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CLERK, SUPREME COURT,

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,205

KEENE BROTHERS TRUCKING, INC.

versus

**PATRICIA PENNELL and
RANDY PENNELL, her husband.**

CROSS PETITIONER'S BRIEF ON JURISDICTION

On Review From the District Court of
Appeal, Second District of Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

THE OPINION OF THE SECOND DISTRICT COURT
OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS
WITH THIS COURT'S RULING IN STATE v. HAMILTON,
574 So.2d (FLA. 1991, AS MODIFIED BY
BAPTIST HOSPITAL OF MIAMI, INC. v.
MALER, 579 So.2d 97 (FLA. 1991)

CONCLUSION.. . . . 9

CERTIFICATE OF SERVICE 10

ABI OF AUTHORITIES

Baptist Hospital of Miami, Inc. v. Maler,
579 So.2d 97 (Fla. 1991) 4, 6, 7, 8, 9

Bottosan v. State,
443 So.2d 962 (Fla. 1983),
cert. den., 469 U.S. 873, 105 S.Ct. 223,
831 L.Ed. 153 (1984) 6

Paz v. United States,
462 F.2d 740 (5th Cir. 1972) 7

State v. Hamilton,
574 So.2d 124 (Fla. 1991) 4, 6, 7, 8, 9

STATEMENT OF CASE AND FACTS

Patricia Pennell and her husband, Randy Pennell, brought a personal injury action against Keene Brothers for injuries sustained for injuries sustained by Patricia on her job. A:2.

The case was tried to the jury from February 19 to February 22, 1990. A:2. On February 22, 1990, the jury returned a verdict for Patricia Pennell determining that her total damages were \$600,000.00 and further finding that her husband had sustained damages in the amount of \$225,000.00. The jury also found Patricia Pennell to be ten percent comparatively negligent. A:2.

After reception of the verdict, Keene Brothers' counsel noted that one of the jurors, an accountant named Donald Duke, had taken a book into the jury room. Mr. Duke acknowledged that he had referred to page 450 of "Introduction to Financial Accounting" during deliberations. A:3. Duke used the book to aid in calculating the present value of the damage award. A:5. Keene Brothers' counsel immediately requested and was granted a mistrial on the ground of juror misconduct. A:3.

On March 16, 1990, twenty-two days after rendition of the jury verdict, Keene Brothers filed its "Defendant's Motion for New Trial or, in the Alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict". A:3. In this motion, Keene Brothers not only raised the issue of juror misconduct,

but raised four additional grounds for entry of an order granting a new trial or remittitur, or for a judgment notwithstanding the verdict: the size of the jury verdict was excessive; the Pennells' counsel made prejudicial comments in closing argument; new evidence was raised by Patricia Pennell for the first time at trial; and the verdict was contrary to the manifest weight of the evidence. A:3.

On March 23, 1990, the Trial Court rendered its "Findings and Order on Defendant's Motion for New Trial or, in the Alternative, Remittitur or Motion for Judgment Notwithstanding the Verdict". A:3-4. The Trial Court granted Keene Brothers' Motion for New Trial on the ground that one of the jurors had access to and had utilized a financial accounting book in the jury room. A:4. The Trial Court next denied Keene Brothers' Motion for New Trial on each of the other three grounds asserted in the Motion for New Trial. A:4. Then, the Trial Court granted Keene Brothers' Motion for Judgment Notwithstanding the Verdict, holding that the overwhelming weight of the evidence supported a judgment N.O.V. A:4.

Pennell, on appeal, argued that the Trial Court lacked the requisite jurisdiction to enter a Judgment Notwithstanding the Verdict. A:4.

The Second District held that when the Trial Court granted Keene Brothers' Motion for New Trial on the ground of juror misconduct, the case below was concluded. A:4. The district court held that the trial court had no authority to

simultaneously grant a new trial and enter a judgment notwithstanding the verdict in the same order. A:4-5. The judgment notwithstanding the verdict was reversed. A:5.

The district court then affirmed the trial court's order granting a new trial on the ground of juror misconduct determining that, as a matter of law, a juror referred to an accounting book in the calculation of the present value of the damage award could not be held to be harmless error. A:5.

The district court held that the new trial should be limited to damages only as "the accounting book was referred to for purposes of determining present value relating to the amount of damages alone". A:6.

SUMMARY OF THE ARGUMENT

The Second District held that, as a matter of law, the juror's use of an accounting book to reduce a damage award to present value " . . . cannot be held to be harmless . . ." This ruling expressly and directly conflicts with the rulings of this court in State v. Hamilton, 574 So.2d 124 (Fla. 1991), and Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97 (Fla. 1991). In Hamilton, the Court held that the presence of unauthorized materials in a jury room is ". . . not a per se rule of reversal . . ." Hamilton, supra at page 126. Rather, once juror misconduct has been established, the opposing party is entitled to a new trial unless the non-moving party can demonstrate that there is no reasonable possibility that the juror misconduct affected the verdict. Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97, 100 n.1 (Fla. 1991). This court held in both Hamilton and Maler that where the type of misconduct is "highly unlikely to indicate any prejudice", an evidentiary hearing need not be held. However, this court has not held the contrary to be true, i.e., that a trial court may hold, as a matter of law, that the jury's use of unauthorized materials mandates a new trial and the opposing party will not be permitted to demonstrate that there is no reasonable possibility that the juror misconduct affected the verdict,

The second district's holding that, as a matter of law, the introduction of unauthorized materials in the jury room "cannot be held to be harmless" (without an evidentiary hearing) expressly and directly conflicts with this court's rulings in Hamilton and Maler. This court should grant the Pennells' Petition for Review.

ARGUMENT

THE OPINION OF THE SECOND DISTRICT COURT
OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS
WITH THIS COURT'S RULING IN STATE v. HAMILTON,
574 So.2d (FLA. 1991, **AS** MODIFIED BY
BAPTIST HOSPITAL OF MIAMI, INC. v.
MALER, 579 So.2d 97 (FLA. 1991)

In the instant case, a juror, Donald Duke, referred to page 450 of "Introduction to Financial Accounting" with regard to reducing the damage award to present value. A:3; A:5.

When this was brought to the Court's attention after reception of the jury's verdict, the Court granted a mistrial on the ground of juror misconduct. A:4.

The District Court affirmed and held, as a matter of law:

The presence of the accounting book in the jury room cannot be held to be harmless under Bottoson [v. State, 443 So.2d 962 (Fla. 1983)].

A:5.

This ruling directly and expressly conflicts with the ruling of this Court in State v. Hamilton, 574 So.2d 124 (Fla. 1991), which held that an evidentiary hearing is necessary to determine whether there was a reasonable possibility of prejudice when unauthorized materials were introduced in the jury room. Hamilton, supra at page 129; 130.

The ruling in Hamilton was clarified by this Court in Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97, 100 (Fla. 1991), wherein this Court held:

* * *

We hold that an inquiry is never permissible unless the moving party had made sworn factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in Hamilton.

Under this standard, the moving party must first establish actual juror misconduct in the **juror** interview. Once this is done, the party making the motion is entitled to a new trial unless the opposing party can demonstrate that there is no reasonable possibility that the juror misconduct effected the verdict. Hamilton, 574 So.2d at 129 (quoting Paz v. United States, 462 F.2d 740, 745 (5th Cir. 1972)).

(emphasis original)

The trial court **may** dispense with an inquiry where the type of misconduct is highly unlikely to indicate **any** prejudice. Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d at 100; Hamilton, 574 So.2d at 130-131. But, Hamilton holds that there is "not a per se rule of reversal wherever any unauthorized materials are present in the jury room". Hamilton, supra, at pg. 126.

At page 5 of its opinion, the Second District has explicitly held that the presence of the accounting book in the jury book " . . . cannot be held to be harmless . . ." Absent an evidentiary predicate, this is a per se rule of reversal which directly and expressly conflicts with the rule in State v. Hamilton, 574 So.2d 124 (Fla. 1991) and Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97 (Fla. 1991).

This court should take jurisdiction of this cause in order to further clarify under what conditions an evidentiary hearing must be held on the issue of juror misconduct. As noted in the opinion of the second district, the Pennells were the Plaintiffs below. Yet, they were not permitted an evidentiary hearing on the issue of whether a juror's use of a present value table to reduce a damage award to present value could in any way be prejudicial to the Defendant.

CONCLUSION

This Court should accept jurisdiction of this case in order to confirm the rule set forth in Hamilton and Maler that the mere presence of unauthorized materials in a jury room does not automatically require the grant of a new trial. Rather, an evidentiary hearing should be held wherein the party opposing a new trial can demonstrate that there is no reasonable possibility that the juror misconduct affected the verdict.

The Pennells respectfully request that this Honorable Court will grant their Petition to Invoke the Discretionary Jurisdiction of this Court and consider this case on the merits.

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