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.

original

REPLY BRIEF OF PETITIONER

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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 MALERS present several arguments why the evidence here is not what it appears and the decisions cited by BAPTIST are allegedly inapplicable. Those arguments should be rejected. There is no factual or legal reason for finding that the trial court abused its discretion in determining that there was a reasonable basis for inquiry of the jurors.

The MALERS argue at 7 that the quotient verdict cases are inapplicable because in those cases there is some record evidence of an impropriety in the verdict itself which provides independent support for any testimony from the jurors. They claim BAPTIST cannot show that there was an agreement to disregard the deliberative process which agreement continued through the time of rendition of the verdict because here, unlike the quotient verdict cases, the result gives no support for the conclusion of the improper conduct. This argument makes no sense--the distinction simply does not exist. Quotient verdict cases contain no such element of proof. Those cases do <u>not</u> require that the verdict itself reflect a quotient verdict before inquiry may be al-

lowed. There is no reason to impose that requirement here.[1/]

The MALERS cite several cases which they claim involve "agreements" and in which the courts refused to allow juror interviews. The MALERS have misstated the facts of those cases. In none of those cases was there any evidence that the jurors reached an agreement to disregard the court's instructions. Rather, as noted in BAPTIST's initial brief, the jurors simply misunderstood the instructions or a single juror misunderstood the deliberation process. See BAPTIST's initial brief at 14 (citing numerous cases). In none of those cases was there any evidence to indicate an agreement of any sort.

The MALERS further try to shield the result by pointing to the fact that the jurors were polled. But the mere fact that each juror stated "That is my verdict" proves nothing one way or the other about whether they had some extrinsic agreement to reach that verdict based on prejudice and sympathy or based on improperly-considered evidence of insurance. By definition, a quotient verdict requires an agreement "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". Marks v. State Road Dep't, 69 So.2d 771, 773 (Fla. 1954). If that is the case, the jurors who have agreed to a quotient verdict will say "Yes" when asked if the verdict rendered in open court in their

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1/ In fact, such a showing does exist here. After certiorari proceedings were pursued on this issue in the Third District, the trial court directed a verdict for BAPTIST - a substantial indication that the verdict was prima facie evidence of impropriety.

verdict. Most of the cases on which the MALERS rely at 12-13 do not support their argument. Only one case in fact holds that the polling of the jury eliminates any indication of a quotient verdict. Lopez v. Cohen, 406 So.2d 1253 (Fla. 4th DCA 1981). Lopez contains no analysis and cites no authority in support of its conclusion. BAPTIST respectfully submits it is incorrect.[2/]

The MALERS also argue that BAPTIST must demonstrate conclusively that there was an agreement before it can interview the jurors to determine that there was an agreement. See MALERS' brief at 7 & n.1 The MALERS are incorrect. BAPTIST does not have to demonstrate conclusively that the jurors entered into such an agreement before it can be entitled to an interview. See Snook v. Firestone Tire & Rubber Co., 485 So.2d 496, 498-99 (Fla. 5th DCA 1986). Rather, the question is whether the trial court abused its discretion in determining whether there was a reasonable basis for inquiry. Id. What would be the point of the interview if BAPTIST already conclusively demonstrated the agreement? The purpose of the interview is to determine whether such an agreement existed. A sufficient preliminary showing has been made so as to entitle BAPTIST to that interview.

As to the jurors' consideration of insurance, the MALERS argue at 16-17 that such consideration was not "extrinsic" be-

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2/ This Court should note that the trial court "polled" the jury in Marks by explaining the meaning of a quotient verdict and, in light of that definition, specifically asking each juror if the verdict returned was his or her individual verdict. Such questioning is quite different from the standard jury polling in which the courts now engage.

cause there was evidence of insurance introduced at trial without objection. The "insurance evidence" at trial consisted of the following introductory remarks from BAPTIST's risk manager, elicited by the MALERS' counsel.[3/]

> Q. What is risk management as it applies to Baptist Hospital?
>
> A. Simply stated, it is managing the risk. It is looking at what we have at the hospital that causes a risk to the hospital and make sure we have insurance for it. And one of the things we do in patient care in that aspect is that we have the nurses, and everyone that is involved with patient care, fill out incident reports when anything of any type or nature happens where there is a patient being given the wrong medication or the patient did not get the medication or did not get the correct dosage.

(R. 91-92). This is not evidence that BAPTIST had insurance to cover this particular case. Further, this evidence was not introduced for any reason relevant to the jury's consideration of liability. Any consideration by the jury of insurance being available to pay damages was extrinsic material concerning which BAPTIST should be permitted to interview the jurors.

In sum, the MALERS do not address the real issue: did the affidavits as filed provide a reasonable basis for inquiry because they indicated an agreement to avoid the deliberative process in accordance with the jury instructions? BAPTIST respectfully submits that such a reasonable basis for inquiry was demonstrated and the trial court did not abuse its discretion in or-

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[3/] The MALERS state at 16 that BAPTIST introduced this evidence. That is incorrect. The MALERS elicited this testimony.

dering the interview. The Third District's contrary determination, which found the trial court abused its discretion, should be reversed. This Court should reaffirm that trial court's discretion to conduct jury interviews where, as here, serious record evidence of jury impropriety exists. The integrity of the jury system demands nothing less.

CONCLUSION

For the foregoing reasons, and the reasons stated in the initial brief, Petitioner 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of September, 1990, to: Patrice A. Talisman, Esq., Daniels & Hicks, P.A., 2400 New World Tower, 100 N. Biscayne Boulevard, Miami, Florida 33132; Christopher Lynch, Esq., ADAMS, HUNTER, ANGONES, ADAMS, ADAMS & McCLURE, Counsel for Petitioners, 9th Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130; and William O. Solms, Jr., Esq., Co-Counsel for Petitioners, 1550 Madruga Avenue, Suite 230, Coral Gables, FL 33146.

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