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IN THE SUPREME COURT

OF FLORIDA

CASE NO. 64,483

ED RICKE AND SONS, INC.
a Florida corporation

Petitioner,

vs.

DEMETRIUS OCTAVIUS GREEN, a minor,
by and through is guardian of the
Property, EDWARD P. SWAN, Esquire,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner, Ed Ricke & Sons, Inc. [Ricke] has simply quoted the opinion of the Third District Court of Appeal for his Statement of the Case and Facts. Respondent, Demetrius Octavius Green [Demetrius], does not believe that this is sufficient to give this Court an understanding of the facts leading up to this appeal and therefore will provide its own Statement of the Case and Facts.

On March 13, 1977 three year old Demetrius was scalded over most of his body when he fell into a deep puddle of boiling water. The water had accumulated from a drip pipe which discharged superheated water from a hot water heater. (T.105)[1]. The puddle was adjacent to a patio area near his grandmother's apartment at James E. Scott Homes, a housing project maintained by Dade County at the time of this incident.

The water heater involved in this action was installed in 1966 pursuant to a plan to modernize the housing project. Ricke was the general contractor and was responsible for the entire project, including the work done by the subcontractors. Thus, although the heater was actually installed by Marr Plumbing Company, a subcontractor, it was up to Ricke to see that Marr complied with all contract requirements and that the work done by

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[1] Unless otherwise indicated, all emphasis is supplied. "R" refers to the record on appeal other than the trial transcript. "T" refers to the trial transcript.

it complied with all applicable laws and ordinances, including the applicable codes and regulations. (Pl. Ex. 31, GC-2, GC-16,GC-17, Para.15, Supervision).

The instant case first came to trial on April 13, 1982. However, a mistrial was declared because the only male juror passed out during certain testimony. Each and every juror, on voir dire, responded that the incident would not affect them. Even so, a new jury was impaneled immediately.

Evidence was presented at this second trial that the water heater was installed negligently in that it did not comply with the applicable provisions of the South Florida Building Code or those of the National Fire Prevention Association Code, which had been incorporated into the building code. These provisions were designed to prevent the injury which Demetrius suffered because if the installation had been done in accordance with them, there would not have been a large standing puddle of super-heated water for Demetrius to fall into. (T.105).

Ricke defended this case on two main grounds: 1) the installation of the water heater was not done negligently; and 2) even if the installation was negligent, the failure of Dade County to maintain the water heater was an intervening cause of Demetrius' injuries. Dade County had already been sued by Demetrius; that suit was settled in 1979. Therefore, when this action was tried in 1982, an order in limine was entered to the effect that no party, attorney, or witness was to make known to the jury that there had been a prior lawsuit and/or settlement between Demetrius and Dade County.

Nevertheless, while reading the deposition of Lavelle R. Hargis to the jury, defendant read the following question and answer:

> QUESTION: It is during that initial suit that you gave your deposition twice?
>
> "ANSWER: Yes. (T.10).

Immediately thereafter, the trial court held a sidebar conference. (T.10). In addition, defendant on direct examination of another witness, Mr. Webb, asked who first retained him to review the building plans and a contract by HUD. (T.113). Demetrius objected on the ground that the question was asked so that the jury would know someone else had also been sued. The objection was sustained and defendant's counsel was again admonished.

In closing argument, the order in limine was again violated by several statements made by Ricke:

> Now, there's going to be some other person responsible. I would like for you to ask them some questions. I would like you to ask them shy (sic) Dade County is not a Defendant in this litigation.
>
> * * *
>
> Ask yourselves if Dade County had done -- I know you're quite familiar with Dade County, but you're sitting on the case and you have to make the determination.
>
> Ask yourselves if Dade County had done what that witness said it should have done if this would ever happen.
>
> If you say yes, then you say that Dade County neglects what is an intervening cause without which it would not have happened.
>
> You're going to get a charge on that ....
>
> * * *

It says, "If somebody was guilty of negligence and if they hadn't been negligent," and this is laymen's terms now and you will get it in pretty much legal terms--"If they hadn't been negligent, the injury wouldn't have happened."

Is there any of you that can say to yourselves that Dade County didn't neglect this place?

Now, I don't know whether it neglected it from lack of funds or lack of interest or whether they figured these people are poor people and we don't care what kind of place they live in. I don't know that, but I know if Dade County had done what it was supposed to have done, it would be responsible for this little boy's injury and let me tell you: My heart goes out to this kid. I'm grateful that he has a good and brilliant mind.

He has a badly injured body. There's no question about that, and you will not hear us anywhere in the pleadings or anywhere else have we ever denied that.

We have denied that it is our client's negligence that caused it. We have plead instead that we weren't guilty of any negligence at all, and secondly, we have plead and said that an intervening cause, Dade County's negligence, is what caused it.

Now, that is going to be the issue for your determination.

Now, I'm going to leave the rest of this to Mr. Solms. He wants to go over what the witnesses said. I simply wanted to touch that one point.

I hope you will ask or, perhaps, in some way Mr. Feldman will tell you why Dade County isn't here when all the witnesses say they were responsible for it.

We who later (sic labor) here seek only the truth sometimes.

* * *

Who's blaming everybody? Mr. Feldman.

Who should be here? Dade County.

Mr. Wicker has told you that.

> We have been through the plans, the specifications.
>
> Marr Plumbing, if they were here, would be saying the same thing we are saying. We did our job. We complied with the code.
>
> If the housing authority was here for the design of the project, they would be saying the same thing we are, but they wouldn't be saying the same thing if they were here from maintenance.

(T.238,253-255).

After Ricke finished its closing argument and before Demetrius began his rebuttal argument, Demetrius moved for a mistrial. With the court's permission, Demetrius' counsel was allowed to elucidate the grounds for the motion after the jury retired:

> MR. FELDMAN: Your Honor, comes now the Plaintiff and moves that this Honorable Court grant a mistrial and reserve ruling thereon until the jury completes their deliberations.
>
> The grounds of the mistrial being that Your Honor has admonished counsel that there be no reference to the lawsuit against Dade County.
>
> * * *
>
> THE COURT: As far as I'm concerned, the empty-chair Defendant is a proper argument. I noted for the record that they should absolutely avoid any mention of settlement or lawsuits. Merely why they are not in the courtroom - I think that's a proper argument. Motion denied.

(T.199-200). The jury returned a verdict in favor of Ricke. Demetrius' motion for new trial was denied. Demetrius appealed. The Third District Court of Appeal reversed and remanded for a new trial holding:

> The cumulative errors complained of here were, as described by Judge Pearson specially concurring in Sharp v. Lewis, 367 So.2d 714,

715 (Fla. 3d DCA 1979), of the "machine gun" variety -- a series of errors that well may have taken place over a long period of time but which, when viewed from afar, provide a clear "design". These kinds of errors may be reversible, he opined, even though dispersed throughout a long trial, if they are so strategic in their nature and placement that their cumulative effect upon the jury can be measured. See also Chapman v. California, 386 U.S. 18, 87 S.Ct. 414, 17 L.Ed. 2d 705 (1967); Groebner v. State, 342 So.2d 94 (Fla. 3d DCA 1977). The "empty chair" arguments in this case violated not only the pretrial order, but also the spirit of Section 768.041(3), Florida Statutes (1981).

* * *

Dade County was not a party to the lawsuit because it had been released, and it was improper to make its absence a feature of the trial.

Appellee's second response is that the errors were waived owing to the nature of appellant's objection and motion for mistrial.

* * *

Specifically, appellee argues that, by asking the court to "reserve ruling (on the motion for mistrial) until the jury completes their deliberations", appellant's counsel had, in the same breath, both made, then waived, the error. We disagree. Appellant merely invoked the court to do what it was already empowered to do in the face of a motion for mistrial -- permit the jury to completely discharge its functions before declaring a mistrial. Cf., Dysart v. Hunt, 383 So.2d 259 (Fla. 3d DCA), rev. denied, 392 So.2d 1373 (Fla. 1980); Freeman v. Rubin, 318 So.2d 540 (Fla. 3d DCA 1975); Ditlow v. Kaplan, 181 So.2d 226 (Fla. 3d DCA 1965). We see no reason why it should make a difference on the question of waiver whether the trial court has reserved ruling at the suggestion of the party moving for a mistrial, rather than at its own instance.

More to the point, there could not have been a waiver where, as was the case here, the motion to reserve ruling was unequivocally denied and the motion for mistrial was considered on its merits at the same time and also denied.

(R.66-68). Ricke moved for rehearing, rehearing en banc and certification of the case to this Court. All motions were denied.(R.71). Ricke then sought to invoke the discretionary jurisdiction of this Court on the ground that the Third District's opinion expressly and directly conflicted with the holding of the Fourth District in Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038 (Fla. 4th DCA 1921). This court accepted jurisdiction.

POINTS ON APPEAL

Petitioner states the points on this appeal to be as follows:

I.

THE DECISION IN THE PRESENT CASE EXPRESSLY STATES IT IS IN CONFLICT WITH EARL HOLLIS INC. v. FRASER MORTGAGE CO., 403 So.2d 1038 (Fla. 4th DCA 1981).

II.

THE DECISION IS IN CONFLICT WITH THE ABUNDANCE OF CASES WHICH HOLD THAT A TRIAL COURT WILL NOT BE REVERSED AND A NEW TRIAL ORDERED UNLESS THE ENTIRE TRANSCRIPT IS PUT BEFORE THE APPELLATE COURT TO DETERMINE WHETHER ANY ALLEGED ERROR IS HARMLESS ERROR.

III.

THE DECISION OF THE COURT OF APPEAL IN GRANTING A NEW TRIAL WAS CONTRARY TO THE CASELAW CONCERNING PRESERVATION OF ERROR FOR APPEAL, WHERE THERE WAS NO OBJECTION OR REQUEST FOR A CURATIVE INSTRUCTION AS TO THE FIRST TWO COMMENTS AND NO REQUEST FOR A CURATIVE INSTRUCTION AS TO THE LAST.

IV.

THERE WAS NO PROPER APPELLATE BASIS FOR REVERSAL OF THE TRIAL COURT WHERE THE JURY WAS NOT TOLD THAT THERE WAS A SETTLEMENT BUT INSTEAD THIS WAS THE TRADITIONAL "EMPTY CHAIR" ARGUMENT WHICH IS A LEGALLY PROPER ARGUMENT.

None of these points has any merit. Earl Hollis is distinguishable and therefore no conflict exists. Second, the record in this case is sufficient to support the District Court's finding of prejudice and, even if the record is not sufficient, the remedy is to order supplementation. Third, the errors which

occurred below were sufficiently preserved; and fourth, the closing argument of petitioner was not simply to point to an empty chair, but to emphasize that there had been a prior suit against that empty chair and it was therefore violative of Section 768.041(3) Fla. Stat. (1981) and the order in limine.

ARGUMENT

Based on the reasons and authorities set forth below, it is respectfully submitted that the decision appealed should be affirmed.

I. Specific Response to Points on Appeal.

A. THERE IS NO CONFLICT WITH EARL HOLLIS, INC. v. FRASER MORTGAGE CO. - ANSWER TO POINT I

Respondent contends that the holding of Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038 (Fla. 4th DCA 1981) requires a finding in this case that Demetrius waived his right to a mistrial by coupling his motion for a mistrial with a request that the Court reserve ruling on the motion. However, Earl Hollis is factually distinguishable from this case and therefore does not require a finding of waiver here. The statements of counsel in Earl Hollis were as follows:

> MR. YOUNG: Before the jury comes in, I want to make a record of just one thing.
>
> During the course of final argument, I objected twice to Mr. Taylor violating what I considered to be the Court's Order in Limine that was entered prior to the trial, precluding any direct first person accounts of what purported to be factually occurring during the course of the negotiations for the sale of this property, and the court sustained my objection. I did not further pursue it at that time, waiting to get outside the presence of the jury. But if

> the court would permit me to do it, while reserving ruling on it, I would want to preserve my motion for mistrial on that basis, if the Court would reserve ruling on it.
>
> If you are not inclined to reserve ruling on such a motion then, I would not pursue it, because I think that would simply allow the defendant to take advantage, essentially, of his own misconduct at this point, But it depends on what the Court is inclined to do with the motion.

(R.A.2-3)

Clearly this was not a motion for mistrial. Rather it was an inquiry by plaintiff's counsel as to whether the judge would postpone a ruling on a motion for mistrial if it were made: counsel clearly stated that if the judge would not reserve ruling, then he would not move for a mistrial. In fact, both the majority and dissenting opinions in Earl Hollis, recognize that there was never a ruling on this 'motion for mistrial.'

In contrast, here, counsel for Demetrius stated:

> Your honor, comes now the Plaintiff and moves that this Honorable Court grant a mistrial and reserve ruling thereon until the jury completes their deliberations.

Thus, there was a specific motion for mistrial. Further, the trial court denied this moiton by ruling that the argument was proper. The motion was coupled with a request that the Court reserve ruling, but it was not contingent upon the Court granting that request, as was the 'motion' in Earl Hollis. Therefore, Earl Hollis does not control this case. There is no express and direct conflict on which this Court can base its jurisdiction.

Even if there is a conflict, the decision of the Third District is proper. As held by that Court, the question of waiver was purely academic. The trial court clearly denied the motion

for mistrial and the request to reserve ruling by holding that the argument was proper. Thus, whether or not Demetrius had a right to ask the court to reserve ruling, the trial court refused to do so and immediately denied the motion for mistrial. Under these circumstances, there is no need to reach the question of waiver.

Additionally, the Third District's opinion is in accordance with the policies of judicial economy and motions for mistrial. The error of Ricke's argument was brought to the trial court's attention at a time when it could be corrected. Therefore there was no sandbagging of the defendants or the court. Further, the procedure approved by the Third District can serve judicial economy where the prejudicial error occurs late in the trial. All that was left in the trial was for the jury to deliberate and render their verdict. In such a situation, the jurors could have possibly overcome the prejudicial effects of the statements and then a new trial would not be needed. If they did find for the defendants and the court then ruled that a new trial was necessary, defendants could then appeal, and, if the appellate court disagreed with the trial court, the jury verdict could be reinstated, thereby obviating the need for a new trial. In these respects, this case is very like those where the court reserves ruling on a motion for directed verdict until after the jury has reached its verdict. Dysart v. Hunt, 383 So.2d 259 (Fla. 3d DCA 1980) rev. den, 392 So.2d 1373 (Fla. 1980).

Finally, since a trial court has the right to reserve ruling on a motion for mistrial there seems to be no reason why a

party should not be able to invoke that power, especially where judicial economy will be served. Ricke also contends that the decision in this case conflicts with other decisions of the courts of Florida. However, here, counsel did move for a mistrial during closing arguments. Since this was a timely motion for mistrial, there is no conflict with these other cases. Therefore, there is no conflict on which this Court can base jurisdiction and even if there is a conflict, the ruling in this case was eminently correct.

B. THE RECORD WAS SUFFICIENT TO DETERMINE THAT REVERSIBLE ERROR EXISTED - ANSWER TO POINT II.

Ricke also contends that the District Court erred in determining that the errors complained of were reversible when it did not have the transcript of the entire trial before it. First, it is clear from the excerpts provided, especially those of the defendant's closing argument, (T.230-256), that Ricke's defense in this case was predicated on the theory that Dade County was responsible for Demetrius's injuries and since the County had already been sued, there was no need for a judgment against Ricke. Ricke made the County's absence, because of its release, "a feature of the trial."(R.67). This was improper and highly prejudicial. The district court's holding that such was reversible error should be affirmed.

Second, that a record brought up to the appellate court is incomplete is no longer a ground on which a case is properly decided. Demetrius filed a Statement of Judicial Acts to be reviewed. In that Statement, he identified the failure of a court to grant a mistrial or new trial because of the statements

of Ricke's counsel in closing argument as the error which he was appealing. (R.57-58). His Directions to the Clerk clearly identified the portions of the transcript which he wanted as part of the record. Ricke had an opportunity to designate other portions of the transcript it thought were necessary for the appeal. Fla.R.App.P. 9.200(b)(1). However, Ricke designated no additional portions of the transcript, thereby admitting nothing else was necessary.

Fla.R.App.P. 9.200(f)(2) provides:

> If the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined because the record is incomplete until an opportunity to supplement the record has been given.

The comment to this section states in part:

> Section (f) replaces former rule 3.6(1). The new rule is intended to assure that appellate proceedings will be decided upon their merits... It is specifically intended to avoid those situations which have occurred in the past where an order has been affirmed because appellate counsel failed to bring up the portions of the record necessary to determine whether or not there was an error...

All of the cases cited by Ricke were decided before the effective date of this new rule; thus, they are no longer applicable. Ricke has not moved to supplement the record nor has any court orderd such supplementation. Therefore, if this Court decides that the record is insufficient to show reversible error, and Demetrius contends that it is not, the proper procedure is to order supplementation, not to determine that the error was harmless and reverse the decision of the Third District.

C. OBJECTIONS WERE NOT REQUIRED. - ANSWER TO POINT III.

Ricke's third argument is that Demetrius has waived his right to complain of errors made by Ricke prior to closing argument because of his failure to object or to request a curative instruction. The errors referred to are three questions asked by Ricke. These questions involved whether depositions were taken during an "initial suit" or "initiation of the suit", who retained a witness to review HUD plans, and when the witness was retained. These questions standing alone did not create reversible error - they could have been understood by the jury to refer to innocuous events and it would only have emphasized the improper purpose to object and request a curative instruction. It is only with hindsight and knowledge of the defendant's plan of defense, as revealed by his closing argument, that these questions and the answers they elicited became prejudicial: it was only during closing argument that the prejudicial implications of these questions and answers were emphasized and thereby made a feature of the trial. This Court has held that if prejudicial conduct in its collective impact of numerous instances is so extensive that its influences pervade the trial, objections need not be made to each and every remark for an appellate court to afford redress. Seaboard Airline RR. Co. v. Strickland, 88 So.2d 519 (Fla. 1956). This is exactly what occurred in this trial. Therefore, Demetrius is not foreclosed from receiving a new trial becuase he did not object to the first two instances of Ricke's prejudicial conduct.

D. RICKE'S CLOSING ARGUMENT WAS HIGHLY PREJUDICIAL - ANSWER TO POINT IV.

Ricke's final point is that its closing argument was simply an empty chair one and therefore proper. However, Ricke did not simply argue that Dade County was reponsible for this accident. Rather it specifically invited Demetrius's counsel to explain to the jury why Dade County wasn't a defendant in this suit. Thus Ricke, with knowledge of the order in limine prohibiting mention of the prior suit and its settlement, intentionally put Demetrius in the untenable position of violating the order by giving an explanation or leaving the jury with the feeling that Demetrius could not or would not answer that question. It is not essential for an argument to expressly state the fact and terms of a settlement for it to violate Section 768.041, Fla. Stat., and thereby be prejudicial. Webb v. Priest, 413 So.2d 43 (Fla. 3d DCA 1982). The innuendoes are just as damaging as the facts, if not more so.

Here, since Demetrius did not give an answer, the jury, based on the evidence solicited by the defendant that there was a prior suit and that the County was involved, probably surmised that Dade County had already been sued and that Demetrius was seeking a double recovery for the same injuries. It is because of the danger of this type of speculation that evidence and arguments as to prior suits and settlements are not allowed; and when admitted, are considered so prejudicial that they cannot be cured by instructions to disregard. Henry v. Beacon Ambulance Service, Inc., 424 So.2d 914 (Fla. 4th DCA 1983), pet. for rev.

den. 436 So.2d 97 (Fla. 1983). See also, the discussion of the collateral source cases, infra pp.22.

II. Response to the Dissenting opinion upon which Petitioner Relies.

A. THE PROPOSITION THAT A MOTION IS NOT A MOTION.

Petitioner, Ricke's position in this cause is based upon the proposition that a motion for mistrial coupled with a request that ruling be reserved is not really a motion for mistrial. This proposition was first stated in the dissenting opinion in this case:

> ...No matter what it was called, a "motion for mistrial," coupled with a request that ruling be postponed until after the verdict so that counsel can tell if he won or lost, is not a motion for mistrial, which requires that the trial be stopped before verdict and begun again, at all; it is a contingent announcement that, if it turns out that the jury finds against him, counsel will move for a new trial on the asserted ground -- which is what he did.

It is hard to fathom why a motion and a request is not just that. The Court can grant or deny the request and rule or not rule on the motion. There is, however, a motion. Having made the motion the plaintiff is at jeopardy of having it granted or denied and could not be heard to complain if it was in fact ruled upon and granted.

The major problem with trying to make the motion into a non-motion is that it requires the further premise that the Judge's ruling on the motion was really a non-ruling: that "the trial judge's disposition of that nonexistent "motion" was simply an advisory statement that if the jury so finds and plaintiff's

counsel so moves, he would deny the motion--which is what he did, too." (R.69)(dissenting opinion).

But the trial court did deny the motion for mistrial by ruling that the argument was proper:

> The Court: As far as I'm concerned, the emply chair Defendant is a proper argument.
>
> Motion denied. (R.67).

As the majority in this case stated:

> More to the point, there could not have been a waiver where, as was the case here, the motion to reserve ruling was unequivocally denied and the motion for mistrial was considered on its merits at the same time and also denied. (R.68).

The policy basis for not accepting the motion made here as a valid motion is set forth in the dissenting opinion:

> Viewed from a broader perspective, the very reasons for requiring contemporaneous and assertive preservation of error are (a) to obviate the necessity of a new trial (and perhaps another appeal) which would be required if the alleged error is presented only after the first one had already been completed, Diaz v. Rodriquez, 384 So.2d 906 (Fla. 3d DCA 1980); and (b) to preclude an attorney from sandbagging the court and his opponent by postponing his motion on the basis of how he believes the trial is going, and even more, by how it comes out. State v. Cumbie, 380 So.2d 10391 Fla. 1980); Murray-Ohio Manufacturing Co. v. Patterson, 385 So.2d 1035 (Fla. 5th DCA 1980). The presentation and acceptance of the present contention on appeal, with the result that a new trial must be conducted, runs directly contrary to each of these purposes. It is therefore clear that the motion, statement, or whatever made by plaintiff's counsel did not preserve the issue for review, Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038 (Fla. 4th DCA 1981), and that the issue is controlled by the host of cases which hold that a non-fundamental error in final argument

> is deemed to be waived when, as here, it is effectively presented for the first time in a post-verdict motion for new trial.

(R.69-70)

Demetrius agrees that the whole purpose of making objections and motions during trial is to give the trial judge a chance to correct error at an appropriate time such that the trial can be saved from reversible consequences. Consistent with this and stating the rule is H.I. Holding Co. v. Dade County, 129 So.2d 692 (Fla. 3d DCA 1961) cert. den., 133 So.2d 646 (Fla. 1961).

> It is felt that some of counsel's statements went beyond the realm of proper argument. this alone, however, does not justify the granting of the motion for mistrial nor does it furnish grounds for reversal and a new trial. It is the duty of opposing counsel to object at the time of the abuse of the privilege of argument. Jenkins et al. v. State, 35 Fla. 737, 18 So. 182; Gaines v. State, 97 Fla. 908, 122 So. 525. Also, numerous other Florida case law supports this position. This gives the court an opportunity to rule upon the objection and to instruct the jury at the same time, so as to remove any effect of the statement. (At pg. 695).

However, the error was graphically brought to the trial judge's attention; it was not hidden; he was certainly not "sandbagged".

Further, the trial judge did nothing curative in the face of the motion made to him and would have done nothing regardless of the manner of the motion or the relief asked as he felt that nothing wrong had transpired. To quibble with form when its exact nature would have been immaterial in any event and the trial judge would have done nothing to cure the error, is not only "purely academic" but does not serve any policy sought to be preserved thereby.

B. NECESSITY FOR A MOTION.

(a) Fundamental Error in General.

While it is the position of Demetrius and the majority that a motion was made and that such was in proper form, it is felt that the contention of the dissent and the respondent, Ricke, that a motion need have been made should be addressed.

The dissent stated this position as follows:

> ...a non-fundamental error in final argument is deemed to be waived when, as here, it is effectively presented for the first time in a post-verdict motion for new trial.
>
> * * *
>
> 3. While, for obvious reasons, I prefer the majority holding in the Earl-Hollis case, I point out that even the dissent of the redoubtable Judge Letts does not support the court's decision here. It states that no motion for mistrial was either made or required, citing earlier decisions involving final arguments which were fundamentally improper. I do not read Judge Fergusons' opinion to hold that the remarks in this case fall into that category, as, in fact, they do not.

(R.70).

The rule of fundamental error has been most recently stated in Sears Roebuck & Co. v. Jackson, (Fla. 3d DCA Case No. 82-1548, opinion filed, July 5, 1983).

> What emerges from the seeming divergence between the authorities which hold that a new trial cannot be granted on a ground which was not preserved by timely objection and the authorities which hold that a trial court is empowered to grant a new trial even absent a timely objection is simply the consoldiated rule that timely objection is as much a predicate for the grant of a new trial by the lower court as it is a predicate for reversal on appeal, unless the error can be said to be so fundamental as to extinguish a party's right to a fair trial.

See also, Albertson v. Stark, 294 So.2d 698 (Fla. 4th DCA 1974)(holding that where "the improper remarks fall into the classification which has been described as being of such character that neither rebuke nor retraction may entirely destroy their sinister influence" they constitute fundamental error which can be redressed on appeal even without a motion for mistrial.)

(b) Prior Settlement Argument As Fundamental Error.

The argument and conduct of Ricke herein breached both the rule against disclosing prior settlements and the rule against disclosing collateral source. It was such as to constitute fundamental error and therefore require no motion for mistrial in order to be reviewed on appeal.

Section 768.041 Fla. Stat. (1981), provides in relevant part:

> (2) At trial if any defendant shows the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or convenant not to sue to any person, firm or corporation in partial satisfaction of the damamges sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordinly.
>
> (3) The fact of such a release or covenant not to sue, or that any defendant has been dismised by order of the court, shall not be made known to the jury.

City of Coral Gables v. Jordan, 186 So.2d 60 (Fla. 3d DCA 1966) clearly held that former F.S.A. 54.28 (which is now F.S.A. 768.041) mandated that a new trial be granted where a jury was made aware of a prior settlement:

> Section 54.28, Fla. Stat., F.S.A. prohibits the revelation to the jury of settlement by an injured party with one of several tort feasors. See Hertz Corp. v. Hellens, Fla. App. 1962, 140 So.2d 73. It would seem to be just as damaging to a fair trial to permit the injured party to reveal to the jury that the alleged tort feasor has settled with another injured party in the same accident. Cf., Annot. at 20 A.L.R. 2d 304. (At pg. 62).
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> * * *
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> Upon the other hand, the knowledge of the settlement by the driver with the defendant was immediately and completely destructive to the possibility of a fair trial between the plaintiff and the defendant. (At. pg. 62).

Thus, the test of Sears Roebuck, supra, was met as to fundamental error. The violation in Jordan, as here, was fundamental error as it "extinguished a party's right to a fair trial" Sears Roebuck & Co., supra.

Jordan was followed by the 4th District Court of Appeal in Taylor Imported Motors, Inc. v. Armstrong, 391 So.2d 786 (Fla. 4th DCA 1980).

> Testimony as to the settlement was inadmissible. City of Coral Gables v. Jordan, 186 So.2d 60 (Fla. 3d DCA 1966), aff'd, 191 So.2d 38 (Fla. 1966). The error was not harmless because the issue of negligence was a close question. But for the suggestion created by evidence of the settlement that the driver of appellants' vehicle may have been negligent, the record might conceivably support a result contrary to that reached by the tril court. (At. pg. 787).

It should be noted that neither of the two cases dealt with conduct which came within the direct purview of the Statute because the settlement was between the defendant and a third party. Nonetheless, the court held that the policy of the Statute dictated harmful immediate error. The result should not be different here.

The argument to the jury by Ricke in this case also violated the collateral source argument. There is no question but that the minor plaintiff Green received money from a collateral source. What is most insidious about this type of argument is that it is not the plaintiff who is going to receive a double recovery because of the collateral source, but the defendant who seeks to have the offset from the collateral source, and, at the same time, altogether bar the plaintiff from recovery against it by use of the disclosure to the jury of that same collateral source.

Collateral source evidence and argument is so improper that it is considered to create a presumption of prejudice to a fair trial or to be per se prejudicial. This is the equivalent of fundamental error, as is illustrated by Clark v. Tampa Electric Co., 416 So.2d 475, (Fla. 2d DCA 1982):

> ...The collateral source instruction, which it should not have been necessary for appellants to request in the first place, was too little and too late to undo the damage done by the series of questions and answers concerning Clark's finances, which this court and others have clearly and unequivocally held to be impermissible.

Id. at 477. See also Kreitz v. Thomas, 422 So.2d 1051 (Fla. 4th DCA 1982); Williams v. Pincombe, 309 So.2d 110 (Fla. 4th DCA 1975); Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA 1973), cert. den., 285 So.2d 414 (Fla. 1973).

Fundamental error, by definition error prejudicing the right to a fair trial, cannot be cured by a trial court's remedial action. This rule was stated by this Court in Baggett v. Davis, 124 Fla. 701, 162 So. 372 (Fla. 1936):

> The law seems to be well settled that it is the duty of the trial judge, whether rquested or not, to check improper remarks of counsel to the jury, and to seek by proper instruction to the jury to remove any prejudicial effect they may be calculated to have against the opposite party. A verdict will not be set aside by an appellate court because of such remakrs or because of an omission of the judge to perform his duty in the matter, unless objection be made at the time of their utterance. This rule is subject to the exception that, if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in which event a new trial should be awarded regardless of the want of objection or exception.

See also, Murray-Ohio Manufacturing Co. v. Patterson, 385 So.2d 1035 (Fla. 5th DCA 1980)(if comments were so inflammatory as to destroy defendant's right to a fair trial, it would constitute fundamental error).

C. THE UNSTATED DISSENTING PREMISE.

Thus, the dissenting opinion in this case presents a very real dilemma. If the remarks could not have been obviated by a curative instruction then what is the significance of whether a motion was or was not made and the trial court given an opportunity to have the error brought to its attention? As shown by both the majority and dissenting opinions, the entire panel thought that there was incurable error presented to the trial court.

It seems to be the unstated premise of the dissent that the wilful violation of the trial court's order in limine and F.S.A. 768.041(3) was curable at the point of closing argument. If this were so, the dissent did not have to even undertake a

discussion of the doctrine of waiver. A mistrial should not have been granted and the form of the motion directed to same would be most immaterial as would any discussion of waiver. The logical inference, then, appears to be that the premise of the dissent is that the error could not be cured, hence it was fundamental by definition, and a proper motion for mistrial would have properly been the only vehicle to use to gain the sought for remedy. If counsel, as in all cases of fundamental error, would not have waived his rights by silence, why should he have done so by any type of would be faulty motion that did no more then put the entire matter directly before the trial court (which ruled, on the spot, to do nothing because all was all right).

Although it is hard to understand the facts and rationale of Earl Hollis, supra, it is not difficult to understand that the following can't be controlling herein.

> ...It is therefore clear that the motion, statement, or whatever made by plaintiff's counsel did not preserve the issue for review, Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038(Fla. 4th DCA 1981), and that the issue is controlled by the host of cases which hold that a non-fundamental error in final argument is deemed to be waived when, as here, it is effectively presented for the first time in a post-verdict motion for new trial. (R.70)(dissenting opinion).

The Earl Hollis case dealt with mistrial and thus the conduct complained of had to create fundamental error, by definition, and the decision has to be fundamentally wrong. That decision is as follows:

> While the final argument of defendant's counsel was egregiously improper, we find that the plaintiff specifically waived the right to a mistrial on the ground below and therefore may not insist upon the issue on appeal. Diaz

v. Rodriguez, 384 So.2d 906 (Fla. 3d DCA 1980); 3 Fla.Jur.2d Appellate Review Section 292 (1978); see State v. Cumbie, 380 So.2d 1031 (Fla. 1980). The other points raised present no error.

403 So.2d at 1038.

In any event the instant case presents a definite motion and Earl Hollis supra, an apparent decision not to make one at all. The faulty conceptualization of that case should not be perpetuated by new life herein.

Although the concept of waiver and that of mistrial are by their very definition incongruous, the dissent herein and Earl Hollis, supra, are attempting to find some manner of requiring counsel to do something other than just sit back and do nothing at all. This is not hard to understand, especially if error sufficient to warrant a new trial occurs early on. In such a case, to save judicial labor and that of all counsel, it may well be that a new trial then and there should be undertaken. The problem is that Earl Hollis and the dissent here does not conceptualize the problem at all and hence cannot and do not address it. In such situations, there is a very real dilemma as to what the trial court should do.

There is also a need presented for the law to conceptualize a concept whch is not embraced by using the terminology of "waiver". To talk of waiver in a situation which is deemed to be non-waivable, only creates conflict, frustration and extreme difficulty in its understanding and application. Where, as here, the trial was at its end and the problem was brought to the attention of the trial court by a motion for mistrial and a request for reservation of ruling, Demetrius put himself in

jeopardy of having the request denied and the motion granted. The court denied the request, and considered and denied the motion. It is unnecessary to go further and find reasons to fault such conduct on the part of a party who did not ask to be put in such a situation and, in fact, tried during the trial to prevent it.

D. THE WRONGDOER SHOULD NOT PROFIT FROM HIS DELIBERATE CONDUCT.

In the case sub judice, very little consideration seems to have been given to the problem faced by the Respondent in trying to escape the technical snares that have been created for him. Albertson v. Starke, 294 So.2d 698 (Fla. 4th DCA 1974); Nadler v. Home Insurance Co., 339 so.2d 280 (Fla. 3d DCA 1976)(Trial judge told plaintiff he would waive mistrial if not asked for); Cameron v. Sconiers, 393 So.2d 11 (Fla. 5th DCA 1981); Murray-Ohio Manufacturing Co. v. Patterson, 385 So.2d 1035 (Fla. 5th DCA 1980); Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038 (Fla. 4th DCA 1981); Carlton v. Johns, 194 So.2d 670 (Fla. 4th DCA 1967); and H.I. Holding Co. v. Dade County, 129 So.2d 692 (Fla. 3d DCA 1961) cert. den. 133 So.2d 646 (Fla. 1961).

It was Demetrius not who created the situation which has caused the appeal herein. There is no question but that the trial conduct and closing argument of Ricke was calculated to and did, in fact, violate the permissible limits carefully and legally prescribed by both the legislature and the courts. If the dissent were adopted as law, there would be absolutely no incentive for counsel, if he felt that the current posture of his

case was doubtful, to refrain from making impermissible argument. Counsel making the improper argument would know that his adversary, if he wished to preserve error, would have to make a motion for mistrial. If the mistrial were granted, then offending counsel would have a second bite at the appeal and the aggrieved party would have little solace but the afforded remedy of beginning all over again. On the other hand, if the aggrieved party chose not to make a motion for mistrial because he did not want to face the propspect of a complete re-trial, then offending counsel would have the benefit of prejudice riding on his side, prejudice which could not be remedied thereafter.

The above type of rule which gives incentive to counsel to deliberately inject prejudice into the trial and reap benefit therefrom is certainly not a prophylaxis against such argument. Quite to the contrary, it is an inducement for same.

It is suggested that when the concept of waiver is set forth, it should also be considered that the wrongdoer is responsible for the entire situation or had at least an equal responsibility for not "sandbagging" the court as does the innocent, aggrieved party.

It was argued on rehearing that the majority opinion will change trial strategy. It is hoped that such strategy will change and deliberate error not be interjected into the trial by counsel who do not respect the necessity of a jury deliberation untainted by hoped for prejudice. All that actually happened in the trial court here, was that counsel asked the court to withhold its ruling so that the jury would have a chance to cure what was probably an incurable error without the necessity of the

expenditure of additional time, money and delay in securing an end to litigation. Certainly the probability of prejudice exists where mistrial is appropriate, but the certainty does not; jurors can and do rise above prejudice. The hoped for probability of prejudice may fortunately not reach fruition.

Finally, it should be noted that Ricke never brought to the trial court's attention the fact that he considered the form of the motion to be improper or invalid.

Thus, there was no waiver of the motion for mistrial and the Third District's opinion should be affirmed.

CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully submitted that the decision of the Third District should be affirmed. A timely motion for mistrial was made and it was not waived. Respondent has also argued that the error complained of was fundamental and therefore no motion for mistrial was needed to present the point for appellate review. Although Respondent believes this to be so, it is not necessary for the court to reach this point since, as stated, a timely and proper motion for mistrial was made.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent on the Merits was mailed this 8th day of June, 1984, to: WICKER, SMITH, BLOMQVIST, TUTAN, O'HARA, McCOY, GRAHAM & LANE, 10th Floor Biscayne Building, 19 West Flagler Street, Miami, Flroida 33130; and LAW OFFICES OF RICHARD A. SHERMAN, 204 E. Justice Building, 524 South Andrews Avenue, Fort Lauderdale, FL 33301.

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