w/o c/a 67

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.

BRIEF OF PETITIONER ED RICKE & SONS, INC. ON THE MERITS

(With Appendix)

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

and

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STATEMENT OF THE CASE

After a jury trial, the jury returned a verdict for the Defendant. On appeal the Third District reversed for a new trial, although there was a vigorous dissent. The decision held that a party can move for mistrial but ask the court not to rule on the motion until the jury returns a verdict, to see if the party won or lost. Express conflict was acknowledged with Earl Hollis, Inc. v. Fraser Mortgage Company, 403 So.2d 1038 (Fla. 4th DCA 1981), and this Honorable court accepted jurisdiction.

STATEMENT OF THE FACTS

SUMMARY

It is most respectfully submitted that the decision of the Third District was legally incorrect for several separate legal reasons.

It should first be noted that the Respondent was the Appellant in the Third District and therefore since the trial court had denied the Motion for Mistrial and Motion for New Trial, the Appellant had the burden of clearly showing to the appellate court that the trial court had abused its wide discretion and committed reversible error by denying the Motions. However, under all traditional appellate caselaw the Appellant did not sustain its appellate burden because:

1. All prior law is clear that a party cannot move for a mistrial but ask the court not to rule on the Motion until the party sees what the jury verdict is, and whether he won or lost. This is in express conflict with all prior cases on point.

2. The Appellant did not put the entire transcript before the Appellate Court so that it could determine whether any alleged error was harmless error in view of the abundance of testimony in the five day jury trial, and therefore whether the trial court abused its wide discretion in denying the Motion for Mistrial and the Motion for New Trial, which contained the same grounds. Only eight short excerpts were put before the Court although this was a five day jury trial, so there was no way the Appellate Court could determine if the trial court abused its wide discretion in denying the Motions and thereby reverse the trial court's finding that the Plaintiff/Appellant had a fair trial.

3. There was no proper objection to any of the comments. Of the four statements quoted in the decision of the Third District, there was no objection or request for a curative instruction in regard to the first two. In regard to the last two (during closing argument) there was no request for a curative instruction. Instead, there was only a Motion for Mistrial with a request for the court not to rule on same until after the jury verdict so the attorney could see if he won or lost.

4. The jury was not told that there was a settlement, but this was the traditional "empty chair argument" which is proper and the trial court did not abuse its wide discretion over the introduction of evidence by allowing this.

FACTS

The Appellant did not put the transcript before the Court of Appeal but instead put only eight short excerpts. Therefore, very few of the facts are in the Record on Appeal

and therefore it will be necessary to restrict the Statement of the Facts to the facts in the decision of the Third District. The decision is in the appendix to this brief, as well as the decision in Earl Hollis, supra. However the facts as set out in the majority decision are as follows:

> Appellant, a three-year-old child, initially brought suit against Metropolitan Dade County and Florida Gas Company for injuries received when he fell into a deep puddle of boiling water which was discharged from a faulty water heater. that suit was settled. This action was then instituted against the general contractor, Ed Ricke and Sons, Inc., which installed the water heaters, and its insurer United States Fidelity and Guaranty Company, on grounds that the defect which caused the leakage was due to negligent installation.
>
> On a pretrial motion the court entered an order in limine requiring that no party, attorney, witness, or anyone else make known to the jury that there was a prior lawsuit and/or settlement between the plaintiffs and other defendants arising out of the subject accident. Appellee denies the allegations that it violated the order, but contends that even if the allegations were true, the violative statements were innocuous and certainly not so prejudicial as to taint a five-day trial. We consider a few of those violations:
>
> Q. [counsel for appellee] It is during that initial suit that you gave your deposition twice?
>
> A. [Mr. Hargis] Yes.
>
> On another occasion a witness was questioned:
>
> Q. [counsel for appellee] Sir, who first retained you to review some building plans, a contract between HUD and --
>
> Plaintiff's counsel: Excuse me one second before we go any further.
>
> At a side-bar conference, appellee's counsel conceded that he was eliciting from the witness the fact that he was retained as an expert by a prior defendant. The court sustained appellant's objection and admonished

appellee's counsel for a second time. Nonetheless, appellee had put before the jury both the fact of a prior lawsuit and the fact that the county, through its agency HUD, was involved.

In closing argument the prejudice was completed:

> By counsel for appellee: Now, there's going to be some other person responsible. I would like for you to ask them some questions. I would like for you to ask [w]hy Dade County is not a Defendant in this litigation.
>
> * * *
>
> Who's blaming everybody? Mr. Feldman.
> Who should be here? Dade County.
> Mr. Wicker has told you that....
> Marr Plumbing is not here now because Mr. Marr died....
> If the housing authority [county] was [sic] 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 [for] maintenance.

The cumulative errors complained of here were, as described by Judge Pearson especially 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. 824, 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), which provides:

> The fact of...a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury.

In Webb v. Priest, 413 So.2d 43 (Fla. 3d DCA 1982), we found error, where appellees had brought to the jury's attention on numerous occasions the fact that certain persons no longer present in the lawsuit had previously been defendants, in violation of Section 768.041(3), even though neither the fact of settlement nor the terms of the agreement were mentioned. By less flagrant but just as effective means, the same was accomplished here. 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. 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 msitrial being that Your Honor has admonished counsel that there be no reference to 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 a 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 wtih 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

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).

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. 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.

A good discussion of the rule of law was given by Judge Schwartz in his dissent in the present case:

> SCHWARTZ, Chief Judge (dissenting).
>
> While I agree that defendant's final argument was improper, I believe that the majority's conclusion that the issue was preserved for appellate review is completely wrong. 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,[1] 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. In turn the trial judge's disposition of that non-existent "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. In sum, there is no such thing as a reserved motion for mistrial, which is a classic contradiction in terms. The plaintiff therefore did not conform with the requirement that a "real" motion for

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[1] At oral argument, counsel readily and forthrightly conceded that he acted as he did because he simply did not want a mistrial (this was the second actual trial of this case within the week; the first one had really mistried), much preferring (and expecting) to receive a jury verdict in his favor without trying the case still again. While this candor is indeed commendable, the fact remains that trying cases requires that chances be taken and decisions be made.

mistrial be made below to raise such a question on appeal. E.g., H.I. Holding Co. v. Dade County, 129 So.2d 693 (Fla. 3d DCA 1961), cert. denied, 133 So.2d 646 (Fla. 1961).

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)[2]which would be required if the alleged error is presented only after the first one had already been completed, Diaz v. Rodriguez, 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 1031 (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

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1 cont.

Indeed, the accepted definition of a waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). By his own admission, counsel did exactly that by knowingly giving up his right to a mistrial to gain the hope-for advantage of a verdict for his client in the present one. The plaintiff should be held to the consequences of his reasoned, if ultimately incorrect, decision in that regard. Finally, the rule against taking two bites at the apple applies just as much when two obvious sets of teeth marks in the Macintosh are voluntarily displayed, as when little nibbles are kept from our view.

2 It is on this basis that the Dysart, Freeman and Ditlow cases, cited by the court, are totally inapplicable. Each of them involves a question, such as the sufficiency of the evidence to support a verdict, which would be settled, one way or the other, by a single verdict or a single appeal. In those situations, it is appropriate for the trial court, as a matter of proper judicial administration, to reserve the ruling to see if the jury will itself resolve the issue. This practice has no pertinence whatever to what is or should be a motion for mistrial, which by definition requires a new proceeding if not timely asserted and ruled upon--just as the majority has mandated here.

for review, Earl Hollis, Inc. v. Fraser Mortgage Co., 403 So.2d 1038 (Fla. 4th DCA 1981).[3] and that the issue is controlled by the host of cases which hold that a non-fundamental[4] 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. Sears, Roebuck & Co. v. Jackson, ____So.2d____(Fla.3d DCA Case no.82-1548, opinion filed, July 5, 1983), and cases cited.[5] In this case, when the waiver was actually an express,[6] rather than only an implied one, it is all the more clear that affirmance is required.

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.

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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 Ferguson's opinion to hold that the remarks in this case fall into that category, as, in fact, they do not.

4 Ibid.

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

6 Note 1, supra.

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, 433 So.2d 1319 (Fla. 3d 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 trial 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.

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. The decision in the present case is in opposition to Florida caselaw and the decision in this case should be quashed, and the decision in Earl Hollis approved as the law of Florida.

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.

This case involved a several day jury trial and the Appellant has not put the transcript of trial before the Court of Appeal but has only included eight excerpts, half of them under twenty pages. The six jurors ruled adverse to the Appellant and the trial judge who was present during the several day trial denied the Motion for New Trial, but the Court of Appeal reversed without even seeing the transcript. This is in conflict with all caselaw on point.

It is well settled that an appellate court will not reverse a case unless, after reviewing the transcript of the whole trial, it appears the alleged error complained of resulted in a miscarriage of justice so prejudicial as to constitute "reversible error."

The harmless error statute is contained in FSA § 59.041:

§ 59.041 Harmless error; effect

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, 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.

The test to be applied by an appellate court in determining whether prejudicial error has been committed is whether but for the error complained of a different result would have been reached at trial, and this requires considering the error in light of the entire transcript to determine if a miscarriage of justice has occurred. Wallace v. Rashkow, 270 So.2d 743 (Fla. 3d DCA 1972).

It is the duty of a party resorting to an appellate court to make the errors complained of clearly apparent, if they in truth exist. Solomon v. Hunt, 243 So.2d 185 (Fla 3d DCA 1971).

If the Appellant does not put the transcript of the trial before the appellate court, the Appellant has not sustained his burden of proving that the error resulted in a miscarriage of justice, and the appellate court will not reverse the case. Castaldo v. Singapore, 258 So.2d 499 (Fla. 3d DCA 1972); Crosby v. Stubblebine, 142 So.2d 358 (Fla 3d DCA 1962).

This decision involving granting a new trial when the entire transcript of trial was not put before the Court of Appeal is contrary to the statute and all cases on point.

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.

The decision was also contrary to the caselaw as to preservation of error because 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.

As to the first two comments, it is elementary that the Court of Appeal will not reverse where there was no objection in the trial court or request for a curative instruction so that any alleged error can be remedied by the trial court. The following is the entire transcript of the first two statements:

> QUESTION: It is during the initial suit that you gave your deposition twice?
>
> ANSWER: Yes.
>
> MR. SOLMS: Let me change that.
>
> QUESTION: During the initiation of the suit, did you give your deposition?
>
> MR. SOLMS: Page 13, line 2.
>
> ANSWER: (By the witness) Yes.
>
> MR. WICKER: Wait a minute. Are you skipping?
>
> MR. SOLMS: Yes sir, I'm Skipping.
>
> MR. WICKER: Okay.
>
> THE COURT: Let me see the attorneys here for a minute.
>
> (Whereupon, a side bar conference was held out-side the presence of the jury

and the court reporter, after which the following proceedings were had:)

MR. SOLMS: Okay, skip to page 14, line 19. (T.10)

The second statement complained of was during the testimony of Elmore Webb:

Sir, who first retained you to review some building plans, a contract between HUD and--

MR. FELDMAN: Excuse me one second before we go any further.

Let's approach the bench here, please.

(Whereupon, the following side bar conference was held outside the presence of the jury:)

MR. FELDMAN: Is this to elicit the fact that he was retained by the architect and so the jury should know the architects were sued in the case?

MR. SOLMS: I'm asking him who retained him.

THE COURT: Sustained.

MR. FELDMAN: Excuse me. I want something very clear.

MR. SOLMS: I understand what he's saying.

THE COURT: Come on. Let's get it worked out and not fight.

Mr. FELDMAN: I want the witness admonished about this particular fact--about his retention.

THE COURT: I can't do that with the jury sitting here.

MR. FELDMAN: If you tell him quietly.

MR. SOLMS: I'll phrase it right.

THE COURT: If there is any problem, I'll stop.

Neither side--I'll handle it right now.

(Whereupon, a discussion was held between the Judge and the witness, after which the following proceedings were held within the

THE COURT: All right, we are all taken care of.

BY Mr. SOLMS:
Q. Sir, when were you first retained to review the plans regarding the alterations of Scott Projects?

A. May I ask you a question?

(Whereupon, a discussion was held off the record, after which the following proceedings were had:)

BY MR. SOLMS:
Q. Just give me a date.

A. August 21, 1981 (T.112-113)

It is elementary that the Appellant must raise arguments before the trial Court and cannot raise them for the first time on appeal. See generally, Bianchi v. State, 272 So.2d 8 (Fla. 3d DCA 1973); Lesperance v. Lesperance, 257 So.2d 66 (Fla 3d DCA 1971); Arensenault v. Thomas, 104 So.2d 120 (Fla 3d DCA 1958).

The caselaw concerning objection and cured errors is too well known to require lengthy discussion or citation, but this law was summarized in 3 Fla. Jur. 2d Appellate Review § 285:

§ 285. Cured errors

The appellant may not seek a reversal for error that is cured by subsequent events or that fails to materialize. An appellate court will not consider an alleged error concerning evidence admitted without proper foundaton, for example, if subsequent evidence establishes the necessasry foundation. Error may also be cured by the subsequent admittance of evidence erroneously excluded, or where the court subsequently strikes evidence erroneously admitted or instructs the jury to disregard the alleged error." (Emphasis added)

This rule of law was similarly stated in 3 Fla.Jur.2d Appellate Review § 362:

> § 362. Error cured by subsequent events
>
> Errors whose injurious effects have been obviated by subsequent proceedings are not prejudicial. For example,error occurring at trial, such as improper argument of counsel or the giving of an erroneous instruction, may have been cured by the giving of proper instructions...
>
> Likewise, where evidence is erroneously admitted, such error may be rendered harmless by the fact that the issue as to which such evidence was submitted was not given to the jury, or by an instruction curing such error... (Emphasis added)

The record does not reveal an objection to the first two statements, any motion to strike any statement, any request for an instruction for the jury to disregard the statements, nor any motion for a mistrial as to the first two statements. In fact, the record reflects that the first two statements were apparently considered at the time to be of no particular consequence and the last apparently was not thought too offensive since the court was asked not to rule on the Motion for Mistrial until the jury returned its verdict. Similarly no traditionally appropriate curative measures were taken as to the statements during closing.

Under abundant caselaw too well known to cite at length, these points were not preserved for appellate review and would not be the basis for a new trial granted by the Court of Appeal.

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.

The jury was not informed in any of the comments that the Plaintiff had settled with anyone, but instead this was the traditional and well respected "empty chair" argument, that the real culprit is not in the courtroom. Therefore the trial court had wide discretion as to the admission of this and there was no basis for a reversal.

It is well settled beyond lengthy discussion that the trial court has discretion as to the introduction of testimony and also as to its ruling on whether a new trial should be granted, 2 Fla. Jur. Appeals Section 337; Home Insurance Co. v. Wiggins, 147 So.2d 157 (Fla 1st DCA 1962); Driscoll v. Morris, 114 So.2d 314 (Fla. 3d DCA 1959); Delano Hotel, Inc. v. Gold, 126 So.2d 301 (Fla. 3d DCA 1961).

The rule concerning discretion of the trial court as to admission of evidence was discussed in 3 Fla. Jur. 2d Appellate Review § 336:

> § 336. Evidence
>
> In accordance with the general rule, the action of the trial court in ruling on matters of evidence within its discretion will not be disturbed unless there has been a clear abuse thereof....

The trial court in the present case when the one objection was made expressly held that this was the traditional "empty chair" argument, and there was no basis for reversal of the trial court's wide discretion as to introduction of evidence as to this traditional "empty chair" argument.

CONCLUSION

The decision in the present case conflicts with all prior caselaw on point, to the effect that a party cannot move for a mistrial but ask the court to reserve ruling on the motion until after the jury verdict, so the party can see if he won or lost. Additionally the decision is incorrect for the other reasons cited. Accordingly the decision in the present case must be reversed.

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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 1st day of May 1984 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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