

**IN THE SUPREME COURT
STATE OF FLORIDA**

JOHN FRANKLIN HOOKS,

Petitioner,

vs.

CASE NO. SC08-_____

DONALD HOLLENBECK,

Respondent.

_____ /

**ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL
FIRST DCA CASE NO. 1D06-5504**

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This is Petitioner's jurisdictional brief on conflict pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.120(d). The Appendix to this brief contains a copy of the opinion of the First District Court of Appeal and will be referenced by page number as (A.__). The First District opinion became final with the denial of Petitioner's motion for rehearing on October 17, 2008.

The facts are stated in the First District's majority opinion and the dissent of Judge Charles J. Kahn, Jr. The issue before the First District was whether the trial court abused its discretion in denying Respondent's motion for mistrial and subsequent motion for new trial based on a single comment made by Petitioner's trial counsel during voir. (A.1-2) Petitioner, John Franklin Hooks, was the defendant in the trial court; Respondent, Donald Hollenbeck, was the plaintiff.

During voir dire, Petitioner's trial counsel stated, "I'm a consumer justice attorney, and I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate." (A.1) Respondent objected, asserting that Petitioner's trial counsel was retained by Petitioner's insurer and thus did represent "one of those big companies." (A.2) In response to the trial court's request that Petitioner's trial counsel explain the definition of a "consumer justice attorney,"

counsel replied that he represented a “client who is a consumer and who is here for justice” and explained that his statement should be considered in the context of Respondent’s voir dire questions regarding large verdicts and whether the venire believed in “caps.”¹ (A.2)

The trial court sustained Respondent’s objection. (A.2) The court noted it was true that Petitioner’s counsel represented the insured, but the court was concerned about “playing on the sympathies of the jury for an individual as opposed to a corporation, and even a corporation would be entitled to justice in our courts.” (A.2) The court denied Respondent’s motions for mistrial, finding that counsel’s remark had no “visible impact on the jury.” (A.2) The court also denied Respondent’s motion for new trial, which was based in part on the voir dire statement. (A.2)

The majority stated that the trial court’s denial of Respondent’s motion for new trial was reviewed under the abuse of discretion standard and concluded summarily that the trial court abused its discretion. (A.2-3) The majority

¹In his dissent, Judge Kahn noted that during the jury selection process and before defense counsel even rose to question the jury, the word “insurance” was uttered in the presence of the jury no fewer than twenty times. (A.9-10) Plaintiff’s counsel concluded his questioning by specifically questioning two jurors as to whether they would agree not to worry about how the verdict would be paid in this

acknowledged that defense counsel’s statement did not expressly contrast Petitioner’s status as an individual with a corporation. (A.3) The majority determined that the statement “implied” that an award of damages would be paid solely by the individual. (A.3) Contrary to the trial court’s express finding that the statement had “no visible impact on the jury,” the majority concluded that the statement “was nothing less than an appeal to the jury to protect that individual from a harmful verdict.” (A.3)

The majority referred to the harmless error statute, Section 59.041, as requiring affirmance “unless we determine that ‘after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.’” (A.4) The majority concluded there was a miscarriage of justice “in light of the egregious nature of counsel’s comment and the fact that [Respondent] provided evidence that his future economic damages alone will exceed \$100,000.”² (A.4) The majority reversed and remanded for a new trial. (A.4)

SUMMARY OF THE ARGUMENT

case. (A.10) It was against this backdrop that defense counsel made the “consumer justice/fancy company” comment. (A.10)

²Judge Kahn noted that the only testimony as to future medical expenses came from Dr. Sury, who provided massage therapy. (A.8) The majority did not dispute this statement.

The First District’s opinion expressly and directly conflicts with multiple decisions of this Court defining the role of appellate courts in reviewing orders on motions for mistrial and for new trial. This Court has repeatedly recognized that trial courts have a superior vantage point in ruling on such motions and has directed appellate courts to apply a reasonableness test in reviewing such orders for abuse of the trial court’s broad discretion. The First District failed to apply the reasonableness test. The First District’s opinion also expressly and directly conflicts with the decision of this Court in *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999), in holding that Section 59.041 required reversal.

This Court should exercise its jurisdiction to resolve these conflicts and once again clarify the appropriate standard of review of a trial court’s rulings on motions for mistrial and for new trial.

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 misapplies a rule of law. *E.g., Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 86 (Fla. 2005); *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).

I. THE FIRST DISTRICT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT DEFINING THE PROPER ANALYSIS FOR AN APPELLATE COURT TO APPLY UNDER AN ABUSE OF DISCRETION STANDARD OF REVIEW.

A trial court's order granting or denying a motion for a new trial based on improper argument is reviewed for abuse of discretion. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1271-74, 1276 (Fla. 2006) (disapproving the Third District's holding that the trial court abused its discretion in denying Tobacco's motion for a mistrial due to improper argument by the Engle Class's counsel). In numerous cases, this Court has 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.

Brown v. Estate of Stuckey, 749 So. 2d 490, 496 (Fla. 1999), reaffirming *Cloud v. Fallis*, 110 So. 2d 669 (Fla. 1959). Trial courts have the same broad discretion in

deciding motions for mistrial. *E.g., Ricks v. Loyola*, 822 So. 2d 502, 506-07 (Fla. 2002).

There is a presumption that the trial court exercised its discretion properly. *Allstate Insurance Co. v. Manasse*, 707 So. 2d 1110, 1111 (Fla. 1998) (quashing the district court’s decision and remanding with directions to reinstate the judgment of the trial court). The general rule is that “unless it clearly appears that the trial court abused its discretion, the action of the trial court will not be disturbed by the appellate court.” *Id.* An appellate court’s mere disagreement with the trial court’s ruling is insufficient *as a matter of law* to overturn a trial court on the need for a new trial. *Castlewood Int’l Corp. v. LaFleur*, 322 So. 2d 520, 522 (Fla. 1975) (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.

E.g., Brown, 749 So. 2d at 497-98. Under the abuse of discretion standard, a trial court’s ruling will be upheld unless the “judicial action is arbitrary, fanciful, or unreasonable.” *Salazar v. State*, 991 So. 2d 364, 2008 Fla. LEXIS 1235, *14 (Fla.

2008) (finding no abuse of discretion in denying the defendant’s motion for mistrial based on improper prosecutorial comments).

Although the First District acknowledged that its standard of review was abuse of discretion, the majority failed to apply the reasonableness standard and failed to accord the proper deference to the trial court in the instant case. The majority made no finding that the trial court’s ruling was arbitrary, fanciful or unreasonable. Rather than defer to the trial court’s superior vantage point in finding that the statement by defense counsel had “no visible impact on the jury,” the majority relied on the cold record in assigning its own interpretation to the comment and drawing its own conclusion as to the statement’s impact on the jury. In doing so, the decision expressly and directly conflicts with the decisions of this Court cited above. *See, e.g., Ricks*, 822 So. 2d at 506-07 (holding that the Fourth District departed from an appellate court’s duty to apply the reasonableness test when evaluating abuse of discretion in that case).

II. THE FIRST DISTRICT’S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS IN HOLDING THAT THE SINGLE COMMENT IN VOIR DIRE WAS SO EGREGIOUS AS TO WARRANT A NEW TRIAL.

The majority relied on *Padrino v. Resnick*, 615 So. 2d 698 (Fla. 3d DCA 1992), in finding that counsel’s statement “implied that an award of damages would be paid solely by the individual and was nothing less than an appeal to the jury to protect that individual from a harmful verdict.” (A.3) However, the

improper comments in *Padrino* did not imply anything but expressly referred to the defendant's financial status as a retiree "in her golden years" and appealed to the jury to consider "what this kind of money would do to her." *Id.* at 698 n.1. The statements were obviously formulated to capitalize on a juror's improper concern and inquiry as to who would pay for any damages awarded to the plaintiffs. *Id.* at 698.

The First District misapplied *Padrino*. In the instant case, defense counsel's comment was not made in response to any question by a juror but after plaintiff's counsel had emphasized financial issues and insurance before the jury. Plaintiff's counsel questioned the jurors regarding large verdicts and whether they believed in "caps." (A.2) Plaintiff's counsel interjected the subject of insurance on multiple occasions with the venire. (A.9-10) Plaintiff's counsel specifically questioned two jurors as to whether they would agree not to worry about how the verdict would be paid in this case. (A.10) Not only the substance of the statements but also the context of the statements were entirely different in the instant case and in *Padrino*. The instant decision thus conflicts with *Padrino*.

The instant case also conflicts with *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234 (Fla. 5th DCA 1991), cited by the majority at A.3. The statement by defense counsel herein neither referred to the wealth or poverty of either party nor contrasted the financial status of the parties as did the plaintiffs in *Batlemento*. If

anything, the statement attempted to place the parties on an even plane. Because neither the quality of the statements nor the context in which they were made were in any way similar, the instant decision conflicts with *Batlemento*.³

The majority likewise misapplied the decision in *Sossa v. Newman*, 647 So. 2d 1018 (Fla. 4th DCA 1994). In that case the Fourth District noted the general rule that during trial no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's. *Id.* at 1019. However, the court concluded the defendants opened the door to issues of the plaintiffs' financial ability to continue medical treatment by repeatedly stressing the fact that the plaintiff never returned to any of her medical providers. *Id.* at 1020. Rather than holding that a party's financial status was inappropriately injected into the case, as suggested by the First District majority, the Fourth District actually held that the trial court erred in *excluding* the plaintiff's testimony regarding the family's inability to afford further medical treatment. *Id.*

The majority in the instant case acknowledged that counsel's statement was offered "in the context of Appellant's voir dire questions regarding large verdicts

³For the same reasons, the instant case conflicts with the decision in *Seaboard Air Line Railway v. Smith*, 43 So. 235, 239 (Fla. 1907), where the plaintiff's attorney argued, "That the plaintiff, a poor negro, who, if he did not get damages out of the defendant railroad company to support him the balance of his life, would be a ward on the county; that the amount of money sued for would not be missed by the defendant, nor would they stop their champagne suppers in consequence of their junketing trips."

and whether the venire believed in ‘caps.’” (A.2) The majority nevertheless concluded that counsel’s statement, which did not expressly refer to the financial status of either party, was *per se* reversible error. The decision thus conflicts with the *Sossa* court’s holding that evidence of financial status can be admissible depending on the context.

III. THE FIRST DISTRICT’S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH *GOODWIN V. STATE*, 751 SO. 2D 537 (FLA. 1999), WITH RESPECT TO THE CORRECT STANDARD OF REVIEW.

In *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999), this Court reiterated that the Legislature has the authority to enact harmless error statutes like Section 59.041, but this Court retains the authority to determine the analysis to be applied in deciding whether an error requires reversal. *Id.* at 542, 546. This Court held that use of a harmless error analysis is not necessary where, as occurred in *Goodwin*, the trial court recognized the error,⁴ sustained an objection and gave a curative instruction. *Id.* at 547. Instead, the correct appellate standard is whether the trial court abused its discretion in denying a mistrial. *Id.* The First District’s reliance on Section 59.041 in the instant case thus conflicts with *Goodwin*.

CONCLUSION

⁴The prosecuting attorney in *Goodwin* elicited improper “bad neighborhood” testimony from one of the arresting officers that he targeted “areas that are known for street level drug sales” and “tries to make buys from street level dealers.” *Id.* at 538.

As noted by Judge Kahn in his dissent, trial judges reviewing this decision may have difficulty discerning a rule capable of uniform application in the future, under similar circumstances. The petition for review should be granted to once again clarify the respective roles of the trial and appellate courts in ruling on improper comments.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 24th day of November, 2008, to **Jeffrey R. Bankston, Esquire**, 2215 South Third Street, Suite 101, Jacksonville Beach, FL 32250; and **John S. Mills, Esquire**, and **Rebecca Bowen Creed, Esquire**, of Mills Creed & Gowdy, P.A., 865 May Street, Jacksonville, FL 32204, Attorneys for Plaintiff/Respondent, and to **Arthur Hernandez, Esquire**, 2223 Oak Street, Suite 711, Jacksonville, FL 32204, Co-counsel for Defendant/Petitioner.

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CERTIFICATE OF TYPE SIZE AND STYLE

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

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