IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,094

BAPTIST HOSPITAL OF MIAMI, INC.,

Petitioner,

v.

JAMES MALER, JR., a minor child etc., et al.,

Respondents.

BRIEF OF PETITIONER

PARENTI & FALK, P.A.
1150 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130

COOPER, WOLFE & BOLOTIN, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

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INTRODUCTION

Defendant/Petitioner BAPTIST HOSPITAL OF MIAMI, INC. will be referred to as its stands before this Court, as it stood before the trial court and as BAPTIST. Plaintiffs/Respondents JAMES MALER, JR., a minor child, etc., et al. will be referred to as they stand before this Court, as they stood before the trial court and as the MALERS.

"R" refers to the record in this Court. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This is a proceeding to review a decision of the Third District which held that BAPTIST could not interview members of the jury even though some of those jurors had told counsel for BAPTIST and another attorney that they had awarded money only because they felt sorry for the child and that they had considered the existence of insurance, despite a lack of evidence on that matter. (R. 134-44).

The MALERS sued BAPTIST and Dr. David Gair and alleged that they had improperly treated a bacterial condition which their son had contracted at birth. (R. 135). The jury returned a verdict which found BAPTIST negligent, the parents comparatively negligent, awarded $1,300,000 to the child and awarded his parents each $80,000.[1/] (R. 135). The trial court polled the jury and then told the jurors that they were free to discuss the case with anyone. (R. 136).

Two days later, Michael J. Parenti, lead counsel for BAPTIST filed a pleading which advised the court of a chance conversation he had with two of the jurors. (R. 27). Shortly after filing this pleading, BAPTIST filed a motion to interview all the jurors. (R. 29). Attached in support were affidavits from Mr. Parenti (R. 32) and from David Mishael, counsel for Dr. Gair and a witness to the conversation with the jurors (R. 35). (R. 136).

A juror had approached Mr. Parenti as he was leaving the courthouse right after the verdict was returned. At the time, Mr.

1/ Dr. Gair settled with the MALERS during trial. (R. 135).

Parenti was in the company of several other people, including Dr. Gair's counsel. A second juror then joined those present. The jurors discussed the case with the group. The first juror told the group the jury returned its verdict out of sympathy for the child, without regard to any evidence. They decided that such a result was acceptable because an insurance company, not the hospital itself, would pay for the verdict. (R. 33-34, 35-36). Mr. Parenti's affidavit summarized his conversation.

> a. Mr. Lemus stated that the undersigned won the case, but the jury felt so sympathetic for the child that it awarded money thinking that an insurance company would pay the verdict and not the hospital itself. He also commented that some members of the jury wanted to award even more money than they did and he tried to hold the verdict believing that a verdict in the range of $800,000 would be enough.

(R. 39). Mr. Mishael's affidavit echoed this description.

> 6. Mr. Lemus told us that he did not think that anyone at Baptist Hospital had done anything wrong. He also told Mr. Parenti that he did not think that the plaintiffs had proved their case. Mr. Lemus stated that some of the jurors wanted to award $5,000,000 or $6,000,000 dollars, which he felt was outrageous. <u>One of the two jurors said that we knew the hospital had insurance which other jurors mentioned also, and we had to award money because someone had to take care of this child</u>.

(R. 35-36).

The trial court granted the motion to interview. (R. 42). It proposed to question each juror using questions from lists submitted by BAPTIST and the MALERS. (R. 136). The MALERS immediately sought a writ of certiorari from the Third District. (R.

1). They argued that the proposed interview was an improper inquiry into the jury's deliberative process. After oral argument, the Third District relinquished jurisdiction for the trial court to compile the list of proposed questions. (R. 136). The trial court did so. The questions were:

> 1. Did the jury agree before the actual signing of the verdict form to find for the child, James Maler, Jr., for reasons outside of the evidence, such as sympathy, insurance, etc.?
>
> 2. Did the jury agree to find for the child, James Maler, Jr., although the greater weight of the evidence supported a verdict for the Defendant, Baptist Hospital of Miami, Inc.

(R. 136). If the jury answered yes to either of these questions, the trial court proposed that appropriate follow-up questions would be asked in the court's discretion. (R. 137).

The Third District reassumed jurisdiction. It issued an opinion which held that the proposed interview could not be conducted. It found that the proposed interview inquired into matters which inhere in the verdict and were therefore impermissible. (R. 137). The court recognized that the Second District reached the opposite conclusion on similar facts in Preast v. Amica Mut. Ins. Co., 483 So.2d 83 (Fla. 2d DCA), rev. denied, 492 So.2d 1334 (Fla. 1986).

> We recognize that Preast [citation omitted] approved a post-trial jury interview by the trial court -- which, in part, probed into the jury's reasoning process and revealed, in effect, that the jury awarded the plaintiff damages in a personal injury action based on sympathy for the plaintiff despite their conclusion that the plaintiff had suffered no

> permanent injury -- and reversed a trial court refusal to grant a new trial on the issue of liability based on this revelation during the jury interview. Indeed, it was this decision which the trial court relied on in ordering the jury interview in the instant case. With all due respect, however, we must decline to follow this aspect of the Preast decision because, in our view, it is contrary to well-established law in Florida as stated above.

(R. 140-41). The court rejected the argument, accepted by the Second District in Preast, that the agreement to award damages based solely on sympathy, without regard to the evidence or the law, constitutes juror misconduct.

BAPTIST sought review of the Third District's decision, based on the certified conflict (R. 152).

SUMMARY OF ARGUMENT

This Court should reject the Third District's conclusion that the trial court's proposed questions constituted prohibited inquiry into the jurors' thought processes in an improper attempt to impeach the verdict. The motion to interview the jurors was based on information which led to a reasonable belief that juror misconduct resulted in an unlawful verdict. The proposed questions did not inquire into the jurors' thought processes. They only sought to determine whether the jury had in fact avoided the deliberative process altogether.

This Court has long held that inquiry into the question of whether the jurors engaged in some form of misconduct was permissible and did not violate the general policy of protecting the secrecy of the jury box. In particular, such inquiry is permitted where there is evidence that the jurors reached a quotient verdict, i.e., where the jurors made a preliminary agreement as to the manner in which they would reach a damage amount, independent of the verdict itself. There is no difference between proof of the fact of a preliminary agreement to reach an improper quotient verdict and proof of the fact of a preliminary agreement to disregard the evidence and reach an improper sympathy verdict.

At this stage of the proceedings, the only issue is whether the trial court abused its discretion in determining that a limited jury interview is appropriate. To uphold that ruling, this Court need only find that the motion and affidavits set forth a reasonable basis on which to believe there are grounds for a legal

challenge to the verdict. Public policy can only be served if the secrecy of the jury box is not permitted to be "a safe cover for the perpetration of wrongs upon parties litigant". City of Miami v. Bopp, 117 Fla. 532, 158 So. 89, 90 (1934).

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT A JURY INTERVIEW WAS APPROPRIATE WHERE THE PROPOSED INQUIRY ONLY SOUGHT TO DETERMINE WHETHER THE JURORS AGREED TO REACHED A VERDICT BASED ON SYMPATHY AND BASED ON EXTRA-RECORD CONSIDERATION OF INSURANCE. THE THIRD DISTRICT ERRED IN REACHING A CONTRARY CONCLUSION.

The Third District found that BAPTIST's motion and affidavits, and the proposed questions formulated by the trial court, constituted prohibited inquiries into the jurors' thought processes in an improper attempt to impeach the verdict. This Court should reject that conclusion. The motion to interview jurors was based on information which led to a reasonable belief that juror misconduct existed and resulted in an unlawful verdict. The proposed questions did not seek to inquire into the jury's thought process. They only sought to determine whether the jury had in fact avoided the deliberative process altogether.

Juror misconduct may be proven by inquiry into objective facts which are extrinsic to the verdict. Marks v. State Road Dep't, 69 So.2d 771 (Fla. 1954); City of Miami v. Bopp, 117 Fla. 532, 158 So. 89 (1934); Lindsley v. State, 88 Fla. 135, 101 So. 273 (1924); Preast v. Amica Mut. Ins. Co., 483 So.2d 83 (Fla. 2d DCA), rev. denied, 492 So.2d 1334 (Fla. 1986).

Proof of facts which do not fall within the legitimate issues in a case involves matters which are extrinsic to the verdict.

The rule that the testimony of jurors will

> not be received to impeach their verdict is subject in many . . . jurisdictions [including Florida] to a recognized exception that affidavits of jurors may be received to show matters . . . not essentially inhering in the verdict, that is, not falling within or pertaining to the legitimate issues in the case.

76 Am.Jur.2d Trial § 1223 at 178, n.66 (1975)(citing Bopp, supra).

> The rule forbidding jurors to impeach their verdict does not apply to prevent a showing of matters . . . that do not essentially inhere in the verdict itself. Cases in which there is improper contact with, or conduct by, a juror involve matters extrinsic to the verdict, and inquiry or impeachment is proper for the reason that neither are the individual thought processes . . . of the jurors revealed thereby nor are matters inquired into that form a proper predicate for the verdict. . . .
>
> The courts reason that the policy protecting the secrecy of the jury box does not govern as to matters lying outside the personal consciousness of the individual juror, that is, those things that are matters of fact and therefore ascertainable from the testimony of others and subject to contradiction. Hence, affidavits as to misconduct of the jury do not fall within the rule forbidding a juror by his testimony to impeach his verdict.

55 Fla.Jur.2d Trial § 227 at 726-27.

A litigant who seeks a jury interview must initially establish only a reasonable basis for inquiry. See Snook v. Firestone Tire & Rubber Co., 485 So.2d 496 (Fla. 5th DCA 1986); Preast, supra; Albertson's, Inc. v. Johnson, 442 So.2d 371 (Fla. 2d DCA 1983); Fla.R.Civ.P. 1.431(g). The decision on whether to allow such an interview is discretionary. Preast, supra; Schofield v. Carnival Cruise Lines, Inc., 461 So.2d 152 (Fla. 3d DCA 1984), rev. denied, 472 So.2d 1182 (Fla. 1985). The motion must

show that the verdict may have been based on improper conduct or considerations which are extrinsic to the verdict, i.e., on factual matters which occur in the jury room and do not essentially inhere in the verdict itself, matters which are overt and capable of objective proof without delving into the personal consciousness of individual jurors. Russ v. State, 95 So.2d 594 (Fla. 1957)(en banc); Marks, supra. See also Fla.Stat. § 90.607(b) and comments.[2/]

The record here shows two matters which properly would support interviews of the jurors. The affidavits concerning the conversations with the jurors show that there is reason to believe they deliberately agreed among themselves to disregard their instructions, to base their verdict on matters outside the evidence and to circumvent the law so they could award damages which they otherwise could not lawfully award. They also show reason to believe that the jurors considered non-record evidence of insurance. Neither an agreement to disregard the instructions, nor considera-

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2/ The comments provide:

> Paragraph (b) . . . does allow a juror's testimony . . . which shows misconduct . . . in the jury room to be used to avoid a verdict as long as the conduct does not inhere in the verdict. . . .
>
> Under this subsection jurors may testify to evidence of overt acts which might have prejudicially affected the jury in reaching their [sic] own verdict. This section distinguishes between a juror's own thought processes and conduct which might affect all the jurors and thus does not inhere in the verdict.

tion of non-record evidence of insurance inhere in the verdict. They involve purely factual evidence which is capable of objective proof without the need to inquire into the juror's motives or thought processes. The proposed inquiry would focus solely on "whether" such matters occurred, not "why".

As the Third District recognized here, the Second District's decision in Preast is on point. In that case, the jurors knew they could not award damages unless they found the plaintiff had suffered a permanent injury. They decided the evidence did not demonstrate a permanent injury. Yet they awarded damages. The plaintiff argued that the jury's decision was a matter which inhered in the verdict. The Second District disagreed.

> The jury had initially decided that the weight of the evidence went against a finding of permanent injury. However, because they wanted to give appellant something, they deliberately agreed among themselves to circumvent the law and find there was a permanent injury as a means to that end. Such deliberate, blatant disregard of the court's instructions on the applicable law cannot be sanctioned, neither can it be seen as a matter which inheres in the verdict itself.
>
> A jury's desire and sympathy to award a plaintiff something despite the evidence, is clearly a matter outside the record. . . . Furthermore, our supreme court has recognized that:
>
> > [W]hen [a juror] has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible. . . . [If a juror] steps aside from his duty, and does an unlawful act, he is a competent witness to prove such fact, and thereby prevent

> the sanction of the law from attaching to that which would otherwise be colorably lawful.

483 So.2d at 86 (quoting Marks, supra, 69 So.2d at 775-76).

The same result should be reached here for the same reason: a jury's deliberate agreement to circumvent the law to award damages it could not lawfully award otherwise is not a matter which inheres in the verdict. It is a factual matter which is amenable to objective proof through juror testimony.

This conclusion is further supported by this Court's decision in Marks. In that case, this Court ruled that quotient verdicts are illegal in Florida. It also ruled that jurors' testimony can be received to determine whether the verdict was reached through such a method. This Court first described quotient verdicts.

> Quotient verdicts are universally condemned. To constitute a quotient verdict . . . it is essential that there be a preliminary agreement or understanding among the jurors that each will select a figure as representing his opinion of value or damage and that the sum of said amounts divided by the number of jurors will be accepted by each as his or her verdict, and is in fact so accepted.

69 So.2d at 773. This Court then addressed the circumstances under which jurors' testimony is admissible to prove the fact that the jury reached a preliminary agreement to disregard its duty. It specifically noted that an agreement by jurors as to how they will reach the verdict was a fact independent of the verdict.

> That the verdict was obtained by lot, for instance, is a fact independent of the verdict itself, and which is not necessarily involved in it.. . .

> [T]o receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot . . . or the like is to receive his testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow jurors . . . . And if, as is universally conceded, it is the fact of improper practice, which avoids the verdict, there is no reason why a Court should close its ears to evidence of it . . . .
>
> [A] juror should not be heard to contradict or impeach that which, in the legitimate discharge of his duty, he has solemnly asseverated. But when he has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act. In other words, public policy protects a juror in the legitimate discharge of his duty, . . . but if he steps aside from his duty, and does an unlawful act, he is a competent witness to prove such fact. . . .

69 So.2d at 774-75. See also Sentinel Star Co. v. Edwards, 387 So.2d 367, 375 (Fla. 5th DCA 1980)(concern of jurors that verdict for plaintiff against defendant city would result in higher utility rates was a matter "wholly extrinsic to jury deliberations").

There is no difference between proof of the fact of a preliminary agreement to reach an improper quotient verdict, as in Marks, and proof of the fact of a preliminary agreement to disregard the evidence and reach an improper sympathy verdict as in Preast and in this case. Each inquiry involves matters extrinsic to the verdict. As this Court noted in Marks, "if . . . it is the fact of improper practice which avoids the verdict, there is no reason why a Court should close its ears to evidence of it." Id.

at 775.

In rejecting BAPTIST's arguments, the Third District reviewed what it considered to be analogous decisions of this Court and of the district courts of appeal which found no basis for vacating a verdict or conducting interviews. In fact, the circumstances of those cases were quite different. In most of the cases cited by the Third District, the jurors simply misunderstood the law given to them in their instructions. Mitchell v. State, 527 So.2d 179, 181-82 (Fla. 1988); State v. Ramirez, 73 So.2d 218 (Fla. 1954); Smith v. State, 330 So.2d 59 (Fla. 1st DCA 1976); Branch v. State, 212 So.2d 29 (Fla. 2d DCA 1968); State Dep't of Transp. v. Rejrat, 540 So.2d 911 (Fla. 2d DCA 1989); Dover Corp. v. Dean, 473 So.2d 710, 712 (Fla. 4th DCA 1985). That is a classic circumstance in which the matter inheres in the verdict. Marks, supra, 69 So.2d at 774 (examples of matters that inhere in the verdict include "that [a juror] misunderstood the instructions of the Court"). In another case, the court refused to allow a juror interview to impeach the foreman's failure to challenge the verdict as not his when it was rendered in open court. State ex rel. D'Andrea v. Smith, 183 So.2d 34 (Fla. 2d DCA 1966). And finally, two cases dealt with the thought processes of only a single juror, either in her own improper misconceptions of the deliberation process, Parker v. State, 336 So.2d 426 (Fla. 1st DCA 1976), or in his misconception of his responsibilities brought on by information from the bailiff, Schmitz v. S.A.B.T.C. Townhouse Ass'n, 537 So.2d 130 (Fla. 5th DCA 1988).

None of these cases has anything to do with agreements by the jury as a whole to deliberate in an unlawful fashion or to consider extra-record evidence such as insurance. Furthermore, the Third District's conclusion that there must be some "objective act" "committed by or in the presence of the jury or a juror which compromised the integrity of the fact-finding process" (R. 142) is not an adequate resolution of the problem. Quite simply, the Third District included in its analysis the "total abandonment of any deliberative process as when the jury decide the case by quotient, lot or chance". Yet it fails to explain why that category does not include the facts of this case where the jury totally abandoned the deliberative process and agreed to decide the case based on sympathy. The Third District also included in its analysis "jury exposure to alleged facts about the case which were never introduced in evidence". Yet it fails to explain why that category does not include the facts of this case where the jury allegedly considered evidence of insurance which was never introduced, nor could have been introduced, into evidence.[3/]

It must be remembered that, at this stage of the proceedings,

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[3/] This Court should note that a view of the issue in this case from other jurisdictions would not be of any assistance. Each jurisdiction has its own approach to the propriety of jury interviews. For example, federal courts, directly contrary to this Court, hold that jurors cannot testify about whether they agreed to a quotient verdict. McDonald v. Pless, 238 U.S. 264 (1915). Federal courts are substantially more restrictive in the matters which they will permit to impeach a verdict, in part because they look to Fed.R.Evid. 606(b), which is far more restrictive than Fla.Stat. § 90.607(b) and Fla.R.Civ.P. 1.431(g). See generally Wright & Miller, Federal Practice and Procedure: Civil § 2810 at 72-73 (1973).

the only issue is whether the trial court abused its discretion in determining that a limited jury interview is appropriate. See Preast, supra; Schofield v. Carnival Cruise Lines, Inc., supra. To uphold that ruling, this Court need only find that the motion and affidavits set forth a reasonable basis on which to believe there are grounds for a legal challenge to the verdict. Snook v. Firestone Tire & Rubber Co., supra; Preast, supra. The affidavits here fully comply with that requirement.

As this Court stated many years ago,

> the interests of justice will be promoted and no sound public policy disturbed, if the secrecy of the jury box is not permitted to be the safe cover for the perpetration of wrongs upon parties litigant. If the jury has been guilty of no misconduct, no harm has been done by permitting their testimony to be received. If the jury has been guilty of misconduct, but such misconduct was not of such a nature as to prejudice the rights of the parties, the verdict should stand. . . . But if such misconduct has wrought prejudice . . . the verdict should . . . be set aside. . . .

Bopp, supra, 158 So. at 90 (quoting Lindsley, supra, 101 So. at 175-76). If it turns out that the jurors here did not engage in any misconduct, no harm will have been done by permitting their factual testimony. But if the contrary is true, public policy will be offended, not served, if the secrecy of the jury box is permitted to be "a safe cover for the perpetration of wrongs upon parties litigant".

CONCLUSION

For the foregoing reasons, Appellant BAPTIST HOSPITAL OF MIAMI, INC., respectfully requests this Court to reverse the decision of the Third District Court of Appeal, approve the trial court's orders and remand for a jury interview.

Respectfully submitted,

PARENTI & FALK, P.A.
1150 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

COOPER, WOLFE & BOLOTIN, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

By: _____
SHARON L. WOLFE
Fla.Bar No. 222291

By: _____
MARC COOPER
Fla.Bar No. 198358

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of July, 1990, to: Patrice A. Talisman, Esq., DANIELS & HICKS, P.A., 2400 New World Tower, 100 N. Biscayne Blvd, Miami, FL 33132; Christopher Lynch, Esq., ADAMS, HUNTER, ANGONES, ADAMS, ADAMS & McCLURE, Counsel for MALERS, 9th Floor, Concord Bldg, 66 W. Flagler St., Miami, FL 33130; and William O. Solms, Jr., Esq., Co-Counsel for MALERS, 1550 Madruga Ave., Suite 230, Coral Gables, FL 33146.

Respectfully submitted,

PARENTI & FALK, P.A.
1150 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130

COOPER, WOLFE & BOLOTIN, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

By: _____
SHARON L. WOLFE
Fla.Bar No. 222291