure need not be intentional to constitute concealment.

The decision shows on its face that the majority failed to apply the appropriate standard of review in this case. This Court's decisions have repeatedly recognized the trial court's superior vantage point in evaluating the dynamics and

---

the record supporting the trial court's order granting a new trial.

context of the entire process in ruling on a motion for new trial. The Fifth District's reversal of the trial court expressly and directly conflicts with this Court's statements in *Brown*, *Castlewood* and *Cloud*, because the Fifth District majority failed to give the proper deference to the trial court, did not even refer to the reasonableness test, and noted no clear abuse of discretion by the trial court. The majority's criticism of one mistaken factual finding by the trial court was not the equivalent of a finding of a clear and patent abuse of discretion by the trial judge in granting a new trial. This Court should exercise its jurisdiction to review this case to once again clarify the appropriate standard of review.

### **CONCLUSION**

The petition for review should be granted.

Respectfully submitted,

---

ELIZABETH C. WHEELER  
Florida Bar No. 374210  
ELIZABETH C. WHEELER, P.A.  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that copies of this Jurisdictional Brief and Appendix have been furnished by mail this 28th day of July, 2008, to Eric S. Block, Law Offices of Eric S. Block, P.A., 6817 Southpoint Parkway, Suite 2502, Jacksonville, FL 32216, Attorney for Plaintiff; and John S. Mills, Mills & Creed, P.A., 865 May Street, Jacksonville, Florida 32204, Attorneys for Plaintiff/Appellant..

---

ELIZABETH C. WHEELER  
Florida Bar No. 374210  
ELIZABETH C. WHEELER, P.A.  
P.O. Box 2266  
Orlando, FL 32802-2266  
Telephone (407) 650-9008  
Telecopier (407) 650-9070  
Attorney for Petitioner,  
RYAN O'CONNOR

**CERTIFICATE OF TYPE SIZE AND STYLE**

I HEREBY CERTIFY that this brief was typed in 14 point Times New Roman.

---

ELIZABETH C. WHEELER  
Florida Bar No. 0374210