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 his Guardian of the Property, EDWARD P. SWAN, Esquire,

Respondent.



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

# BRIEF OF PETITIONER
# ED RICKE & SONS, INC.

WICKER, SMITH, BLOMQVIST, TUTAN,
O'HARA, McCOY, GRAHAM & LANE

and

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## STATEMENT OF THE FACTS AND THE CASE

The basic fact is that during closing argument an attorney moved for mistrial but asked the judge not to rule on the Motion until after the jury had returned a verdict. In a 2-1 decision the majority held that this was acceptable and reversed to grant the Motion for Mistrial. In doing so the majority expressly disagreed with the majority holding and agreed with the dissent in Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038 (Fla 4th DCA 1981). Conversely, the dissent in the present case authored by Judge Schwartz agreed with the majority opinion in Earl Hollis Inc., supra. Therefore there is express and direct conflict with that case.

The relevant portion of the majority opinion reads as follows:

> Appellee's second response is that the errors were waived owing to the nature of appellant's objection and motion for mistrial. Appellant's last motion for mistrial was made during closing argument. With the court's permission, counsel was permitted to elucidate the grounds for the motion after the jury had 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 of a lawsuit against Dade County....
> >
> > * * *
> >
> > The Court: As far as I'm concerned, the empty chair Defendant is a proper argument....
> > Motion denied.
>
> 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).[1] 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.[2]

Reversed and remanded for new trial.

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[1] On this point, which is purely academic, we analogize from the cited cases which involve motions for directed verdict. If a trial court reserves ruling on a motion for mistrial until after a jury verdict, and then grants a new trial on the grounds asserted in the motion for mistrial, that new trial order is reviewable on appeal. If it is determined by the reviewing court that the trial court erred in granting a new trial and that the jury verdict should stand, all concerned would have been spared the time and expenses of a second trial.

A stronger argument could be made that a movant for a mistrial has waived the error complained of where the court, on the movant's motion, reserves ruling on the motion for mistrial until after a jury verdict, then denies it. The effect is, it might be argued, as if the motion had been made and then withdrawn. Unless the court has committed itself to granting the motion for mistrial, see Dysart v.

Hunt, 383 So.2d at 260 n.1, the request to reserve ruling is a gamble at best.

[2] We respectfully disagree with the majority holding in Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038 (Fla. 4th DCA 1981) to the extent that it would require a different result, and agree with the dissenting opinion of Chief Judge Letts.

## ARGUMENT

### 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).

The Decision in the present case expressly states it is in conflict with Earl Hollis, Inc., as follows:

> [2] We respectfully disagree with the majority holding in Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038 (Fla. 4th DCA 1981) to the extent that it would require a different result, and agree with the dissenting opinion of Chief Judge Letts.

Similarly, the dissent in the present case relied on the majority opinion in Earl Hollis Inc. and also acknowledges conflict:

> [5] I believe the majority opinion is in conflict not only with the Earl Hollis case, as it acknowledges, but with our very recent decision in Sears, Roebuck and the numerous cases it relies upon.

The conflicting rules of law announced is that in the present case the majority expressly held that a party can move for mistrial but ask the trial judge not to rule on the motion until after the jury has returned a verdict. In Earl Hollis the court held that a party could not do this. Therefore, this is an express conflict as to the rule of law which must be reconciled.

As previously indicated in the present case an attorney during closing argument moved for mistrial but asked the trial judge not to rule on the Motion until after the jury had returned a verdict. The majority opinion in the court of appeal held that this was acceptable and reversed to grant the motion for mistrial, the opposite of the holding in the Earl Hollis case.

The facts in Earl Hollis were that an attorney moved for a mistrial but requested the trial court to postpone a ruling on the motion. The majority opinion held that this was improper and was not an effective Motion for Mistrial.

As indicated in the present decision the majority relied on the dissent in Earl Hollis, and the dissent in the present case relied on the majority opinion in Earl Hollis.

The decision in the present case also conflicts with other cases concerning preserving matters for appellate review. In Murray-Ohio Manufacturing Company v. Patterson, 385 So.2d 1035 (Fla. 5th DCA 1980), certain inflammatory comments were made during closing arguments but were not objected to at the time. After the jury retired the attorney moved for mistrial. The court held that this was not sufficient to preserve the matter for appellate review.

Similarly in State v. Cumbie, 380 So.2d 1031 (Fla 1980) certain comments were made during final argument and no motion for mistrial was made until the jury retired. The Florida Supreme Court held that this was untimely and did not preserve the question for appellate review.

In Sears, Roebuck & Co. v. Jackson, ___ So.2d ___ (Fla. 3rd DCA CAse No. 82-1548, opinion filed July 5, 1983), the attorney did not timely object to one remark and did not timely move for a mistrial directed to the second remark but nonetheless, the trial court granted a new trial based on those remarks. The Third District Court of Appeal reversed and held that since there was no objection to one and no motion for mistrial as to

the other the trial court could not grant a new trial based on these two remarks, and reversed the trail court.

Similarly, in H.I. Holding Co. v. Dade County, 129 So.2d 693 (Fla. 3d DCA 1961), cert. denied, 133 So.2d 646 (Fla. 1961), certain comments were made but no objection was made at the time, but at the conclusion of the petitioner's argument the motion for mistrial based on the statements was made, and after the court had instructed the jury another motion for mistrial was made. The Third District held that it would not rule on the motions for mistrial because they were not timely made and stated that it is the duty of counsel to make the motion at the time of the objectionable statement and that "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". In the present case, the objection was not even made at the time of the statement but was made after the jury had retired to deliberate and even at that point it was moved that the trial court should wait until after the jury returned its verdict.

It should also be noted that a very good legal discussion of the conflict was given in the dissent in the present case authored by Judge Schwartz.

In summary the decision expressly states on the face of it that it is in conflict with Earl Hollis, and that it disagreed with the majority decision in that case and agreed with the dissent in that case. Since there is express conflict of law as to whether a party can move for mistrial but asks the court to reserve ruling on it until the jury has returned a verdict, this Honorable Court should take jurisdiction and reconcile the

conflicting rules of law.

## CONCLUSION

The decision in the present case expressly acknowledges that it conflicts with the decision in the Earl Hollis case. The correct rule of law will effect trial strategy in practically every jury trial in the state. Accordingly, this Honorable Court should accept jurisdiction of this expressly stated conflict and state the correct rule of law.

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By Richard A. Sherman
Richard A. Sherman

CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of November 1983 to: DONALD FELDMAN, ESQUIRE, Feldman & Abramson et al., Suite 800 Brickell Centre, 799 Brickell Plaza, Miami, FL 33131 and G. VICTOR TUTAN, ESQUIRE, Wicker & Smith et al., 10th Floor Biscayne Building, 19 West Flagler Street, Miami, FL 33130.

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