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IN THE
SUPREME COURT OF FLORIDA

LOURDES DE LA ROSA,

Petitioner,

-vs.- CASE NO. 83,369

MARCOS A ZEQUEIRA,

Respondent.
_____/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE THIRD DISTRICT

INITIAL BRIEF OF PETITIONER LOURDES DE LA ROSA

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STATEMENT OF THE CASE AND OF THE FACTS

This appeal concerns the standards to be applied in determining whether juror misconduct during voir dire is sufficiently egregious to warrant the granting of a new trial. In this case, the eventual foreperson of the jury concealed his involvement as a party to prior litigation in response to direct questions by counsel during voir dire. The trial court concluded that the juror's misconduct unfairly deprived Ms. de la Rosa's counsel of a meaningful opportunity to challenge that juror, and it accordingly granted a new trial.

The Court of Appeal for the Third District disagreed and reversed the trial court's order. Zequeira v. de la Rosa, 627 So.2d 531 (Fla. 3d DCA 1993). By Order dated September 7, 1994, this Court accepted jurisdiction to review the Court of Appeal's decision.

This is a medical malpractice action. R-I-2 to 6. Mrs. Lourdes de la Rosa filed suit as the personal representative of her deceased husband's estate on September 20, 1989. Id. Dr. Marcos Zequeira was one of the named Defendants. R-I-2. The case proceeded to trial on September 30, 1991, and on October 8th, the jury returned its verdict in favor of Defendants and against Mrs. de la Rosa on all of her claims. R-V-811. Final Judgment on the jury's verdict was entered on October 22, 1991. Id.

Mrs. de la Rosa filed a Motion for New Trial on October 18, 1991. R-IV-786 to 804. Her motion was predicated upon the misconduct of the jury foreperson during voir dire, and that is the only issue for decision in this appeal.

The jury was selected from two panels of prospective jurors. TR-142 to 143. The second panel included Mr. Louis Edmonson, the juror whose conduct formed the basis for the Circuit Court's Order granting Mrs. de la Rosa's request for a new trial. R-2471 to 2473.

Counsel for Mrs. de la Rosa began his questioning of the second jury panel with a number of questions directed to each of the potential jurors concerning that particular juror's address, employment, family background, prior jury experience and knowledge of the parties or any of their counsel. TR-149 to 176.

Counsel then turned to a number of general questions which were addressed to the entire venire. Among those questions were several inquiries that were intended to elicit a juror's prior personal experience with litigation:

> Q. Has anyone on the panel themselves been involved in a lawsuit and let me ask it where you have brought the lawsuit, either you, a very close family member or a very close personal friend, whether its been for personal injury, a commercial dispute where you have been involved in litigation?
>
> Has anyone on this panel had such an experience before?

TR-176 to 177.

In response to this question, Juror Moore described a workers compensation claim that he had filed to recover for an injury to his hand. TR-177. He expressed satisfaction with the outcome of that dispute. Id.

Counsel again inquired: "Anyone else that has been involved in a lawsuit?" TR-177 to 178. Juror Smith replied that she had once been the plaintiff in a personal injury action arising from an automobile accident and that the case had been resolved to her satisfaction. TR-178.

Juror Weber spoke up to note that he had long ago been named as a party to a variety of lawsuits in his capacity as the manager of a condominium. "[I]t didn't really make a difference to me, per se, it wasn't me being on trial or anything like that or me having any personal injury or personal loss. I just represented the condominium." TR-178. He expressed confidence that his litigation experience would not influence his ability to serve as a juror in Mrs. de la Rosa's case. TR-179.

Counsel again inquired: "Anyone else on the first row?" TR-179. Juror Torres responded, "It was a lawsuit against my company. Somebody hit one of the trucks, but it was resolved through the insurance company." Id.

Counsel for Mrs. de la Rosa inquired of the panel one more time, this time reversing the thrust of his question:

Q. Anyone else?

> Okay. Has anyone, and I think Mr. Torres you have mentioned it to me, but has anyone been a defendant? Now I'm just going to reverse the question. Before the question was whether you have brought the suit as the plaintiff.
>
> Has anyone been a defendant in a case, yourself, a very close family member or a very close friend? No one has been a defendant?

TR-179.

No one on the jury panel responded. Mr. Edmonson, in particular, remained silent throughout counsel's entire colloquy with the jury panel.

Mr. Edmonson's silence in the face of counsel's questioning served to conceal the fact that he had actually had extensive prior involvement in litigation, much of it as a defendant. Counsel for Mrs. de la Rosa conducted a search of the public records after the trial was over, and that search revealed that Mr. Edmonson had been a party to at least seven prior lawsuits. R-IV-787 to 788.[1]

Usually, Mr. Edmonson was the defendant. On October 10, 1990, for example, a Final Default Judgment was entered against Mr. Edmonson in the case of Household Finance Corporation III v. Louis Edmonson, Case No. 90-16117 CC 05 (Fla. County Ct.). R-IV-795. The amount of the Judgment was $4,038.88. Id.

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[1]Several of the available court documents listed an address for "Louis Edmonson" in El Portel. Juror Edmonson testified that "I live in El Portel, which is just south of Miami Shores." TR-150.

On February 2, 1990, a Final Default Judgment was entered against Mr. Edmonson in the amount of $8,977.48. R-IV-796. The case was Eastern Financial Federal Credit Union v. Edmonson, Case No. 89-49696 (CA 08)(Fla. Cir. Ct.). Id. On July 17, 1991, Eastern Financial Federal Credit Union obtained a Final Judgment of Garnishment against Maroone Chevrolet, Inc., Mr. Edmonson's employer. R-IV-797.[2]

Mayor's Jewelers, Inc. sued Mr. Edmonson in 1989. R-IV-799. Mayor's Jewelers, Inc. v. Louis Edmonson, Case No. 89-14894-SP-28 (Fla. County Ct.). The case was apparently dismissed for lack of prosecution one year later. Id.

Gars, Dixon & Shapiro, P.A. recovered a Judgment against Louis Edmonson for $616.77 on March 13, 1989. R-IV-800. That Judgment was satisfied on March 31, 1989. R-IV-801. The Gars, Dixon & Shapiro cause of action apparently grew out of its representation of Mr. Edmonson in a divorce proceeding in which Mr. Edmonson was named as the respondent. R-IV-802. The dissolution action itself was dismissed for lack of prosecution in 1988. Id.

Finally, there were two additional cases in which a Louis Edmonson was named, but the pertinent court records were unavailable. One appears to have been a breach of contract action. Ford Motor Credit Company v. Louis Edmonson, Case No. 79-904122-SP-05 (Fla. County Ct.). R-IV-788. The second was a personal injury

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[2]During voir dire examination, Mr. Edmonson confirmed that he worked as a business manager at Maroone Chevrolet (mistakenly designated in the trial transcript as "Marina Chevrolet"). TR-150.

auto negligence action in which Mr. Edmonson was the plaintiff. Louis Edmonson v. Saturnery Martelo, Case No. 78-11104 (CA 01)(Fla. Cir. Ct.). Id.

If Mr. Edmonson had spoken up and revealed his litigation history during voir dire examination, he would have been excluded from the jury: "if, in response to the questions I posed on voir dire examination, Louis Edmonson had truthfully disclosed his involvement in numerous lawsuits, including the at least six times that he had been a named defendant in litigation, I would have absolutely, unequivocally, and without doubt exercised a peremptory challenge and struck Louis Edmonson from the jury." Affidavit of Herman J. Russomanno ¶ 6 (Oct. 18, 1991). R-V-808.

Having discovered Mr. Edmonson's long--and generally unfortunate--history of involvement in litigation, Mrs. de la Rosa moved for a new trial on October 18, 1991. R-IV-786. That motion was granted by the trial court on November 8, 1991. R-XV-2471.

In its Order, the trial court made the following observations:

> This is a complex medical malpractice case, the trial of which lasted 6 days. The issues were very, very close and could have been decided for either Plaintiff or Defendants. The attorneys handling the trial were among the very best of our trial bar.
>
> It was vital to everyone's case to have a completely fair and impartial jury.
>
> . . . .

> Mr. Edmonson failed to disclose that he was a named Defendant in at least 6 lawsuits.
>
> . . . .
>
> Defendants argue that this concealment is not material. It is hard for this Court to see what could be more relevant than a potential juror hiding his involvement in litigation.
>
> Defendants then argue Plaintiff has failed to establish concealment because we cannot be sure Mr. Edmonson heard the question. This is ludicrous. The courtroom is quite small and Plaintiff's attorney was standing no more than 5 feet away from the jury panel.
>
> . . . .
>
> The juror [Edmonson] was well aware of these suits. In one, he was sued for $7,687.00 and after judgment entered into negotiations for payment of the judgment and had a Final Judgment in garnishment entered against him only 2 months prior to jury selection.
>
> In another case, he appeared at a deposition in aid of execution only 6 months before jury selection.
>
> These were material facts concealed by the potential juror. This warrants the granting of a new trial.

R-XV-2471 to 2473.

Pursuant to Florida Statutes Section 59.04 (1993), Defendants appealed the trial court's Order to the Court of Appeal for the Third District on December 3rd and December 5th, 1991.[3] R-V-910, 914.

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[3]Dr. Zequeira is the only Defendant remaining in this case. The other Defendant, Hialeah Hospital, settled during the pendency of the initial appeal.

On November 9, 1993, the Court of Appeal rendered its decision. With one dissent, it reversed the trial court and remanded the case for entry of judgment on the jury's verdict. Zequeira v. de la Rosa, 627 So.2d 531 (Fla. 3d DCA 1993)(R-XV-2498). Rehearing and rehearing en banc were denied by the Court of Appeal on January 5, 1994. R-XV-2507.

Mrs. de la Rosa filed a timely Notice to Invoke Discretionary Jurisdiction on February 4, 1994. This Court accepted jurisdiction on September 7, 1994.

SUMMARY OF ARGUMENT

The standard for granting a new trial based upon juror concealment during voir dire is well established. A new trial is required if a juror has made a (1) material (2) concealment of some fact and (3) the failure to discover the concealment is not due to lack of diligence on the part of counsel.

All of those requirements were fully met in this case. It is undisputed that Juror Edmonson affirmatively concealed his past history of involvement in litigation. Mr. Edmonson's concealment must be considered material because it indicated potential bias and destroyed counsel's ability to make an informed judgment as to the composition of the jury. If counsel had known of Mr. Edmonson's background, he would have had him stricken from the jury. Finally, counsel diligently inquired of the entire jury panel concerning each prospective juror's litigation history, and he immediately brought

Mr. Edmonson's deception to the attention of the trial court as soon as it was discovered.

Under the circumstances, the law in Florida is clear that Mrs. de la Rosa suffered irretrievable prejudice and that the decision of the trial court to grant her a new trial was absolutely correct. In reversing the trial court's Order, the Court of Appeal improperly imposed a requirement of similarity between a juror's past litigation experience and the issues presented in the case under review. Such a requirement is not only contrary to precedent, but effectively reduces the meaning of "materiality" almost to the vanishing point. The concealment of material facts by a prospective juror subverts the very process of jury selection and impairs a litigant's right to a fair trial. It was that right which the trial court meant to vindicate in this case.

The decision of the Court of Appeal in this case is also troublesome in its supposition that questions on voir dire that are addressed to the entire jury panel may not be heard or understood by individual jurors and may not, therefore, form the basis for a subsequent challenge. If the Court of Appeal is correct in that assertion, then the use of collective questioning in voir dire is rendered useless, and courts and counsel must henceforth depend upon individual, juror-by-juror questions and answers.

In reversing the trial court, the Court of Appeal simply substituted its own judgment in this instance for that of the trial judge. In doing so, the Court of Appeal ignored the well-settled

principle that an order granting a new trial may only be disturbed upon a showing of a clear abuse of discretion. Since the trial court properly exercised its discretion in this case, the decision of the Court of Appeal should be reversed with directions to remand this case for a new trial.

ARGUMENT

I

Juror Edmonson's Concealment of His Litigation History Constituted the Type of Material Misconduct That Requires The Granting of a New Trial

As a general matter, "[w]hen material information is either falsely represented or concealed by a juror upon voir dire, the entire proceeding is tainted and the parties are deprived of a fair and impartial trial." Redondo v. Jessup, 426 So.2d 1146, 1147 (Fla. 3d DCA), review denied, 434 So.2d 887 (Fla. 1983).

The test for determining when a new trial should be granted in such a circumstance has been articulated in the following manner: "three requirements must be met in order to require a new trial in this situation: (1) a material (2) concealment of some fact by the juror upon his voir dire examination, and (3) the failure to discover this concealment must not be due to the want of diligence of the complaining party..." Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379, 380 (Fla. 2d DCA 1972)(emphases in original), cert. denied, 275 So.2d 253 (Fla. 1973); accord Schofield v. Carnival

Cruise Lines, Inc., 461 So.2d 152 (Fla. 3d DCA 1984)(adopting an identical test), review denied, 472 So.2d 1182 (Fla. 1985).

Skiles illustrates the application of this principle. In that case, a member of the jury failed to disclose his involvement in prior litigation and the fact that he had been represented at the time by a partner of the plaintiff's attorney. The Court of Appeal rejected a requirement that actual prejudice on the part of the juror be shown. Instead, all that was necessary was that the juror had concealed his participation in a former lawsuit by failing to respond in a forthright manner to counsel's voir dire examination. "[T]here is a 'miscarriage of justice' when a party is precluded from the opportunity of having a juror excused for cause or of excusing such juror peremptorily by reason of a material concealment by the juror..." Skiles, 267 So.2d at 382.

What is particularly significant about the decision in Skiles is its implicit recognition that the fact of concealment generally raises a presumption of both materiality as to the matter concealed and prejudicial bias on the part of the juror concerned.

Such conclusions are justified because false statements by a juror during voir dire, or the concealment of material facts by a juror, strike at the heart of the adversary process itself. Such misconduct necessarily degrades counsel's ability to make reasoned and informed judgments about the composition of the trial jury and, thus, always subverts the dispassionate administration of justice.

The process itself suffers from the lack of candor; thus, a presumption of harm is almost always required.

"When the right to make an intelligent judgment as to whether a particular juror should be challenged is lost or unduly impaired, the right to a fair trial by an impartial jury is destroyed. When this occurs, the verdict should be set aside and a new trial granted." Ellison v. Cribb, 271 So.2d 174, 177 (Fla. 1st DCA 1972) (footnote omitted), cert. denied, 272 So.2d 160 (Fla. 1973); accord Mitchell v. State, 458 So.2d 819, 821 (Fla. 1st DCA 1984) ("The right of peremptory challenge implies the right to make an intelligent judgment as to whether a juror should be excused. Counsel have the right to truthful information in making that judgment.") (emphasis in original); Smiley v. McCallister, 451 So.2d 977, 978 (Fla. 4th DCA 1984) ("Concealment of a material fact relevant to the issues in the case by a juror during voir dire examination is prejudicial to the interrogating parties and impairs a party's right to challenge jurors.").

It should therefore come as no surprise that juror concealment during voir dire is almost universally recognized as virtually automatic grounds for a new trial. In Ellison, for example, the eventual foreperson of the jury failed to disclose, in response to an inquiry, that his daughter had once been involved in an automobile accident. The Court of Appeal held that a new trial was required: "failure of a juror to honestly answer material questions propounded to him on voir dire examination constitutes bad

faith requiring his disqualification from service in the case." Ellison, 271 So.2d at 177 (footnote omitted).

Smiley reached a similar result. A member of the jury failed to disclose that her son-in-law had been involved in an accident similar to the accident which formed the subject matter of the trial. Holding that "[t]he verdict could well have been fatally infected by such omission," the Court of Appeal reversed and remanded the case to the trial court. Smiley, 451 So.2d at 978.

Industrial Fire and Casualty Insurance Company v. Wilson, 537 So.2d 1100 (Fla. 3d DCA 1989), involved yet another instance of juror concealment. Counsel for the insurance company asked the entire jury panel if any of the prospective jurors had ever had any relationship with his client. No one responded. After the jury was discharged, however, it was learned that the foreperson had been insured by the same company and had once submitted a claim which the company had denied. That was enough for the Court of Appeal to remand the case for a new trial. The "concealment of material facts in response to questions posed...on voir dire deprived the defendants of a fair trial." Industrial Fire, 537 So.2d at 1103.

Finally, Perl v. K-Mart Corporation, 493 So.2d 542 (Fla. 3d DCA 1986), is virtually indistinguishable from this case. The pertinent facts are set out in the opinion itself:

> During the course of voir dire, counsel for Perl asked all the jurors, including Frank Bower [the eventual jury foreman], whether any of them had ever been a party to a lawsuit either as a plaintiff or as a defendant. Bower

> responded that, in his capacity as a partial owner of an automobile company, his company had been sued once for improperly repairing a car. Bower did not recall any other involvement in litigation. After the trial concluded, counsel for Perl discovered that Bower and his automobile company had been involved in litigation at least twenty times and that he personally had been a plaintiff in a lawsuit brought by his condominium association against a developer.

Perl, 493 So.2d at 542.

Needless to say, the Court of Appeal determined that "Bower's denial of personal involvement in any lawsuits and his extremely limited response with respect to lawsuits against his company involving personal injuries amount to a concealment of material facts." Id. The Court reversed the judgment entered by the trial court and remanded for a new trial.

There is no reason why the outcome of this case should be any different. Juror Edmonson concealed his prior involvement in litigation. Edmonson's past history as a defendant in numerous lawsuits must be considered material because it undoubtedly affected his perspective on the American legal system and his ability to render dispassionate service as a juror in this case. At a minimum, Edmonson's concealment destroyed counsel's ability to inquire further about Edmonson's personal experiences as a litigant and the impact those experiences might have on his capacity to be fair and impartial. The very fact that Edmonson chose not to disclose his prior, unhappy involvement with the courts tends to reinforce the material nature of the information withheld; Edmonson, after all,

must have believed that a forthright answer would be embarrassing to him or would jeopardize his eventual selection as a juror in Mrs. de la Rosa's case. The revelation of Edmonson's misconduct was made promptly (within a matter of days after the trial had concluded) and was not delayed through any want of diligence on the part of Mrs. de la Rosa's counsel.

Nonetheless, the Court of Appeal in this case disagreed. It held that Juror Edmonson's litigation history was not material because none of the cases to which he had been a party "had anything to do with the issues in the trial below." Zequeira v. de la Rosa, 627 So.2d 531, 532 (Fla. 3d DCA 1993).

The rule thus fashioned by the Court of Appeal is brand new. Contrary to well established precedent, it imports into the law a requirement of similarity between a juror's own experience with the courts and the precise issues raised in the pending litigation. Hence, even the willful and intentional concealment of involvement in litigation will not be enough to support a new trial unless the prior litigation involves similar legal issues. Mr. Edmonson's lack of candor will always be immune from attack unless and until he is personally involved in a medical malpractice suit.

Such a parsing of the governing law makes no sense. In this instance, Mr. Edmonson had been sued by his creditors and, in at least one case, had had his salary garnished. It is certainly not unreasonable to suppose that Mr. Edmonson had developed a strong

antipathy toward lawyers as a result and, perhaps, had become cynical or disillusioned about the legal process itself.

No one can know for sure. Mr. Edmonson's feelings about the judicial system and his own experience with it will never be known because Mr. Edmonson himself made responsible inquiry impossible. By refusing to respond to counsel's questioning, Mr. Edmonson foreclosed further inquiry into areas which might well have elicited strong opinions and prejudices. Mr. Edmonson's concealment of relevant facts short-circuited the process; it aborted any investigation by counsel into further details.

As a consequence, no other reported decision has ever imposed a requirement of similarity in the circumstances of this case. To the contrary, Perl explicitly stands for the proposition that similarity is not required: the juror's lack of candor in that case (a slip and fall action) was deemed material even though his prior lawsuits were all either commercial in nature or actions by a condominium association. It cannot be presumed that a juror's mind will be tainted only by parallel experience; the very fact of concealment raises a presumption that something is badly amiss.

The Court of Appeal in this case fleetingly raised another possibility: "it is not known whether Edmonson even heard the questions, much less understood them..." Zequeira, 627 So.2d at 532.[4]

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[4]In its Order granting a new trial, the trial court noted that "[t]he courtroom is quite small and Plaintiff's attorney was standing no more than 5 feet away from the jury panel." R-XV-2472.

This is an extremely dangerous proposition. The integrity of all jury verdicts depends upon the assumption that the jury hears all of the evidence put before it. If it were otherwise, every judgment entered on a jury verdict would be vulnerable to challenge on the grounds that the evidence was legally insufficient because the jury might not have heard or understood the trial testimony. Unless it can be shown that a particular juror does not comprehend the English language or is deaf, unconscious or dead, the system depends upon the presumption that evidence admitted is evidence which the jury both perceives and understands. See, e.g., Mobil Chemical Company v. Hawkins, 440 So.2d 378, 381 (Fla. 1st DCA 1983) ("It is abundantly clear from the transcript of the voir dire proceedings that no person sufficiently perceptive and alert to be qualified to act as a juror could have sat through the voir dire without realizing that it was his or her duty to make known to the parties and the court any relationship with any of the named parties, witnesses, or attorneys."), review denied, 449 So.2d 264 (Fla. 1984).

Otherwise, as the dissent in this case points out, "[t]he majority's holding that a juror's failure to answer counsel's question does not constitute concealment precludes collective questioning of jurors and will compel attorneys to obtain individual oral or written responses in order to fulfill the concealment prong..." Zequeira, 627 So.2d at 533-34 (Baskin, J., dissenting). If a juror cannot be presumed to have heard each of the questions

addressed to the entire jury panel, then counsel can ill afford the risk of engaging in collective questioning at all. All voir dire will have to be conducted on an individual, juror-by-juror basis.

Finally, the Court of Appeal in this case questioned, but did not decide, whether Mrs. de la Rosa's counsel had been sufficiently diligent in uncovering Mr. Edmonson's deception. Zequeira, 627 So.2d at 533 n.6. An examination of the governing cases, however, clearly reveals that the diligence required by counsel is diligence in the initial questioning, not diligence in uncovering the truth. Thus, a new trial may not be granted on the strength of a question never asked. Or on the basis of an ambiguous question, susceptible to more than one response. Or, in the proper circumstances, after counsel has failed to make reasonable further inquiry upon being apprised of pertinent preliminary facts.

Counsel must be diligent in attempting to elicit a relevant answer even though that answer may be false or concealed. "[T]he plaintiffs' counsel made careful and diligent inquiry of each of the jurors regarding any prior experience in litigation, whether as a party or otherwise." Bernal v. Lipp, 580 So.2d 315, 317 (Fla. 3d DCA 1991). "[T]he questioning by Industrial Fire's trial counsel... earnestly attempted to discover the very type of information that juror Perets chose to conceal." Industrial Fire, 537 So.2d at 1103.

In this case, Mrs. de la Rosa's counsel tenaciously pursued his questioning on the subject of prior involvement in litigation. "Has anyone on this panel had such an experience?" TR-177. "Anyone

else that has been involved in a lawsuit?" TR-177 to 178. "Anyone else on the first row?" TR-179. "Anyone else?...Has anyone been a defendant in a case..." TR-179. Clearly, "counsel's efforts [were] sufficient. The prospective jurors were questioned in different ways regarding involvement in prior lawsuits." Zequeira, 627 So.2d at 534 (Baskin, J., dissenting).

Even if the requirement of due diligence were interpreted to include the investigation and disclosure of the actual juror misconduct, that condition was more than satisfied in this instance. Mrs. de la Rosa's Motion for New Trial, attaching the relevant documents from Mr. Edmonson's prior lawsuits, was served only ten days following the return of the jury's verdict. There is no requirement in the law that the truth of a juror's responses be investigated in the midst of trial itself or even before the jury is discharged. See, e.g., Bernal and Industrial Fire. The imposition of such a burden would unreasonably encumber the conduct of the trial and could not even be met in most cases where trial might not last more than a single day.

This case presents a particularly egregious example of juror misconduct which unquestionably affected the final result. As the trial court noted, "[t]he issues were very, very close and could have been decided for either Plaintiff or Defendants." R-XV-2471.

The three-part test of juror misconduct first formulated in Skiles was more than met in this case. Mr. Edmonson's past involvement with the courts and as a litigant was highly material

to his ability to serve fairly and impartially on the jury in this action. Mr. Edmonson's silence in response to the specific and precise questions of Mrs. de la Rosa's counsel clearly constituted an act of concealment. The failure to discover Mr. Edmonson's misconduct at the time was not due to any want of diligence on the part of counsel.

The decision of the Court of Appeal in this case expressly and directly conflicts with Mobil Chemical Company v. Hawkins, 440 So.2d 378 (Fla. 1st DCA 1988), Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984), and Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379 (Fla. 2d DCA 1972).

As such, it should be reversed with directions to remand this case to the Circuit Court for a new trial.

II

An Order Granting a New Trial May Not be Disturbed on Appeal in the Absence of a Clear Abuse of Discretion Which is Apparent from the Record

If there is any doubt as to the propriety of the Court of Appeal's decision in this case, then that decision must be reversed. The Court of Appeal obviously and impermissibly applied the wrong standard of review.

In this instance, the Court of Appeal merely disagreed with the trial court's rulings as to the materiality of Mr. Edmonson's deceptions and as to whether or not an act of concealment had taken

place. The Court of Appeal simply substituted its own judgment for that of the trial court.

This it may not do. "A trial judge is given broad discretion in granting new trials, and, when there is a reasonable basis to exercise that discretion, an appellate court should not disturb it." Bankers Multiple Line Insurance Company v. Farish, 464 So.2d 530, 533 (Fla. 1985); Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981)("We have stated and restated the appropriate standard for district courts on review of a trial court's motion [sic] granting a new trial....If reasonable men could differ as to the propriety of the action taken by the trial court, then there is no abuse of discretion."); Castlewood International Corporation v. LaFleur, 322 So.2d 520, 522 n.2 (Fla. 1975)("a stronger showing is required to upset an order granting a trial than is required for an order denying a new trial."); Ward v. Hopkins, 81 So.2d 493, 494 (Fla. 1955)("the granting or denying of a motion for new trial rests in the sound judicial discretion of the trial Judge and...his order is entitled to a presumption of correctness.").

The decision of the trial court in this case to grant a new trial to Mrs. de la Rosa was eminently correct, both on the law and with regard to the specific facts that were presented to the trial judge. In reversing the Circuit Court's decision, the Court of Appeal ignored the governing standard of review and reached out to substitute its own opinion in contravention of the established principles of appellate review.

CONCLUSION

Petitioner Lourdes de la Rosa respectfully submits that the judgment and decision of the Court of Appeal for the Third District should be reversed with directions to remand this case to the Circuit Court for a new trial.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished by hand delivery to the following on this 25th day of October, 1994:

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