IN THE SUPREME COURT OF FLORIDA

MARCOS A. ZEQUEIRA, JR., M.D., Appellant,	:	CASE NO. 83369
vs.	:	
LOURDES DE LA ROSA, as Personal Representative of the Estate of MANUEL DE LA ROSA, deceased	:	
Appellee,	:	

DISCRETIONARY PROCEEDING TO REVIEW A DECISION OF THE COURT OF APPEAL FOR THE THIRD DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

FLOYD PEARSON RICHMAN GREER WEIL
BRUMBAUGH & RUSSOMANNO, P.A.
Courthouse Center, Suite 2600
175 N.W. First Avenue
Miami, Florida 33128
Telephone (305) 373-4000

HERMAN J. RUSSOMANNO, ESQ.
PAUL M. BUNGE, ESQ.
MICHELE A. MARACINI, ESQ.
Counsel for Lourdes de la Rosa

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STATEMENT OF THE CASE AND OF THE FACTS

This is a medical malpractice/wrongful death action brought by Lourdes de la Rosa, as personal representative of her deceased husband's estate against Marcos A. Zequeira, Jr., the doctor who performed surgery on Mr. de la Rosa, and Hialeah Hospital. Following a verdict in favor of the Defendants, the Circuit Court granted a new trial after it was discovered that the foreperson of the jury had failed to disclose his involvement as a party to at least seven prior lawsuits. During voir dire, all of the jurors were questioned, as a panel, about their participation in prior lawsuits. The eventual foreperson failed to respond to any of the questions posed.

On appeal, the Third District Court of Appeal reversed the trial court's Order granting a new trial and remanded with instructions to enter judgment on the jury verdict in favor of the defendant[1] surgeon. Appendix 1. In doing so, the Court of Appeal held that (1) the specific juror misconduct presented was not material to the outcome of the jury's deliberations and (2) concealment by a juror during voir dire cannot be inferred from a failure to respond to a question posed to the entire jury panel. Appendix 5.

Mrs. de la Rosa moved for rehearing, rehearing en banc and for certification of a question of great public importance. All of the above motions were denied by the Court of Appeal on January 5, 1994. Appendix 10.

Mrs. de la Rosa filed a timely Notice to Invoke the Discretionary Jurisdiction of this Court on February 4, 1994.

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[1] The hospital settled with the Plaintiff in the early stages of the appeal.

SUMMARY OF ARGUMENT

A juror's concealment during voir dire of prior extensive involvement in lawsuits constitutes juror misconduct and requires a new trial.

The trial court properly granted Plaintiff's motion for new trial on the basis of juror misconduct where, during voir dire in response to numerous specific questions concerning prior involvement in litigation as either plaintiff or defendant, the jury foreperson failed to disclose his prior extensive involvement in no less than seven lawsuits including one in which he appeared at a deposition in aid of execution just six months before jury selection in the instant case and another in which, after judgment was entered against him, he entered into negotiations for payment of the judgment and had a final judgment in garnishment entered against him just two months before jury selection herein.

In reversing the trial court's order, the Court of Appeal expressly decided that a juror's concealment of his litigation history is not material where the prior lawsuits have issues different from the subject litigation. The Appellate Court also determined that intentional concealment by a juror can never be inferred from a failure to respond to a question addressed to the entire jury panel. The Court stated that it was improper for the trial court to grant a new trial without having first conducted a juror interview because it was unknown whether the juror even heard the questions, much less understood them. The decision by 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) in which the First District Court of Appeal held that the failure of a prospective juror to reveal information requested by a question posed on voir dire deprived the defendant of its right to intelligently participate in the selection of a jury thereby entitling the defendant to a new

trial. No juror interview was required. The Court premised its decision upon its belief 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 to the court the information being requested.

Since the decision in this case expressly and directly conflicts with *Mobil Chemical Company v. Hawkins,* 440 So.2d 378 (Fla. 1st DCA 1988) and with contrary decisions by the Second and Third District Court of Appeal, this Court should accept jurisdiction to resolve the existing conflict.

ARGUMENT

THE COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH *MOBIL CHEMICAL COMPANY V. HAWKINS,* 440 SO.2D 378 (FLA. 1ST DCA 1988) AND WITH CONTRARY DECISIONS BY THE SECOND AND THIRD DISTRICT COURT OF APPEAL.

The Court of Appeal in this case reversed the trial court's order granting a new trial to Plaintiff because it concluded that a juror's concealment of his litigation history is not material where the prior lawsuits do not involve essentially the same issues as the subject litigation. The appellate court also determined that intentional concealment by a juror can never be inferred from a failure to respond to a question addressed to the entire jury panel.

The reasoning of the court is apparent from the opinion itself. The Court stated that without a prior juror interview, it is unknown whether the juror even heard the questions, much less understood them to require disclosure of the information requested. As a consequence, the Court decided that the jury foreperson's failure to disclose his prior involvement in multiple lawsuits was not a material and actual concealment bearing upon the juror's ability to be fair and impartial.

The Court of Appeal's decision in this case implicitly mandates that a party seeking a new trial on grounds of juror misconduct must first request and obtain a juror interview pursuant to Florida Rule of Civil Procedure 1.431(h)[2] to determine the reason for the juror's failure to disclose the requested information. While Rule 1.431(h) provides a procedural mechanism to allow an interview of a juror suspected of juror misconduct, the rule is not a condition precedent to the granting of a new trial. Where it is demonstrated that a juror has failed to reveal material information sought during voir dire examination, it is appropriate to grant a new trial. See generally *Perl v. K-Mart*, 493 So.2d 542 (Fla. 3d DCA 1986).

In this case, during voir dire counsel for Mrs. de la Rosa asked the following questions of the jury panel:

> 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 fried, whether it's been for personal injury, a commercial dispute where you have been involved in litigation?
>
> Has anyone on this panel had such an experience before?
>
> * * *
>
> Anyone else?
>
> Okay. Has anyone . . . been a defendant? Now I'm just going to reverse the question. Before the question was

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[2] Fla.R.Civ.P. 1.431(h) provides in pertinent part as follows:

> **(h) Interview of a Juror.** A party who believes that grounds for legal challenge to a verdict exists may move for an order permitting an interview of a juror to determine whether the verdict is subject to the challenge. . . . After notice and hearing, the trial judge shall enter an order denying the motion or permitting the interview. If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview.

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?

In response to those questions, three members of the panel spoke up and recounted the details of their past involvement in litigation. Louis Edmonson, who was later to be elected as the jury's foreperson, remained silent.

After the jury had returned its verdict in favor of Defendants, a search of the Dade County court records revealed that Louis Edmonson had in fact been a party to at least seven lawsuits prior to his service as a juror in this case. Five of those cases were actions to collect upon debts in which Mr. Edmonson was the named defendant. One was a divorce proceeding in which Mr. Edmonson was named as the respondent. The remaining case was a personal injury lawsuit in which Mr. Edmonson was apparently the plaintiff. The most recent lawsuit was concluded by the entry of a Final Judgment against Mr. Edmonson just two months before the trial in this case began. In another case in which judgment was entered against Mr. Edmonson, he appeared at a deposition in aid of execution less than six months before jury selection herein.

The trial court granted Mrs. de la Rosa's motion for new trial finding that the juror failed to disclose material information during voir dire. The Court of Appeal reversed the trial court's order stating that

> because the motion was granted without a prior juror interview, it is not known whether Edmonson even heard the questions, much less understood them to require (if they really did) answers as to matters which were so foreign to the case being tried.

It is impossible to reconcile the Court of Appeal's decision in this case with *Mobil*

Chemical Company v. Hawkins, 440 So.2d 378 (Fla. 1st DCA 1988) and with similar decisions from the Second and Third District Court of Appeal. In *Hawkins* the First District unequivocally held that a prospective juror's failure to reveal information requested during voir dire deprived the defendant of its right to intelligently participate in the selection of a jury thereby entitling the defendant to a new trial.[3] No juror interview was requested in that case nor was one required by the court.

The decision in *Hawkins* is not unique. It follows from an unbroken chain of precedent dating back almost 55 years to the Florida Supreme Court's decision in *Seay v. State*, 139 Fla. 433, 190 So. 702 (1939) in which this Court held that the failure of a juror to honestly answer material questions propounded to him on voir dire examination constitutes bad faith requiring his disqualification from serving on the jury.

The Florida Supreme Court subsequently explained in *Loftin v. Wilson*, 67 So.2d 185, 192 (Fla. 1953) that

> [t]he examination of a juror on his voir dire has a twofold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law.
>
> * * *

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[3] In so ruling, the *Hawkins* court noted that during the voir dire process

> the court and the attorneys for both parties increasingly relied on the commendable (and, we believe, universally practiced) time saving technique of asking the new prospective jurors whether they had heard the questions asked previously, and whether their answers would differ from those given by the other prospective jurors.

440 So.2d at 380.

The decision of the Court of Appeal in the instant case inevitably will require that collective voir dire questioning not be used either by the trial court or by counsel.

> It is the duty of a juror to fully and truthfully answer questions on voir dire, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents ... or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct, is prejudicial to the party, for it impairs his rights to challenge.

Following the Supreme Court's pronouncements in *Seay* and *Loftin*, the Florida courts have protected the integrity of jury trials from omissions and concealments by prospective jurors which affect the jury selection process. To the extent there is any doubt as to the relevancy of a juror's motivation, if any, for his failure to fully and truthfully respond to questions posed on voir dire, Florida law resolves that doubt in favor of granting a new trial. There has never been any requirements that a party must demonstrate that the information was withheld intentionally.

Nonetheless, in the instant case, the Court of Appeal concluded that the trial court erred in granting a new trial stating that there was no affirmative showing in the record "that the juror deliberately concealed anything at all during voir dire...."

Florida law, however, does not require a showing of intent to conceal. On the contrary,

> [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. [T]he fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; ... when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law.

Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379, 380 (Fla. 2d DCA 1972), *cert. denied*, 275 So.2d 253 (Fla. 1973).

In *Skiles* the Second District Court of Appeal set forth a 3-prong test that establishes grounds for a new trial on the basis of juror misconduct.[4] In that case, the court stated that where there has been (1) a material (2) concealment of some fact by the juror upon his voir dire examination, and (3) the failure to discover this concealment is not due to the want of diligence of the complaining party, a new trial is required. 267 So.2d at 380. Accordingly, the court held that a prospective juror's concealment, during voir dire examination, of the fact that he had been a party to a lawsuit and had been a client of any attorney who was a partner of plaintiff's counsel constituted grounds for a new trial. No further requirement was imposed by the court to first determine the reason why the juror failed to disclose the requested information.

Following on the heels of *Skiles* and recognizing the rule long ago established by the Florida Supreme Court in *Seay, supra*, the First District Court of Appeal similarly ruled in *Ellison v. Cribb* that the 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. 267 So.2d 379, 380 (Fla. 2d DCA 1972), *cert. denied*, 275 So.2d 253 (Fla. 1973).

The *Seay, Skiles* and *Ellison* cases were cited with approval by the Third District Court of Appeal in *Minnis v. Jackson*, 267 So.2d 379, 380 (Fla. 2d DCA 1972), *cert.*

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[4] In a series of cases the Third District Court of Appeal has affirmed the 3-part test enunciated in *Skiles*. See *Schofield v. Carnival Cruise Lines, Inc.*, 461 So.2d 152 (Fla. 3d DCA), *rev. denied*, 472 So.2d 1182 (Fla. 1984); *Perl v. K-Mart* , 493 So.2d 542 (Fla. 3d DCA 1986); *Industrial Fire & Casualty Co., Inc. v. Wilson,* 537 So.2d 1100, 1103 (Fla. 3d DCA 1989); *Bernal v. Lipp.*, 580 So.2d 315 (Fla. 3d DCA 1991).

denied, 275 So.2d 253 (Fla. 1973). The *Minnis* court held that where the jury foreman denied during voir dire that any member of his family had been injured in an accident when, in fact, his daughter had been injured in a county bus accident a year before, a new trial was warranted. The court reiterated that

> the question is not whether an improperly established tribunal acted fairly, but whether a proper tribunal was established.

Minnis, 330 So.2d at 848. See also *Mitchell v. State*, 458 So.2d 819 (Fla. 1st DCA 1984)(trial counsel are entitled to truthful responses to questions propounded during jury selection process).

Finally, in a case strikingly similar to the instant case, the Third District Court of Appeal ruled in *Perl v. K-Mart*, 493 So.2d 542 (Fla. 3d DCA 1986) that a juror's concealment during voir dire of prior involvement in lawsuits required a new trial. There, just as here, during voir dire counsel for Perl asked all the jurors, including the eventual jury foreman, whether any of them had ever been a party to a lawsuit either as a plaintiff or defendant. Apart from stating that his company had been sued once for improperly repairing a car, the juror indicated he did not recall involvement in litigation. After the trial concluded, counsel for Perl discovered that the juror and his company had been involved in multiple lawsuits. Attempting to distinguish its earlier decision in *Perl* from the instant action, the Court of Appeal simply asserted that the information requested of Juror Edmonson was not material and that the record did not affirmatively show that he intentionally withheld anything. The court stated "the record does not show . . . that what he did not say was relevant to his ability to be fair and impartial in this case." The Court of Appeal's decision in the case at bar is totally inconsistent with its earlier ruling in *Perl* and completely ignores the well established law of Florida.

CONCLUSION

The decision of the Third District 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, 380 (Fla. 2d DCA 1972), *cert. denied*, 275 So.2d 253 (Fla. 1973) and cannot be reconciled with its own prior opinion in *Perl v. K-Mart* , 493 So.2d 542 (Fla. 3d DCA 1986).

Accordingly, Petitioner Lourdes de la Rosa respectfully submits that this Court should accept jurisdiction of this case and reverse the decision of the Third District Court of Appeal.

Respectfully submitted,

FLOYD PEARSON RICHMAN GREER WEIL BRUMBAUGH & RUSSOMANNO, P.A.
Attorneys for Lourdes de la Rosa
Courthouse Center, Suite 2600
175 N.W. First Avenue
Miami, Florida 33128
Telephone (305) 373-4000

By: _____
HERMAN J. RUSSOMANNO

By: _____
MICHELE A. MARACINI

Dated: February 14, 1994

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished by mail on this 14th day of February, 1994 to Phillip D. Parrish, Esq., STEPHENS LYNN KLEIN & MCNICHOLAS, P.A., 777 Brickell Avenue, Suite 500, Miami, Florida 33131.

By: _____
MICHELE A. MARACINI

APPENDIX

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

MARCOS A. ZEQUEIRA, M.D., **

Appellant, **

vs. ** CASE NO. 91-2909

LOURDES DE LA ROSA, as Personal Representative of the Estate of MANUEL DE LA ROSA, deceased, **

Appellee. **

Opinion filed November 9, 1993.

An Appeal from the Circuit Court for Dade County, Murray Goldman, Judge.

Stephens, Lynn, Klein & McNicholas, and Philip D. Parrish and Marlene S. Reiss, for appellant.

Floyd Pearson Richman Greer Weil Brumbaugh & Russomanno, and Herman J. Russomanno, and Michele A. Maracini, for appellee.

Before SCHWARTZ, C.J., and BASKIN, and GERSTEN, JJ.

SCHWARTZ, Chief Judge.

The defendant Dr. Zequeira won a jury verdict in his favor in a medical malpractice action. He now appeals from an order granting the plaintiff a new trial on the grounds of juror misconduct during voir dire examination. We reverse.

/

The order below was based on the fact that juror Edmonson, the foreman, had not responded to inquiries in voir dire about prior "lawsuits,"[1] although, as was revealed by the appellee's motion for a new trial, he had been a party in six cases, involving debt collections and the dissolution of his marriage.[2]

1

> 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 it's been for personal injury, a commercial dispute where you have been involved in litigation?
>
> Has anyone on this panel had such an experience before?
>
> * * *
>
> Anyone else?
>
> Okay. 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?

2 The cases were referred to as follows in the motion:

> 1. Household Finance Corporation III v. Louis Edmonson, Case No. 90-16117 CC 05 (copy of the Default Final Judgment dated October 16, 1990 attached hereto as Exhibit A).
>
> 2. Eastern Financial Federal Credit Union v. Audrey Edmonson and Louis Edmonson, Case No. 89-49696 (08)(copy of Default Final Judgment dated February 2, 1990 attached hereto as Exhibit B).
>
> 3. Mayor's Jewelers, Inc. v. Louis

But none of them had anything to do with the issues in the trial below. Moreover, because the motion was granted without a prior interview, it is not known whether Edmonson even heard the questions, much less understood them to require (if they really did) answers as to matters which were so foreign to the case being tried. Thus, in sharp contrast to such cases as Perl v. K-Mart Corp., 493 So. 2d 542 (Fla. 3d DCA 1986),[3] and Bernal v. Lipp, 580

Edmonson, Case No. 89-14394-SP-28(copy of Judgment of Dismissal dated August 20, 1990 attached hereto as Exhibit C).

4. Gars, Dixon & Shapiro, P.A. v. Louis Edmonson and Audrey Edmonson, Case No. 88-5374-SP-25-A (copy of Default Final Judgment dated March 13, 1989 attached hereto as Exhibit D).

5. Audrey Moss Edmonson v. Louis Edmonson, Case No. 86-47647-FC-01 (copy of Judgment of Dismissal dated January 21, 1988 attached hereto as Exhibit E).

6. Ford Motor Credit Co. v. Louis Edmonson, Case No. 79-904122-SP-05 (Due to the age of this case, the records have been destroyed by the Office of the County Clerk).

In addition, Edmonson had apparently been the plaintiff in a 1978 personal injury case.

3

During the course of voir dire, counsel for Perl asked all the jurors, including Frank Bower, whether any of them had ever been 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

So. 2d 315 (Fla. 3d DCA 1991),[4] the record does not show either that the juror deliberately concealed anything at all during voir

---

> and that he personally had been a plaintiff in a lawsuit brought by his condominium association against a developer.
>
> . . . 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.

Perl v. K-Mart Corp., 493 So. 2d at 542 [e.s.].

4

> Potential juror Alberto Parejo remained silent and did not indicate that he had been a defendant in any lawsuit. In addition, on the juror questionnaire which Parejo completed, he answered in the negative the question whether he or any member of his family ever had a claim for personal injury made against them. See Fla.R.Civ.P. Form 1.984.
>
> Juror Parejo was a member of the jury, which returned a defense verdict. Subsequent to verdict, plaintiffs learned that juror Parejo had previously been a defendant in a personal injury lawsuit. Plaintiffs moved for a new trial on the basis that the jury had been improperly constituted.
>
> A juror interview was ultimately conducted. See Bernal v. Lipp, 562 So. 2d 848, 849 (Fla. 3d DCA 1990). At that time it was ascertained that juror Parejo had indeed been a defendant in an automobile accident case approximately one year prior to the trial of the instant case.
>
> * * *
>
> For a plaintiff in a personal injury case, the failure of a juror to disclose that he had been a defendant in a personal injury

dire or, even more obviously, that what he did not say was relevant to his ability to be fair and impartial in this particular case. Hence, neither of the first two requirements--materiality and actual concealment--of the test stated in Schofield v. Carnival Cruise Lines, Inc., 461 So. 2d 152 (Fla. 3d DCA 1984), pet. for review denied, 472 So. 2d 1182 (Fla. 1985),[5] was satisfied. [6]

> case one year previously would be material. Smiley v. McCallister, 451 So. 2d 977, 978-79 (Fla. 4th DCA 1984).
>
> As to the second prong of the test, the information was concealed from counsel, as a result of which counsel lost "the right to make an intelligent judgment as to whether a juror should be challenged. . . ." Minnis v. Jackson, 330 So. 2d 847, 848 (Fla. 3d DCA 1976). Since the information was squarely asked for and was not provided, this branch of the test is satisfied. See Skiles v. Ryder Truck Lines, Inc., 267 So. 2d 379, 382 (Fla. 2d DCA 1972), cert. denied, 275 So. 2d 253 (Fla. 1973). Although the juror did not intend to mislead plaintiffs' counsel, the omission nonetheless prevented counsel from making an informed judgment--which would in all likelihood have resulted in a peremptory challenge.

Bernal v. Lipp, 580 So. 2d at 316-17 [e.s.].

5

> In Florida, 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.

The motion for new trial--upon which, with its supporting affidavits, the plaintiff solely relied below--was therefore insufficient as a matter of law and should have been denied outright. As in the strikingly similar case of Skopit v. Neisen, 616 So. 2d 505 (Fla. 3d DCA 1993),

> [t]he asserted juror misconduct, if true, was not material to this case, and, thus did not warrant a new trial. See Blaylock v. State, 537 So. 2d 1103 (Fla. 3d DCA 1988), review denied, 547 So. 2d 1209 (Fla. 1989).

Skopit, 616 So. 2d at 505.

For these reasons the order below is reversed and the cause remanded with directions to enter judgment for the defendant on the jury verdict.

Reversed.

GERSTEN, J., concurs.

> 2d 379, 380 (Fla. 2d DCA 1972)(emphasis in original), cert. denied, 275 So. 2d 253 (Fla. 1973).

Schofield v. Carnival Cruise Lines, Inc., 461 So. 2d at 154.

[6] There is also considerable doubt about the third condition. The information about Mr. Edmonson was compiled from a computer search of the public records obviously conducted by plaintiff's counsel only after the jury had found against him. This set of circumstances not only invites the question of why the investigation was not "diligently" conducted previously but, more significantly, presents the disquieting practice of exposing jurors, who have done nothing more than honestly perform their civic duty, to the invasion of their private affairs because they have had the temerity to find against a particular litigant.

BASKIN, Judge (dissenting).

I am unable to agree with the majority's conclusion that the trial court abused its broad discretion in granting the motion for new trial. Instead, I would hold that the three-part test enunciated in Bernal v. Lipp, 580 So. 2d 315 (Fla. 3d DCA 1991) was satisfied and would affirm the trial court's decision.

Here, as in Bernal, the juror's involvement in six prior lawsuits as both defendant and plaintiff is material. He was a defendant in five prior lawsuits brought by creditors; his involvement may well have affected his point of view in this action. Moreover, in view of the juror's involvement in so many lawsuits, it is difficult to believe he simply did not think the questions posed by counsel applied to him. Bernal should not be viewed as distinguishable from this case on the ground that this juror's involvement was not in a personal injury action:[1] A person involved in prior litigation may sympathize with similarly situated litigants or develop a bias against legal proceedings in general. In these circumstances, counsel must be permitted to make an informed judgment as to the prospective juror's impartiality and suitability for jury service.

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[1] The fact that the juror had also been a plaintiff in a personal injury action supports the trial court's order. Plaintiff's counsel will probably follow up such disclosure with questions concerning the juror's satisfaction with the outcome of his case.

The concealment prong of the test was also met in this case: the juror failed to respond truthfully to counsel's questions concerning his litigation participation. See Industrial Fire & Casualty Ins. Co. v. Wilson, 537 So. 2d 1100 (Fla. 3d DCA 1989). As the trial court stated in its order, "[t]he courtroom is quite small and Plaintiff's attorney was standing no more than 5 feet away from the jury panel." There were several questions regarding involvement in prior lawsuits including whether the jurors were involved in "a commercial dispute where you have been involved as a litigant." There is no record basis supporting a conclusion that the juror did not listen to or hear any of counsel's questions.[2] Assuming, arguendo, that the juror had no intention of misleading counsel, "the omission nonetheless prevented counsel from making an informed judgment--which would in all likelihood have resulted in a peremptory challenge." Bernal, 580 So. 2d at 316-17. The 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 of the Bernal test.

As for the due diligence branch of the test, I find counsel's efforts sufficient. The prospective jurors were questioned in different ways regarding involvement in prior lawsuits. The majority's holding would require counsel to question each juror individually and obtain a response. In

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[2] The parties do not dispute the juror's involvement in the lawsuits. A juror interview is not a prerequisite to an order granting a new trial. E.g. Wilson, 537 So. 2d at 1100.

addition, the majority mandates pre-verdict discovery of juror concealment even though Bernal does not require counsel to discover the concealed facts prior to the return of a verdict. Bernal, 580 So. 2d at 316 ("Subsequent to verdict, plaintiffs learned that juror Paejol had previously been a defendant in a personal injury lawsuit.")(e.s.); Wilson, 537 So. 2d at 1102 ("Industrial Fire learned after the trial that juror Norbert Perets (who was the jury foreperson) had been insured by Industrial Fire . . . .")(e.s.). I see no reason to extend Bernal's due diligence requirements and would not impose on counsel the onerous burden of investigating the venire during the trial.

Finally, I disagree with the majority's suggestion that counsel's investigation concerning information given during voir dire is a "disquieting practice," slip op. at 6 n.6, where, as here, a juror fails to reveal lawsuit participation. "It is the duty of a juror to fully and truthfully answer questions on voir dire, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause." Loftin v. Wilson, 67 So. 2d 185, 192 (Fla. 1953)(citations omitted). The juror in question was not "honestly perform[ing his] civic duty . . .," slip op. at 6 n.6; a search of the public records is by definition not an "invasion of [a juror's] private affairs," id; and the "disquieting" facet of such practice is the juror's failure to disclose the requested information, not counsel's efforts to seek the truth.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

JANUARY 5, 1994

MARCOS A. ZEQUEIRA, M.D.,	**	CASE NO. 91-02909
Appellant(s),	**	
vs.	**	
LOURDES DE LA ROSA, etc.,	**	LOWER TRIBUNAL NO. 89-42410
Appellee(s).	**	

Upon consideration, appellee's motion for rehearing and certification is hereby denied. Schwartz, C.J., and Nesbitt, J., concur. Baskin, J., dissents.

Appellee's motion for rehearing en banc is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of Appeal, Third District

By: _____
Deputy Clerk

cc: Philip D. Parrish
/NB

Herman J. Russomanno

would have the classical belt bruises, but that would be the extent of it." (Tr. 702).

[10] While the foregoing testimony arguably tends to prove that had Rivera worn a seat belt, she would not have been injured by the belt, it simply does not tend to prove that had Rivera worn a seat belt, she would not have been injured in the accident. Since Honda refers us to no other proof on the issue, we must conclude that the record contains no competent evidence that Rivera's failure to wear a seat belt bore a causal relation to her injuries and, consequently, that the jury's finding that Rivera was ten per cent responsible for her injuries because of that failure is without evidentiary support.

Accordingly, insofar as the order of the trial court granted a new trial on damages, it is reversed with directions to the trial court to enter judgment for Rivera in the amount of three million dollars, with interest thereon from the date of the verdict rendered in favor of the appellee. *See Mabrey v. Carnival Cruise Lines, Inc.*, 438 So.2d 937 (Fla. 3d DCA 1983). That part of the order denying a new trial on liability is affirmed.

Affirmed in part; reversed in part.

MOBIL CHEMICAL COMPANY, A DIVISION OF MOBIL CORPORATION, Appellant,

v.

Carl R. HAWKINS, Appellee.

No. AQ-165.

District Court of Appeal of Florida, First District.

Sept. 14, 1983.

Rehearing Denied Nov. 3, 1983.

Action was brought against insecticide manufacturer for breach of warranty. The Circuit Court, Union County, Chester B. Chance, J., entered judgment against manufacturer, and manufacturer appealed. The District Court of Appeal, Thompson, J., held that: (1) failure of prospective juror to reveal her relationship to plaintiff's wife and to his former attorney deprived manufacturer of its right to intelligently participate in selection of jury, entitling manufacturer to new trial, and (2) plaintiff was not entitled to award of punitive damages where he did not plead and prove that manufacturer committed independent tort against him.

Reversed and remanded.

1. Jury ⇐110(6)

Failure of manufacturer of insecticide in action for breach of warranties to specifically ask prospective juror on her voir dire about any relationship she might have with plaintiff or his family did not constitute waiver of manufacturer's right to challenge juror posttrial where it was abundantly clear from transcript of voir dire proceedings that no person sufficiently perceptive and alert to be qualified to act as juror could have sat through voir dire without realizing that it was his or her duty to make known to parties and court any relationship with any of the named parties, witnesses, or attorneys.

2. New Trial ⇐20

Failure of prospective juror to disclose her relationship to plaintiff's wife and her association with plaintiff's former attorney deprived defendant of its right to intelligently participate in selection of jury, entitling defendant to new trial.

3. Damages ⇐89(2)

Punitive damages are not awardable for breach of contract unless conduct constituting breach of contract is accompanied by wrongful conduct which amounts to distinguishable and independent tort.

4. Sales ⇐442(1)

Plaintiff was not entitled to award of punitive damages in action against insecti-

cide manufacturer for breach of warranty where plaintiff did not plead and prove independent tort against manufacturer in that representations which allegedly created warranty were precisely same representations as those which plaintiff chose to characterize as tortious.

On Rehearing

5. Fraud ⇐13(2)

Misrepresentation of quality can be and is fraudulent misrepresentation where there is misrepresentation of known and presently existing characteristics or attributes of the product.

6. Fraud ⇐12

Insecticide manufacturer's statements concerning future performance of its product were not misrepresentation of presently existing and presently known quality or quantity, and thus did not constitute tort which was independent of breach of warranty claim to entitle purchaser to punitive damages, where future performance of product involved application and use which were wholly beyond manufacturer's control.

7. Jury ⇐90

Even if relationship between prospective juror and plaintiff's wife was not within degree of kinship justifying challenge for cause, fact that juror withheld information that she was cousin of plaintiff's wife and withheld information that she had been represented within the past year by attorney still holding fee interest in the case cast grave doubts on her ability to render fair and impartial verdict to defendant such that challenge for cause should have been granted.

Julian Clarkson of Holland & Knight, Tallahassee, Charles H. Kirbo and Michael C. Russ of King & Spalding, Atlanta, Ga., for appellant.

Alan C. Sundberg, George N. Meros, Jr., and J. Robert McClure, Jr. of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tallahassee, and Edwin B. Browning, Jr. of Davis, Browning & Hardee, Madison, for appellee.

David G. Owen, Columbia, S.C., for amicus curiae FMC Corp.

Stephen F. Baker, Winter Haven, for amicus curiae Florida Agr. Research Institute, Inc.

John D. Conner, Jr. and Raymond B. Biagini of McKenna, Conner & Cuneo, Washington, D.C., for amicus curiae Nat. Agr. Chemicals Ass'n.

Mygnon C. Evans, Lakeland, for amicus curiae Florida Citrus Mutual.

THOMPSON, Judge.

Mobil Chemical Company (Mobil) appeals a judgment awarding appellee compensatory and punitive damages pursuant to the jury's verdict finding that Mobil breached express and implied warranties, and knowingly made certain misrepresentations in connection with the sale of its nematicide-insecticide, Mocap. Mobil's principal contentions on appeal are that a new trial should have been granted because of juror misconduct and that a directed verdict should have been granted in Mobil's favor with respect to the punitive damage count. We agree with both of these contentions and reverse.

During voir dire of prospective jurors, the trial judge introduced the parties and their attorneys to the members of the venire, and the attorneys then read to the venire the names of their prospective witnesses. The names of the attorneys and several of the witnesses were thereafter repeated before the venire as specific questions were asked of individual prospective jurors. Among the names so repeated was that of A.E. Crawford, appellee's father-in-law. In another question, the prospective jurors were asked if any of them knew "the Crawford family." Another name repeated before the venire was that of Judge Bobby Kirby, an attorney who represented appellee in this case prior to being elected judge and who retains a fee interest in this case by virtue of that prior representation. As the voir dire progressed, and as individual pro-

spective jurors were excused and replaced in the jury box by other members of the venire, the court and the attorneys for both parties increasingly relied on the commendable (and, we believe, universally practiced) time saving technique of asking the new prospective jurors whether they had heard the questions asked previously, and whether their answers would differ from those given by the other prospective jurors. The last person on the venire to be called into the jury box answered "No" to the court's questions whether she knew "anything about this case or anyone involved" and whether her answers to the previously asked questions would be "unusual." When Mobil's counsel asked this prospective juror if she had heard the questions asked of the other jurors and whether her answers would be the same as theirs, she responded affirmatively. Based on these responses, the juror was accepted as qualified by both parties, and was seated on the jury. After conclusion of the trial, counsel for Mobil discovered that the juror was a member of the Crawford family, was the second cousin of appellee's wife, and had been a client of Judge Kirby's as recently as one year before the trial.

Florida Rule of Civil Procedure 1.431(c)(1) provides as follows:

> On motion of any party the court shall examine any prospective juror on oath to determine *whether he is related to any party* or to the attorney of any party *within the third degree* or is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called or has any interest in the action or has formed or expressed any opinion or is sensible of any bias or prejudice concerning it or is an employee or has been an employee of any party within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand indifferent to the action *or any of the foregoing grounds of objection exists* or that he is otherwise incompetent, another shall be called in his place. (emphasis supplied).

In Florida, the rule to be applied in determining degrees of kinship is the common law rule, under which second cousins are held to be related within the third degree. *See* E. Simon, *Redfearn Wills and Administration in Florida*, § 20.10 at 377, n. 23 (5th Ed.1977); Trawick, *Florida Practice & Procedure*, § 23–6 (1982). *See also Walsingham v. State*, 61 Fla. 67, 56 So. 195 (1911), wherein a juror who was a second cousin of the decedent's wife was held related by affinity to the decedent within the third degree. Thus, the juror who failed to disclose her relationship to appellee's wife was subject to challenge for cause under the rule, and we have not the slightest doubt that she would have been so challenged had this relationship been revealed.

Appellee's argument that reversal is not required because Mobil has failed to prove that the juror was biased in his favor or that the juror even knew of her relationship to him must fail. In our view, the above quoted rule and its predecessor statute, § 53.021(1), Fla.Stat. (1971), were respectively promulgated and enacted on the basis of a commonly held (and probably accurate) presumption that persons related to a party within the third degree know of the relationship and are prejudiced thereby. Obviously, if prejudice is presumed no burden of proving prejudice exists. If a jury verdict in a case such as this is to be allowed to stand at all, logic would dictate that the burden be placed on appellee to prove an absence of bias, and not vice versa. Furthermore, we believe that the rule was intended to eliminate both actual impropriety and any appearance of impropriety. The public perception of our system of justice would hardly be enhanced by a rule which permitted a relative of a party to sit in judgment of that party's dispute with an outside party.

The case of *State v. Rodgers*, 347 So.2d 610 (Fla.1977), wherein an underaged juror lied about her age in order to be seated on the jury, is clearly distinguishable. The fact that a person has not attained the age

of majority may give rise to an inference that he or she lacks the maturity necessary to the proper discharge of the solemn responsibilities of jurors. However, age, unlike kinship, will not ordinarily support an inference of bias for or against a particular party in a particular case.

[1, 2] We also reject, as being entirely without merit, appellee's argument that Mobil waived its right to challenge the juror post-trial by failing to specifically ask her on her voir dire about any relationship she might have with the Crawford family or appellee's wife. 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. Nevertheless, the juror failed to reveal her relationship to appellee's wife and to his former attorney. Her failure to disclose material information bearing on her possible bias and her qualifications to serve as a juror deprived Mobil of its right to intelligently participate in selection of the jury, and gives rise to an unacceptably strong inference that Mobil did not receive the fair trial to which it was entitled. Accordingly, we reverse and remand for a new trial.

[3] We further conclude that the trial judge erred in permitting the appellee's claim for punitive damages to go to the jury. It is the established law of this state, as recently reaffirmed by our Supreme Court, that punitive damages are not awardable for a breach of contract unless the conduct constituting the breach of contract is accompanied by wrongful conduct which amounts to a distinguishable and independent tort. *Southern Bell Telephone & Telegraph Co. v. Hanft*, 436 So.2d 40 (Fla. 1983); *Lewis v. Guthartz*, 428 So.2d 222 (Fla.1983); *Griffith v. Shamrock Village, Inc.*, 94 So.2d 854 (Fla.1957).

[4] Here, the representations which created the warranty alleged to have been breached are precisely the same representations as those which the appellee chooses to characterize as tortious misrepresentations, and upon which appellee relies as the basis for his claim for punitive damages. Appellee did not plead and prove an independent tort against him. The case of *Johnson v. Lasher Milling Co., Inc.*, 379 So.2d 1048 (Fla. 1st DCA 1980) is not to the contrary. There, the defendant deliberately defrauded the plaintiff by misrepresenting the weight of loads of corn sold to plaintiff, an act which in our view could constitute a criminal act under Ch. 812, Fla.Stat. In other words, the defendant intentionally took the plaintiff's money in exchange for goods which he represented had been delivered, but which in fact he did not deliver and did not intend to deliver. Here, the alleged misrepresentations made by Mobil were directed only to the quality and efficacy of Mocap. The appellee has not alleged that he received less Mocap than he believed he had purchased, and he neither pled nor proved that the chemical composition of the Mocap was other than as represented by Mobil. While it appears that appellee did not receive the benefit of his bargain in the sense that the Mocap did not perform well and did not meet his economic expectations, *see Monsanto Agricultural Products Company v. Edenfield*, 426 So.2d 574 (Fla. 1st DCA 1983) (tort law does not impose a duty upon a manufacturer to produce only such products as will meet the economic expectations of purchasers), there is no issue in this case as to whether the appellee received what he paid for, i.e., a stated quantity of Mocap. Although the proofs adduced at trial suggest that Mobil may have breached its warranty of the effectiveness of Mocap, no independent tort has been committed and punitive damages may not be awarded.

For the foregoing reasons we remand the case to the trial court with instructions that judgment be entered for Mobil with respect to the punitive damages count of the complaint, and for retrial of appellee's counts alleging breach of express and implied war-

ranties. Reversed and remanded for further proceedings consistent herewith.

BOOTH and WENTWORTH, JJ., concur.

ON REHEARING

THOMPSON, Judge.

Much of appellee's motion for rehearing or certification is impermissible reargument. See Rule 9.330(a), Fla.R.App.P. However, several of appellee's apparent misconceptions warrant discussion.

Appellee contends this court held that a misrepresentation of quality cannot be fraud, and that the same facts that were the basis for the breach of warranty cannot also constitute a tortious misrepresentation which would support an award of punitive damages. Although this was not the court's holding, the opinion should be clarified if it is susceptible of such an interpretation.

[5] Appellee argues this court misunderstands *Johnson v. Lasher Milling Co., Inc.*, 379 So.2d 1048 (Fla. 1st DCA), *cert. denied*, 388 So.2d 1114 (Fla.1980). The *Johnson* case involved a seller who lied about the weight of his loads of corn, an intentional misrepresentation of a known and existing fact. This court affirmed the award of punitive damages on the fraud count of the complaint, finding that "the willful tort of fraudulent misrepresentation was properly pled and proved." 379 So.2d at 1051. According to appellee this court erroneously distinguished *Johnson* from the instant case on the ground that *Johnson* involved a misrepresentation of quantity whereas this case involves a misrepresentation of the quality and efficacy of Mocap. He contends that this is not a meaningful distinction under Florida law or the definition of fraudulent misrepresentation. Using the example of a merchant who sold a one carat diamond and represented it as a two carat diamond, the appellee argues that under the holding in this case the merchant would be guilty of fraudulent misrepresentation, whereas if the same merchant sold an F-quality diamond and misrepresented it as the highest quality diamond, A-quality, it would not be a fraudulent misrepresentation. That is simply not true. A misrepresentation of quality can be and is fraudulent misrepresentation where there is a misrepresentation of known and presently existing characteristics or attributes of the product. In fact, the selling of an F-quality diamond which was represented as an A-quality diamond is a very good example of an actionable fraudulent misrepresentation of quality because it is a misrepresentation of a presently known and existing fact.

[6] Mobil's alleged misrepresentation concerned the future performance of a product which was to be applied under circumstances and conditions, in a manner, and by persons over which it had no control, and was not a misrepresentation of a presently existing and presently known quality or quantity. This court has previously held in *Monsanto Agricultural Products Co. v. Edenfield*, 426 So.2d 574, 577 (Fla. 1st DCA 1982), that tort law does not impose a duty upon manufacturers to produce only such products as will meet the economic expectations of purchasers, saying that "[a] manufacturer of agricultural chemicals, like a producer of seed, will generally have no knowledge of the field or weather conditions which will obtain when its product is put to use, and certainly has no control over the manner in which its product is applied." Likewise, a seed producer breaches his warranty, express or implied, but is not guilty of fraudulent misrepresentation merely because the seed he sells, when planted in the future, does not have the represented percentage rate of germination. *Cf. Corneli Seed Co. v. Ferguson*, 64 So.2d 162 (Fla. 1953); *Pennington Grain and Seed, Inc. v. Tuten*, 422 So.2d 948 (Fla. 1st DCA 1982). As the representation in this case involved the future performance of a product, the application and use of which was wholly beyond Mobil's control, such representation does not rise to an actionable tort of fraudulent misrepresentation and cannot be a basis for punitive damages.

The same facts that are the basis for a breach of warranty count *can be* but are

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not always the basis of a fraudulent misrepresentation count. The misrepresentation of the quality of a diamond would support not only a breach of warranty count, but also a fraudulent misrepresentation count. However, in this case the representation as to the future performance of a product to be used under conditions and in a manner over which Mobil had no control was not a representation of a known and existing fact or condition and did not constitute a tort or fraudulent misrepresentation.

Appellee also contends this court overlooked its recent per curiam decision in *Mobil Chemical Company v. Garrison,* 392 So.2d 71 (Fla. 1st DCA 1980), which affirmed an award of both compensatory and punitive damages in connection with the sale of Mocap. *Garrison* was a per curiam affirmance without written opinion, which is no precedent even in this court. *See Department of Legal Affairs v. District Court of Appeal, 5th District,* 434 So.2d 310 (Fla.1983). If we could consider per curiam affirmances as precedent and went to the trouble of obtaining the record and briefs and reviewing same we would find, as admitted by the appellee in his Motion for Rehearing, that the issue of the absence of a separate and independent tort was not raised on appeal in *Garrison.* This court does not consider on appeal points which are not raised, briefed, or argued on appeal. Therefore, the question could not have been considered by this court in its per curiam affirmance.

[7] In our discussion of the appellee's misconception of our holding we have removed all of the alleged conflicts except the alleged conflict on the degree of kinship created by *Jenkins v. State,* 380 So.2d 1042 (Fla. 4th DCA 1980). As we stated in the opinion, the Supreme Court has held in *Walsingham v. State,* 61 Fla. 67, 56 So. 195 (Fla.1911) that a juror who was a second cousin of the decedent's wife was related by affinity to the decedent in the third degree. This decision has never been modified or reversed by the Supreme Court. *Walsingham* was not cited by the *Jenkins* court, but the court in *Jenkins* was without authority to overrule it, either knowingly or unknowingly. *See Hoffman v. Jones,* 280 So.2d 431 (Fla.1973). Even if the relationship was not a sufficient basis for a challenge for cause pursuant to Rule 1.431(c)(1), Fla.R.Civ.P., the fact that the juror withheld information that she was a cousin of appellee's wife and withheld information that she had been represented within the past year by an attorney still holding a fee interest in the case casts such grave doubts on her ability to render a fair and impartial verdict to the defendant that a challenge for cause should be granted. *See Irby v. State,* 436 So.2d 1047 (Fla. 1st DCA 1983).

The motion for rehearing or certification is denied.

BOOTH and WENTWORTH, JJ., concur.

COMMERCIAL UNION INSURANCE COMPANY, Appellant,

v.

The R.H. BARTO COMPANY, A DIVISION OF ATLAS AIR CONDITIONING CORPORATION, Appellee.

No. 81-1512.

District Court of Appeal of Florida, Fourth District.

Sept. 21, 1983.

Rehearing Denied Nov. 21, 1983.

Insurer appealed from a judgment of the Circuit Court, Palm Beach County, R. William Rutter, Jr., J., which found it liable to insured for breach of insurance contract in refusing to defend its insured. The District Court of Appeal, Downey, J., held that although owner's claim against insured, which was charged with installing defective equipment which caused owner to be unable

1

Richard DECKER, Appellant,

v.

STATE of Florida, Appellee.

No. 72-82.

District Court of Appeal of Florida, Second District.

Oct. 13, 1972.

The defendant was convicted before the Circuit Court, Pasco County, Richard Kelly, J., upon a plea of guilty and he appealed. The District Court of Appeal held that reviewing court would not consider on appeal an assignment of fundamental error which was not first presented to the trial court.

Appeal dismissed.

Criminal Law ⇐1030(1)

Reviewing court would not consider on appeal an assignment of fundamental error which was not first presented to the trial court. 33 F.S.A. Rules of Criminal Procedure, rule 3.850.

Waldense D. Malouf, Clearwater, for appellant.

Robert L. Shevin, Atty. Gen., Tallahassee, and David Luther Woodward, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

This appeal is taken from a judgment entered upon plea of guilty and asserts fundamental error. It appears that the question argued on appeal was not first presented to the trial court. Accordingly, the appeal is dismissed without prejudice to the right of appellant to file a petition under Cr.P.R. 3.850, 33 F.S.A.

LILES, A. C. J., and HOBSON and MANN, JJ., concur.

2

Doris R. FREDERICK, Appellant,

v.

William H. FREDERICK, Appellee.

No. 71-54.

District Court of Appeal of Florida, Fourth District.

Aug. 26, 1971.

Appeal from Circuit Court, Brevard County; Richard B. Muldrew, Judge.

Eli Breger, North Miami Beach, for appellant.

Charles M. Rieders, Cocoa Beach, for appellee.

PER CURIAM.

The court has carefully considered the briefs, record and argument of counsel. The appellant has failed to demonstrate error. The judgment appealed from is affirmed.

WALDEN and MAGER, JJ., and MELVIN, WOODROW M., Associate Judge, concur.

3

Ben SKILES, Appellant,

v.

RYDER TRUCK LINES, INC., a Florida corporation, Appellee.

No. 71-428.

District Court of Appeal of Florida, Second District.

Sept. 20, 1972.

Rehearing Denied Oct. 31, 1972.

Action by motorist against other motorist's employer for injuries sustained in motor vehicle collision. The Circuit Court, Hillsborough County, Robert W. Patton, J.,

upon $200,000 jury verdict for plaintiff, granted new trial to defendant on ground of concealment by prospective juror of material information sought by questions propounded on voir dire, and plaintiff appealed. The District Court of Appeal, Dean, Roy E., Associate Judge, held that prospective juror's concealment, during voir dire, of fact he had previously been party to a lawsuit and had been a client of attorney who was partner of one of attorneys for plaintiff constituted ground for new trial.

Affirmed.

1. New Trial ⇐20

Prospective juror's concealment, during voir dire, of fact that he had previously been party to a lawsuit and had been a client of attorney who was partner of one of attorneys for motorist seeking to recover from other motorist's employer for injuries sustained in motor vehicle collision constituted ground for new trial. F.S.A. § 59.041.

2. New Trial ⇐20

There is a miscarriage of justice when a party is precluded from opportunity of having a juror excused for cause or of excusing such juror peremptorily by reason of material concealment by the juror of a fact sought to be elicited on voir dire, where failure to discover the concealment is not through want of diligence by complainant. F.S.A. § 59.041.

William R. Hapner, Jr., of Rood & Hapner, and Richard E. Leon, Tampa, for appellant.

Thomas A. Clark, A. Broaddus Livingston, and William F. McGowan, Jr., of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tampa, for appellee.

DEAN, ROY E., Associate Judge.

The question presented on appeal is whether or not the trial court erred in granting a new trial to the Defendant, Ryder Truck Lines, Inc., on the ground that concealment alone, by a prospective juror, whether intentional or not, of material information sought by questions propounded on voir dire, deprives the parties to the action of the opportunity to exercise challenges either peremptory or for cause.

Appellant's principal contention is that in order to grant a new trial there must be a showing of prejudice on the part of the juror in question. Appellant maintains that the trial judge should have made a factual determination as to whether the presence of juror Mesa on the jury, under the circumstances, was unfair, and that appellee was, therefore, prejudiced. Appellant maintains that without such a factual determination by the trial judge the granting of the new trial was improper; that there must be a determination of actual prejudice before a new trial can be granted. Appellant quotes specifically Florida Statute § 59.041, 1970, F.S.A., which reads as follows: [(sic) citation and quotation taken from appellant's brief.]

> "No judgment shall be set aside or reversed, or new trial granted by any court of this 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 miscarriage of justice. This section shall be liberally construed."

Appellee asserts that the Florida position is that 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, and that these requirements were met here. We agree with Appellee's assertion.

On July 23, 1969, on State Road 55 near Inglis, Citrus County, Florida, Plaintiff

was injured as a result of a collision between the pickup truck he was driving and a semi tractor-trailer owned by Defendant and operated by its employee, Walter High. The two trucks sideswiped each other, and Plaintiff's left arm was so severely mangled that it had to be amputated. At the trial, commencing March 1, 1971, the jury returned a verdict for Plaintiff in the amount of $200,000.00.

Following the trial it was discovered that one of the jurors, Fernando Mesa, had been a client of attorney Ed Rood, partner of one of Plaintiff's attorneys, William R. Hapner, Jr. Mr. Rood did not participate in the trial, nor was he ever present at trial. Mr. Rood had represented juror Mesa in a suit as a result of a claim for $13,000.00 filed in an estate for services rendered. Judgment for Mesa was entered in 1968.

The record reflects that Mr. Hapner asked the prospective jury panel whether any of them knew Mr. Rood, Mr. Hapner, associated counsel Mr. Leon, attorney for the Defendant, Mr. Clark, or any member of Mr. Clark's firm. There was no apparent affirmative response from any of the jury panel. Mr. Hapner then specifically asked each of the panel whether or not they had ever been involved in accident cases to which Mr. Mesa replied, "Just a car." Mr. Mesa was then asked, "You have never been a party to a lawsuit, one way or the other?", to which he replied, "No." The jury was thereafter selected, and Mr. Mesa was a member. The case was tried, verdict returned and judgment entered for Plaintiff in the amount aforesaid.

Defendant filed its motion for new trial stating several grounds all of which were considered without merit by the trial court except ground "#(11) the failure of juryman Fernando Mesa to respond truthfully to questions on voir dire." The trial court heard argument of counsel and inquired of juror Mesa, under oath, (1) "as to whether he was the same person who was the Plaintiff in the . . . action against the First National Bank of Tampa as Executor, etc." and (2) "whether he was represented in that action by the said Ed Rood, Esq." Juror Mesa answered affirmatively to both questions. The motion for new trial was thereupon granted on the basis that Mesa's failure to respond truthfully on voir dire deprived defendant Ryder of the opportunity to examine Mesa concerning these matters and, therefore, deprived him of a possible basis for challenge for cause and certainly deprived him of information that could have given him the opportunity to challenge peremptorily.

[1] We believe the trial court is correct in its ruling granting a new trial. The trial court in its order extensively considered cases from Florida and other jurisdictions, and the Court very ably set forth the rule applying and the reasonableness of the rules.

"'. . . The examination of a juror on his voir dire has a two fold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. . . .

"'It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, ... A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, . . . impairs . . . [a party's] right to challenge.'" (Loftin v. Wilson, Fla., 67 So.2d, 185, quoting Pearcy v. Michigan, Mut. Life Ins. Co., 111 Ind. 59, 12 N.E. 98.)

". . . When the right of challenge is lost or impaired, the . . . conditions and terms for setting up an authorized jury are not met; the right to challenge a given number of jurors without showing cause is one of the most important rights to a litigant; . . . the terms of the statutes with reference to peremptory challenges are substantial

rather than technical; such rules, as aiding to secure an impartial, or avoid a partial, jury, are to be fully enforced; the voir dire is of service not only to enable the court to pass upon a juror's qualifications, but also in assisting counsel in their decision as to peremptory challenge; the right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true; the right to challenge implies its fair exercise, and, if a party is misled by erroneous information, the right of rejection is impaired; a verdict is illegal when a peremptory challenge is not exercised by reason of false information; *the question is not whether an improperly established tribunal acted fairly, but it is whether a proper tribunal was established;* . . . next to securing a fair and impartial trial for parties, it is important that they should feel that they have had such a trial, and anything that tends to impair their belief in this respect must seriously diminish their confidence and that of the public generally in the ability of the state to provide impartial tribunals for dispensing justice between its subjects; the fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; . . . when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law." (Emphasis supplied) Drury v. Franke, 247 Ky. 758, 797, 57 S. W.2d 969, 984, 985; 88 A.L.R. 917.

[2] The above quotes from the Loftin and Drury cases adequately state the position of this Court. The cases cited by the parties, when taken together, and considered with the words of F.S. § 59.041, F.S. A., lead inescapably to the conclusion that there 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 of a fact sought to be elicited on voir dire where the failure to discover the concealment is not through want of diligence by the complainant. White v. State, Fla., 176 So. 842; Loftin v. Wilson, Fla., 67 So.2d 185; Pearcy v. Michigan Mutual Life Insurance Company, 12 N.E. 98; Texas Employer's Insurance Association v. Wade, Tex.Civ.App., 197 S.W.2d 203; Seaboard Air Line Railroad Company v. Holt, Fla., 92 So.2d 169; Wright v. Bernstein, 23 N.J. 284, 129 A.2d 19; Photostat Corporation v. Ball, 10 Cir., 338 F.2d 783; Hartley v. State, Fla.App., 214 So.2d 489.

We affirm the order of the trial court granting a new trial.

LILES, Acting C. J., and McNULTY, J., concur.

Albert Melvin COLLIE, Appellant,

v.

The STATE of Florida, Appellee.

No. 72-465.

District Court of Appeal of Florida, Third District.

Oct. 10, 1972.

Defendant was convicted in the Criminal Court of Record, Dade County, Paul Banker, J., of possession of narcotics and possession of narcotic implements, and he appealed. The District Court of Appeal held that where witness who was a heroin user was under influence of drugs at time she testified and her testimony was cumulative evidence, striking of witness' testimony was not error.

Affirmed.

LOFTIN et al. v. WILSON.

MILLS et al. v. WILSON.

Supreme Court of Florida,
Special Division A.

March 10, 1953.

Rehearing Denied Sept. 21, 1953.

Action by "trainman" for injuries sustained as result of derailment of car of railroad on which he was standing when train collided with truck owned by a defendant. The Circuit Court for Dade County, Vincent C. Giblin, J., entered judgment on verdict for plaintiff, and defendants appealed. The Supreme Court, White, A. J., held that award of $300,000, less than $93,000 of which constituted compensation for actual monetary loss, was excessive.

Affirmed in part and reversed in part.

1. Damages ⇐163(1)

Plaintiff who seeks damages for personal injuries must present proof affording a basis for a reasonable estimate of the amount of his loss.

2. Damages ⇐26

Damages for future medical expenses are recoverable only as to those reasonably certain to be incurred.

3. Evidence ⇐364

In determining damages for personal injuries, mortality tables are to be used only as a factor with all other factors shown by the evidence with which the jury is to determine as best it can the life expectancy of the person in question.

4. Evidence ⇐364

A jury, when assessing damages for permanent personal injuries, may consider along with mortality table, the person's health, habits, occupation, surroundings and any other elements which are likely to operate for or against his expected length of life, as well as fact that injured person's earning power may diminish as his physical and mental strength decline with the passage of time.

5. Damages ⇐100

Jury, when assessing damages for permanent personal injuries, may make allowance for the fact that no individual has a practical capacity for working each week during the remainder of his life, but it may also consider, within limits, the opportunities for promotion and prospects for increased capacity as shown by the evidence.

6. Damages ⇐132(10)

Award of $300,000 for personal injuries to railroad "trainman", consisting of partial loss of right foot, fracture of the bones in each hand, and loss of several teeth, was excessive when less than $93,000 represented compensation for actual monetary loss, and balance represented an award for pain and suffering.

7. Damages ⇐97

Award of damages which included an amount for pain and suffering which, when invested at 3% per annum, simple interest, would yield return to plaintiff of an amount in excess of his entire annual earnings prior to injury, is ordinarily contrary to intention of law to provide compensatory damages for those who have suffered personal injuries.

8. New Trial ⇐77(2)

Where the amount of an award of damages for personal injuries is such as to indicate passion or prejudice, a new trial must be ordered, and there is no necessity that court inquire and declare what wrongful influence or failure of duty brought about the excessive verdict.

9. Appeal and Error ⇐1004(1)
Damages ⇐208(1)

Question of amount of damages to be awarded for personal injuries is for jury, and not for appellate court.

10. Appeal and Error ⇐999(2)

An appellate court may sanction verdict of jury for personal injuries only when it has been reached by unprejudiced

and unimpassioned analysis of evidence with conscious desire to apply law to true facts as shown by evidence.

11. Automobiles ⇦179

Owner of truck which was driven onto railroad crossing in rural section on which train which had right of way, was in plain view, was liable for injuries to "trainman", sustained as result of derailment of car on which he was riding when train struck truck.

12. Railroads ⇦320

Operators of railroad's freight train approaching rural crossing at which train had right of way had right to assume that approaching truck, which had full view of crossing, would stop a safe distance therefrom, and degree of care required of operators of train when it became discernable that truck was not going to stop, was that which ordinarily is required when persons are confronted with an emergency.

13. Negligence ⇦12

Upon happening of sudden and unexpected danger, same responsibility is not cast upon parties as when circumstances show that danger might reasonably have been anticipated, but it is only required that a person exercise such judgment as a person of ordinary reason and prudence would exercise under similar extraordinary circumstances.

14. Negligence ⇦56(1.9)

A defendant's conduct in an action for personal injuries is considered a cause of the event if it was a material and substantial factor in bringing it about.

15. Negligence ⇦136(25)

The question of proximate cause is one for the jury, unless reasonable men could not differ.

16. Master and Servant ⇦286(30)

In action for injuries to railroad trainman when car on which he was riding was derailed as result of crossing collision between train and truck, wherein it appeared that train had right of way and that driver of truck had negligently failed to stop at safe distance from crossing, evidence made question for jury on negligence of railroad company.

17. Jury ⇦136(3)

Copartnership defendant in negligence action was an entity for purpose of peremptory challenges to jurors, and each member of copartnership was not entitled to three peremptory challenges. F.S.A. § 54.11.

18. Jury ⇦131(18)

New Trial ⇦20

It is duty of juror on his voir dire examination to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, and juror who violates such duty is guilty of misconduct prejudicial to the examining party, in that right to fair exercise of challenge, either peremptorily or for cause, is impaired.

19. New Trial ⇦26

Where railroad and construction company were defendants in personal injury action, and it appeared during trial that juror had previously had unpleasant business relations with construction company which had not been disclosed on voir dire, railroad company was not precluded from asserting such misconduct as ground for new trial, since it, unlike construction company, was in no position to have had knowledge of such circumstances.

20. New Trial ⇦27

Where railroad and construction company were defendants in personal injury action, and it was disclosed during trial that certain juror had previously had unpleasant business relations with construction company, and such fact was not disclosed on voir dire, and verdict against defendant was excessive, misconduct of juror was prejudicial to railroad, and its request for new trial should have been granted.

21. Trial ⇐235(7)

In action for injury to trainman as result of derailment of car upon which he was riding when train collided with truck, railroad's requested instruction that distance in which train can be stopped when emergency brakes are applied is essentially an engineering question and should be determined by experts, was properly refused as misleading in that it tended to eliminate from jury's consideration the principle that juries may judge such matters by common sense and every day experiences.

Loftin, Anderson, Scott, McCarthy & Preston, Miami, Russell L. Frink, Jacksonville, Robert H. Anderson and William C. Steel, Miami, for Scott M. Loftin and John W. Martin, as trustees of property of Florida East Coast Ry. Co.

Walton, Hubbard, Schroeder, Lantaff & Atkins and Dixon, DeJarnette & Bradford, Miami, for H. L. Mills and Kathryn Mills, individually and as copartners comprising copartnership trading and doing business as H. L. Mills Const. Co.

Nichols, Gaither & Green, Perry Nichols and William Clinton Green, Miami, for appellee.

WHITE, Associate Justice.

These appeals bring for review a judgment entered upon the verdict of a jury for $300,000 against two of three defendants in an action for personal injuries. We are called upon to decide whether or not the verdict is excessive.

Plaintiff in the court below, appellee here, one Wilson, sustained serious bodily injuries as a result of a "crossing accident". At the time he was a "trainman" employed on a work train of Florida East Coast Railway, one of the appellants. The train collided with a ten ton Diesel automobile truck belonging to H. L. Mills and Kathryn Mills a co-partnership doing business under the firm name of "H. L. Mills Construction Company", the other appellant.

The work train was engaged in spraying weeds and undesirable growth upon the railroad track. The spraying operation and the spraying equipment was under the control of the third defendant, Allied Chemical and Dye corporation. The operation of the train was under the supervision of the employees of the railroad company, including Wilson, the injured plaintiff. In the order of its approach along the track, toward the crossing in question,, the train consisted of, first, the spray car, next two tank cars filled with the chemical solution used in spraying the weeds, next a Diesel locomotive, proceeding forward, and last a "caboose". Wilson was standing on top of the spray car, passing signals back to the engineer to regulate the progress of the train. As a result of the collision, the spray car was derailed and thrown some distance from the track. Wilson fell to the ground amid the wreckage of the truck and the spray car. He was painfully and permanently injured. His right foot was crushed and mangled. Bones in each hand were fractured. He was saturated by the chemical solution and lost several teeth. He lost some of his hair temporarily. In an effort to save his foot, skin grafts were made from his uninjured leg. He was hospitalized 131 days and had to use crutches for more than a year. He was in court at the time of the trial wearing a specially built shoe, designed to partially compensate for the fact that only a portion of his foot remained.

Wilson sued the three defendants upon a claim of joint liability. His claim against his employer, the railroad company, was upon the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. His claim against the construction company was upon common law principles of tort liability. For similar cases see: Southern Pac. Co. v. Ralston, 10 Cir., 1933, 62 F.2d 1026; Id., 10 Cir., 67 F.2d 958; Southern R. Co. v. Blanton, 1937, 56 Ga.App. 232, 192 S.E. 437; Id., 1938, 59 Ga.App. 252, 200 S.E. 471; Id., 1940, 63 Ga.App. 93, 10 S.E.2d 430; Howard v. Atlantic Coast Line Ry.

Co., 1951, 84 Ga.App. 307, 66 S.E.2d 87; Casseday v. Baltimore & O. Ry. Co., 1941, 343 Pa. 342, 22 A.2d 663; Missouri-Kansas-Texas R. Co. v. McKinney, Tex.Civ. App., 1939, 126 S.W.2d 789; Id., 1941, 136 Tex. 75, 145 S.W.2d 1081.

Questions regarding the right to join defendants in such cases as well as questions of severance, are discussed in Way v. Waterloo etc. Co., 1947, 239 Iowa 244, 29 N.W.2d 867, 174 A.L.R. 723; and Annotation 174 A.L.R. 734.

The chemical company was exonerated from liability in the lower court and no point is made here regarding the propriety of that action. To all intents and purposes, it has been dropped as a party to the proceedings.

[1, 2] The injury occurred October 20, 1949. The verdict was entered January 16, 1952. Hospital and medical expenses incurred prior to the trial amounted to $7791.50. There was proof at the trial that plaintiff would need further medical attention, although a basis for computing the value thereof was left to some uncertainty. In every case, plaintiff must afford a basis for a reasonable estimate of the amount of his loss and only medical expenses which are reasonably certain to be incurred in the future are recoverable.

The construction company has computed the amount of this item at $2900.00. The railroad company computed it at $8160. The latter figure includes $5,280.00, estimated as being the cost of purchasing the specially designed shoes to be worn by plaintiff throughout the period of his future life expectancy.

At the time of the injury, plaintiff was earning $443 per month. He had been unable to return to gainful employment, so that the sum of $11,800 was due him on the date of the trial for earnings previously lost.

At the time of the trial plaintiff was 46 years of age. It was stipulated that his life expectancy at that time was 24 years and 150 days.

[3, 4] It is contrary to reason to assume that Wilson must remain in idleness the balance of his life on account of his injuries. Serious though they were, his earning capacity is not completely gone. He had been a railroad employee for seven years. Prior to that time he was a bookkeeping machine operator and a teller in a bank. He is a high school graduate. Plaintiff's counsel suggested in his summation, that the jury compute the value of his diminished earning capacity by assuming that he could earn an average of $100 per month, notwithstanding his injuries. Thus, his net loss per annum would amount to $4,116. When reduced to present worth, using the annuity value of One Dollar, at 3% interest for an individual 46 years of age, the result is $64,522.41.

When computing the present worth of future loss of earning power by the use of an annuity table, it may be proper to consider certain factors. Such a formula assumes that the individual in question will live the exact period of the life expectancy of an individual of that age as fixed by the mortality tables, and that the value of his lost earning capacity will be exactly the same each year for that period of time in the future. Mortality tables do not presume to establish as a certainty that any person of the age indicated will live for the identical period specified. A mortality table is to be used only as a factor with all the other factors shown by the evidence with which the jury is to determine as best it can the life expectancy of the person in question. With the expectancy indicated by the table as a basis of calculation, the jury must consider the person's health, habits, occupation, surroundings and any other elements, which in his case will be likely to operate for or against his expected length of life, as well as the fact that his earning power may diminish as his physical and mental strength decline. Due allowance should be made for the decline of earning power because of the abatement of mental and physical vigor consequent upon the passage of time. Littman v. Bell, etc. Co., 1934, 315 Pa. 370, 172 A. 687.

[5] In addition, it may be in order to make allowance for the fact that no individual has a practical capacity for working each week during the remainder of his life. Holidays, illnesses, and at least some vacations, are essential to the maintenance of earning capacity. Renault Lumber Yards v. Levine, Fla.1950, 49 So.2d 97. Within limits, the jury likewise may take into consideration opportunities for promotions and prospects for increased capacity as shown by the evidence. See 25 C.J.S., Damages, § 87, p. 625; 15 Am.Jur. p. 779, Sec. 338; Annotation 15 A.L.R.2d 418.

[6] When the amounts previously mentioned are summarized, the following result is obtained:

Medical expense incurred	$ 7,791.50
Medical expense to be incurred in future	8,160.00
Loss of earnings to date of trial	11,800.00
Diminished earning capacity	64,522.41
Total	$92,273.91

When this sum is paid to the plaintiff, it is seen that he has been made whole, so far as his monetary loss is concerned. His medical expenses, both past and future, have been paid by the tort-feasor. He has been reimbursed for every dollar of his lost earnings before the trial and in addition has been paid a sum which will afford him full compensation for the remainder of his life for the diminished earning power occasioned by the permanency of his injury.

In addition, plaintiff is entitled to compensation for his physical pain and suffering directly resulting from the wrongful acts of the defendants, if any, including pain and suffering incident to surgical operations or medical treatment.

Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. The award for pain and suffering must be limited to compensation. However, compensation in this connection is not to be understood as meaning price in dollars and cents as one might charge another to endure the same pain as has been suffered by the plaintiff. No sane individual would deliberately go through the plaintiff's experiences in this case for all the money in the world. Nor is such compensation to be understood as meaning value as one would engage a clerk or laborer on a per diem basis. Compensation in this connection is to be understood as describing an allowance looking toward *recompense* for, or made because of, the suffering consequent upon the injury. Any sum arrived at on the basis of another concept results in a conclusion opposed to legal principles governing the award of compensatory damages for personal injury.

The remainder of the verdict here of $207,000 represents an award for "pain and suffering". A comparison with other cases is sometimes fraught with danger because, of course, each case is different and must of necessity be measured in the light of the circumstances peculiar to it. Nevertheless, it is recognized that reference to amounts awarded in similar cases has at least a limited value. See Annotation 16 A.L.R.2d 3.

In a recent case decided by this court an award of $260,000 for severe and lasting injuries was set aside and a new trial ordered because the amount was considered excessive. Florida Power & Light Co. v. Watson, Fla.1951, 50 So.2d 543.

Of course, a comparison of the injuries suffered by the individuals involved in that case and the present one cannot be made with satisfactory results. No doubt the injured person in that case and the appellee here would be unable to agree which had the more serious condition. Probably neither would be willing to exchange places with the other. At the same time, however, this court cannot consistently ignore the precedent it established in that case.

In a case before another court, an award of $225,000 to a railroad employee for the loss of both legs was reduced to $150,000. Bartlebaugh v. Pennsylvania R. R. Co., 1948, 150 Ohio St. 387, 82 N.E.2d 853.

In still another case, an award of $130,000 to a railroad employee for the loss of both feet was reduced to $100,000. McKinney v. Pittsburgh etc. Co., D.C.N.Y.1944, 57 F.Supp. 813.

In another case, an award of $80,000 to a railroad employee for the loss of one leg was reduced to $50,000. Joice v. Missouri-Kansas-Texas R. Co., 1945, 354 Mo. 439, 189 S.W.2d 568, 161 A.L.R. 383.

In another case before the Supreme Court of Florida, an award of $75,000 for serious fractures of plaintiff's leg and right arm and injuries to his hip and back was reduced to $60,000. Renault Lumber Yards v. Levine, Fla.1950, 49 So.2d 97.

In another case before a Federal Court an award to a railroad employee of $60,000 for loss of one leg was reduced to $40,000. Cunningham v. Pennsylvania R. R. Co., D.C.N.Y.1944, 55 F.Supp. 1012.

In a case before another court an award of $50,000 to a railroad employee for the loss of one leg was reduced to $27,555. Smiley v. St. Louis etc. Co., 1949, 359 Mo. 474, 222 S.W.2d 481.

A study of those cases as well as the many others reviewed in the annotation to which reference has been made, 16 A.L.R.2d 3, leads to the conclusion that the award here of more than $200,000 for "pain and suffering" alone is far out of line.

[7] The fact that the verdict here is excessive is further demonstrated by observing that $207,000, the amount awarded for "pain and suffering" alone, invested at 3% per annum, simple interest, is the "present worth" of a payment of more than $13,000 each year throughout plaintiff's life expectancy as fixed by the mortality tables. It is also interesting to note that when the sum is invested at 3% per annum it will yield a return to the plaintiff of an amount in excess of his entire annual earnings prior to his injury, leaving the principal amount intact at his death to pass to his heirs. Such a result is contrary to the original intention of the law providing compensatory damages for those who have suffered personal injuries.

[8] Thus, a consideration of the amount of the award in this case, in the light of precedent, leads to the conclusion that its determination was governed by sentimental or fanciful standards. It is not necessary that a court inquire and declare what wrongful influence or failure of duty brought about an excessive verdict. Where the amount of an award is such as to indicate passion or prejudice, a new trial must be ordered. Alabama Gas Co. v. Jones, 1947, 244 Ala. 413, 13 So.2d 873; Florida Power & Light Co. v. Watson, supra; S. A. Freel Distributing Co. v. Lenox, 147 Fla. 550, 3 So.2d 157.

[9, 10] To what amount of damages is the plaintiff in this case entitled? That is for a jury to decide, and not this court. A jury decision in such a case must mean, however, a decision free from sentimental or emotional considerations. An appellate court may sanction a verdict of a jury only when it has been reached by an unprejudiced and unimpassioned analysis of the evidence with a conscious desire to apply the law in the case to the true facts as shown by the evidence. Where a verdict is so excessive as to indicate that other considerations have influenced the jury, justice has been thwarted and the verdict cannot be sanctioned.

[11] In the case of Remsberg v. Mosley, Fla.1952, 58 So.2d 432, 433, this court said that a new trial "on the question of damages only should not be granted unless liability on the part of defendant is clearly shown and it is not deemed necessary for any reason to try that issue again". In the case at bar, liability on the part of the construction company is clearly shown and there is no occasion for re-trying the question of liability of that defendant. The driver of the truck, in approaching the railroad crossing at the time of the accident, showed a wanton and reckless disregard for his own safety, as well as for that of several individuals on the spray car. There was

nothing unusual about the crossing. It was in a rural section and the train was in plain view at all times. It had the right-of-way. See Southern Railway Co. v. Mann, 91 Fla. 948, 108 So. 889; Atlantic Coast Line R. Co. v. Watkins, 97 Fla. 350, 121 So. 95; Roberts v. Powell, 137 Fla. 159, 187 So. 766. By the exercise of the slightest attention to his surroundings, the driver of the truck could have seen the approaching danger and permitted the train to pass without event.

It is such mental lethargy on the part of the drivers of motor vehicles upon public highways that is producing an appalling accident rate. Under the circumstances it is no surprise that the amount of the verdict bears characteristics of having punitive implications.

[12] On the other hand, liability of the railroad company is not clearly shown. Those in charge of the train had a right to assume that the truck driver would stop a safe distance from the crossing. When they were apprised to the contrary, they were faced with an emergency brought about through no fault of their own.

[13] The law recognizes that upon the happening of a sudden and unexpected danger, the same responsibility does not arise as when the circumstances show that the danger may reasonably have been inferred. So that where one is confronted by a sudden emergency he is not held to the same accuracy of judgment as is required under ordinary circumstances. In other words, such a person is not required in an emergency to exercise the same degree of care as if he had time for deliberation and the full exercise of his judgment and reasoning faculties, but is only required to exercise such judgment as a person of ordinary reason and prudence would exercise under similar extraordinary circumstances.

[14–16] Whether or not the accident would have occurred under the circumstances notwithstanding some act or omission on the part of the railroad company is questionable. Prosser on Torts, p. 322. Of course, the fact of causation is never capable of mathematical proof, since no man can say with absolute certainty what would have occurred if another had acted otherwise. Defendant's conduct in an action for personal injuries is considered a cause of the event if it was a material and substantial factor in bringing it about. Whether it is such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable men could not differ. Prosser on Torts, p. 324; 2 Restatement of Torts, p. 1159, Sec. 431. After a jury has decided the issue, "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury." Tennant v. Peoria etc. Co., 1943, 321 U.S. 29, 64 S.Ct. 409, 412, 88 L.Ed. 520.

It follows that a new trial should be granted only upon the issue of damages against the construction company and upon both issues of liability and damages against the railroad company. We do not decide whether the verdict of a jury upon another trial, either for the plaintiff or for the defendant, regarding negligence vel non of the railroad company will meet the test thus prescribed by the United States Supreme Court in such cases.

Having come to the conclusion that there should be a new trial, it is proper that other questions presented on this appeal, which might arise in a second trial, be determined now.

[17] The construction company contends that the lower court erred in not allowing each member of the co-partnership three peremptory challenges of jurors. See Statute 54.11, F.S.A. The lower court ruled that the real "party" to the litigation was the partnership entity and that no more than three peremptory challenges were allowable, regardless of the number of individuals making up the firm. We hold that the ruling was correct.

The railroad company assigns as error the action of the trial court in denying its motion for a mistrial made in the midst of the trial because of the misconduct of a

juror. After the trial was underway, counsel for the construction company, in the absence of the jury, made the announcement that the Millses had discovered that one of the jurors had had some transactions with the construction company "and that in that business transaction there was some unpleasantness between the parties, and differences between them, that would possibly tend to prejudice (the juror) against those parties; that a dispute arose as to some money that was required to be paid to (the juror) from Mills, and finally a settlement was made, * * * that (the juror) concealed that matter, possibly not intentionally, but nevertheless the inference is that he did know that he was concealing it."

The construction company moved that the juror be excused and that the trial continue before the five remaining jurors. Later, however, the construction company waived the objection. The railroad company stood upon a motion on its own behalf to declare a mistrial. The motion was denied.

Apparently, at the time no one questioned the facts as thus disclosed, as the Court made this observation: "Assuming the representation can be and would be supported by sworn evidence, I don't think it is sufficient".

After verdict, the ruling was relied upon by the railroad company as ground for a new trial. The motion for new trial likewise was denied.

[18] In this regard the following statement from Pearcy v. Michigan, etc. Co., 1887, 111 Ind. 59, 12 N.E. 98, 99, 60 Am. Rep. 673, is approved:

> "* * * The examination of a juror on his voir dire has a two fold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. * * *
>
> "It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct, is prejudicial to the party, for it impairs his right to challenge."

Also, see Jones v. Imperial Garages, 1944, 174 Or. 49, 145 P.2d 469; Texas Emp. Ins. Ass'n v. Wade, Tex.Civ.App.1946, 197 S.W. 2d 203; Cradick v. Reich, 1947, 77 Cal.App. 2d 667, 176 P.2d 70, and 39 Am.Jur. p. 65, Sec. 45.

[19] The construction company was in no position to take advantage of the juror's misconduct, since its owners should have known, as well as the juror, at the time of the voir dire examination, of the previous dispute between them. The owners could not sit by in silence and then complain of their own oversight after having accepted the jury.

[20] However, the railroad company is in a different position. It had no way of knowing about the dispute except from the answers the juror gave on his voir dire examination.

It may be argued with merit that animosity on the part of the juror toward the construction company would have no bearing on the juror's decision regarding wrongdoing on the part of the railroad company. However, the construction company and the railroad company were charged with having concurrently committed a tort, for which the amount of damages fixed by the jury was to be assessed against each. Therefore, it cannot be said that the misconduct of the juror had no bearing on his decision so far as the railroad company was concerned.

In many instances rulings upon such occurrences during the trial of a law suit

come within the sound discretion of the trial judge. But, where facts exist as assumed by the judge here, followed by a verdict so excessive in amount as to indicate that the jury has been influenced by improper considerations, it is the duty of the trial judge to grant a new trial.

[21] At the trial the railroad company called as its witness an air brake expert, who testified concerning tests made by which the witness had determined the space in which a similar train might be stopped by the application of the emergency brake. Based upon that proof, the railroad company requested the following charge:

> "The distance that a train can be stopped when the emergency brakes are applied under a given set of circumstances is essentially an engineering question and the law in this state is that such conclusions should be determined by experts as the courts trust experts in their respective lines for an answer to such questions."

The trial judge refused to give the instruction and the ruling has been assigned as error.

The requested instruction was misleading and the trial judge was correct in his ruling. The thought conveyed by the instruction had a tendency to eliminate from the jury's consideration the principle that juries likewise may judge such matters by common sense and every day experiences.

The judgment is affirmed as to H. L. Mills and Kathryn Mills, co-partners doing business under the firm name of H. L. Mills Construction Company, on the issue of liability, and is reversed on the issue of damages. A new trial is ordered on the issue of damages alone. The judgment is reversed as to Scott M. Loftin and John W. Martin, as Trustees of the property of Florida East Coast Railway, a corporation, and a new trial is ordered on all issues.

Affirmed in part and reversed in part.

TERRELL, Acting Chief Justice, and SEBRING and ROBERTS, JJ., concur.

THE MACCABEES v. TERRY.

Supreme Court of Florida, Division B.

July 31, 1953.

Rehearing Denied Sept. 21, 1953.

Action on double indemnity provisions of insurance policy. The Circuit Court for Dade County, Charles A. Carroll, J., affirmed judgment of Civil Court of Record of said county granting the relief sought, and the insurer petitioned for certiorari. The Supreme Court, Drew, J., held that death from ruptured aneurysm in brain, brought about by strain, was not within coverage of policy providing double indemnity in case of accidental death but excepting death resulting directly or indirectly from physical infirmity.

Judgment quashed.

Insurance ⇐515.10

Death from ruptured aneurysm in brain, brought about by strain, was not within coverage of policy providing double indemnity in case of accidental death but excepting death resulting directly or indirectly from physical infirmity.

Morehead, Forrest, Gotthardt & Orr and F. E. Gotthardt, Miami, for petitioner.

Boyce F. Ezell, Jr., Miami, for respondent.

DREW, Justice.

A petition for constitutional certiorari has been filed in this Court to review an order of the Circuit Court of Dade County affirming a judgment against petitioner in the Civil Court of Record of Dade County on double indemnity provisions of a policy of insurance and awarding attorney's fees under Section 625.08, F.S.A., to beneficiary's counsel.

The bone of contention here as to the first point is that the Circuit Court of Dade County, in affirming the judgment of the Civil Court of Record of said county, "refused to recognize that the medical testi-

tered into before trial with the remaining defendants was error, which, though it did not result in prejudicial harm during trial, could not be determined to be harmless with regard to entry of judgment.

2. Appeal and Error ⇐1169(4, 10), 1178(1)

Where error in failing to require plaintiff to produce agreement which he had entered into before trial with certain defendants did not result in prejudice to other defendants during trial but was not harmless with regard to entry of judgment, judgment for plaintiff would be reversed and cause remanded and such other defendants afforded opportunity to apply to trial court for setoff. F.S.A. § 768.041(2).

R. Edward Campbell, of Jones, Paine & Foster, West Palm Beach, for appellants.

John A. Gentry, III, and John Paul Jones, Jr., of Moyle, Gentry, Jones & Flanigan, West Palm Beach for appellee-Theresa Ochoa.

Stephen C. McAliley, of Carlton, Brennan & McAliley, West Palm Beach, for appellees-Karen Diane Brinkman and Allstate Ins. Co.

OWEN, Judge.

[1] On the authority of the opinion we have filed this date in the case of Maule Industries, Inc. et al. v. Rountree, Fla.App. 1972, 264 So.2d 445, we find that the court erred in denying appellants' pretrial and posttrial motions for an order requiring the plaintiff to produce for inspection and copying the agreement which she had entered into before trial with the remaining defendants.

We conclude from our examination of the record that such error did not result in prejudicial harm to appellants during the trial of this cause. Hence, there is no reason to disturb the verdict for the plaintiff or to grant appellants a new trial.

[2] We cannot determine that the error was harmless as pertains to the entry of the judgment. Therefore, the judgment is reversed and this cause remanded for further proceedings to afford appellants the opportunity to apply to the trial court for any setoff to which they may be entitled under the provisions of F.S. Section 768.041(2), F.S.A. Thereafter, plaintiff-appellee shall be entitled to have judgment entered in her favor against appellants for the amount of the verdict less any setoff to which appellants shall be found entitled.

Appellants' remaining point on appeal is without merit. Stecher v. Pomeroy, Fla. 1971, 253 So.2d 421.

The judgment is reversed and this cause remanded for further proceedings consistent herewith.

REED, C. J., and WALDEN, J., concur.

Ralph J. ELLISON, Individually and Port Carriers, Inc., a corporation, Appellants,

v.

Gurney A. CRIBB, Jr., Appellee.

No. Q-331.

District Court of Appeal of Florida, First District.

Oct. 17, 1972.

Motorcyclist brought action against owner and operator of truck for injuries sustained in collision. The Circuit Court for Duval County, Thomas J. Shave, Jr., J., rendered judgment in favor of the motorcyclist and the defendants appealed. The District Court of Appeal, Wigginton, J., held that where prospective juror who

was subsequently chosen as foreman gave false, negative answer to question on voir dire as to whether any member of his family had been involved in an automobile accident and other jurors testified that because foreman had informed them that he had a deficient heart condition they were reluctant to engage in heated argument or prolonged controversy with him and that they were in favor of returning verdict in favor of defendants but yielded their views and agreed with foreman to return verdict in plaintiff's favor out of deference to foreman's physical condition, defendants were deprived of fair trial.

Reversed with directions.

1. Automobiles ⇐245(16, 90)

Under evidence that area around intersection where southbound motorcyclist collided with left turning tractor trailer was sufficiently lighted to enable person to see distances from 250 to 300 feet in each direction, questions of whether operator of truck should have seen motorcyclist approaching from north even though motorcyclist was operating his vehicle without a headlight at night and should have refrained from turning left across road and whether motorcyclist's negligence in operating vehicle without headlight or at an excessive speed proximately caused or contributed to collision were for jury. F.S.A. §§ 316.217, 316.249.

2. Trial ⇐315

In action arising from collision, where prospective juror who subsequently was named as foreman gave false, negative answer to question propounded on voir dire as to whether any member of his family had ever been involved in an automobile accident and other jurors testified that because foreman had informed them that he had a deficient heart condition they were reluctant to engage in heated argument or prolonged controversy with him and that they were in favor of returning verdict in favor of defendants but yielded their views and agreed with foreman to render verdict in favor of plaintiff in deference to foreman's physical condition, defendants were deprived of fair trial.

3. Jury ⇐83(1)

Failure of juror to honestly answer material questions propounded to him on voir dire examination constitutes bad faith requiring his disqualification from service in case.

4. New Trial ⇐42(1)

When right to make an intelligent judgment as to whether a particular juror should be challenged is lost or unduly impaired, right to fair trial by an impartial jury is destroyed and verdict should be set aside and new trial granted.

C. T. Boyd, Jr., of Boyd, Jenerette, Leemis & Staas, Jacksonville, for appellants.

William C. Davis, and Ray L. Wilson, Jacksonville, for appellee.

WIGGINTON, Judge.

Defendants have appealed a final judgment awarding damages to plaintiff for injuries sustained as a result of the negligent operation of defendants' motor vehicle. Appellants contend that the trial court erred in denying their motion for a directed verdict made at the conclusion of the evidence as well as their motion for a new trial.

By his complaint plaintiff alleged that defendants so negligently operated their motor vehicle as to cause it to collide with the motor vehicle driven by plaintiff, resulting in severe injuries for which damages were claimed. Defendants interposed the defenses of general denial and contributory negligence.

The undisputed facts reveal that at about eleven o'clock in the nighttime appellant Ellison was operating a 54-foot-long trac-

tor-trailer rig owned by appellant, Port Carriers, Inc., on a two-lane 22-foot-wide public road in Duval County. Appellant was proceeding northward and upon reaching a point where the road intersects a driveway into an industrial plant, appellant slowed his tractor to a speed of about five miles per hour and turned to the left and across the road preparatory to entering the driveway. Appellee was driving his motorcycle southward on the road without a headlight and, in an apparent attempt to avoid striking the vehicle driven by appellant, applied the brakes of his motorcycle causing it to skid a distance of approximately 105 feet before colliding with appellants' vehicle. Appellant-driver testified that he did not see appellee as he approached from the north on his motorcycle and was not aware of his presence until he heard the noise caused by the impact of the motorcycle against the wheel of the tractor. As a result of the collision, appellee was severely injured.

It is appellants' position that the proof fails to establish any negligence on their part and that their motor vehicle was being operated in a careful, prudent, and lawful manner as it approached the driveway into which it attempted to turn. Appellants urge that, since appellee was operating his motorcycle without a headlight or other illumination as required by statute,[1] he was prima facie guilty of negligence which proximately contributed to his injuries and is therefore precluded from recovery.[2]

Appellee was so severely injured that at no time was he able to recall the facts immediately preceding the collision. The record is silent as to the speed appellee was traveling immediately prior to the accident, although some estimate of speed may be inferred from the length of skid marks caused by appellee's motorcycle in his attempt to stop or avoid colliding with the tractor of appellants. The evidence construed in a light most favorable to appellee indicates that the point where the road intersects the driveway leading into the industrial plant where the collision occurred was sufficiently lighted as to enable a person to see a distance of from 250 to 300 feet in each direction. The illumination at the intersection was created by the blinker caution light installed at that point together with lights from the adjacent parking lot leading into the plant and from the administration building located on the opposite side of the road. It is appellee's position that even though he was presumptively negligent by operating his motorcycle in the nighttime without a proper headlight as required by law, such negligence was not the proximate cause of the collision. He argues that the intersection where appellant attempted to turn across the road in front of him was so well lighted that if appellant had been exercising due care and keeping a proper lookout ahead, he would have seen appellee approaching from the opposite direction in the southbound lane of the road even though no headlight was burning on his motorcycle. He urges that appellant was therefore negligent in turning in front of him under such circumstances that the collision could not be avoided. Appellee insists that whether he was guilty of contributory negligence to the extent of barring his recovery was a question properly submitted to and resolved by the jury and that to have granted appellants' motion for a directed verdict would have constituted error. With this contention we are forced to agree.

[1] If the area around the intersection where the accident occurred was as well illuminated as appellee's witnesses testified it was, it fell within the province of the jury to decide whether appellant, in the exercise of reasonable care, did see or should have seen appellee approaching from the

1. §§ 317.461 (now 316.217), and 317.872 (now 316.249), F.S.

2. Parker v. Hofheinz (Fla.App.1966) 181 So.2d 367; Holland v. Watson (Fla.App. 1968) 215 So.2d 498; Knabb v. Tompkins (Fla.App.1971) 254 So.2d 858.

north on his motorcycle and should therefore have refrained from turning left across the road in front of appellee under circumstances which made the collision inevitable. It was likewise within the jury's province to decide whether appellee's negligence in operating his vehicle without proper lighting or at an excessive speed under conditions then existing proximately caused or contributed to the collision from which he suffered damages.[3]

[2] Appellants' next point on appeal raises a perplexing and most delicate problem. The issue presented for our decision is whether on the record before us it must be held that the conduct of one of the jurors was such as to require that the verdict and judgment be set aside and a new trial granted.

During the voir dire examination of the jury by counsel for the parties, appellants' attorney asked the prospective juror, Ninno, whether any member of his family had ever been involved in an automobile accident, to which inquiry the juror responded in the negative. After the jury was selected, sworn and retired to its room for the purpose of organizing, juror Ninno was named as foreman. After the verdict was rendered, appellants' attorney served notice of his intention to interview three of the jurors who served on the trial jury pursuant to the provisions of Canon 23 of ethics governing attorneys as it existed on October 11, 1971. A certified copy of a death certificate issued by the Florida Department of Health and Rehabilitative Services was introduced in evidence and established that foreman Ninno's daughter died from injuries received in an automobile accident which occurred some 2½ years prior to the trial of the case sub judice.

It is appellants' position that the failure of the juror Ninno to disclose matters personal to him in response to questions asked him on his voir dire examination deprived the court and counsel for the appellants of the opportunity to weigh his qualifications as a juror and make a determination as to whether he should be relieved from further service, either for cause or by peremptory challenge. Appellants contend, and we must agree, that since the plaintiff in this case was claiming substantial damages for the injuries sustained by him as a result of the alleged negligent operation of defendants' motor vehicle, it was of overriding importance to defendants as well as to the court for it to be known whether any juror or member of his immediate family had suffered a similar experience as that alleged by plaintiff. Had the juror Ninno honestly answered the question put to him and admitted that his daughter had died as a result of injuries sustained in an automobile accident, defendants' counsel would then have had the opportunity of developing by further interrogation whether the death of Ninno's daughter occurred under circumstances which would disqualify him as a juror for cause or provide a basis for a judgment as to whether he should be challenged peremptorily.

[3, 4] The rule has long been established in this jurisdiction that 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.[4] The right of counsel to challenge a juror either for cause or peremptorily is indispensible to the successful operation of our jury system. 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.[5] It has further been specifically held that when a prospective

3. Wisdom v. Nickels (Fla.App.1968) 212 So.2d 652; Booth v. Mary Carter Paint Company (Fla.App.1966) 182 So.2d 292; Bessett v. Hackett (Fla.1953) 66 So.2d 694.

4. Seay v. State, 139 Fla. 433, 190 So. 702.

5. Drury v. Franke, 247 Ky. 758, 57 S.W. 2d 969 (1933).

juror in a personal injury action fails or refuses to honestly answer questions put to him on voir dire examination regarding whether he or any member of his family has been involved in an automobile accident in the past, a verdict rendered by a jury composed of such a juror has been set aside and a new trial granted.[6]

The prejudice suffered by appellants because of the juror Ninno's failure to fully and honestly answer the questions propounded to him on his voir dire examination is emphasized by appellants' second contention which we consider to be extremely material although not necessarily controlling. In the court's interrogation of the venire prior to voir dire examination by counsel for the parties, the jurors were asked whether any of them had any physical defects which would render them incapable of performing their duties as jurors in the case, to which each venireman responded in the negative. Following rendition of the verdict, three jurors who served in the case were examined by appellants' counsel as to events which transpired in the jury room during the course of the trial. The testimony of the jurors who were examined established that foreman Ninno let it be known at the outset that he had a deficient heart condition, and because of this the jurors were reluctant to engage in any heated argument or prolonged controversy with him during the course of their deliberations. These jurors testified that at the conclusion of the trial when they retired to consider their verdict five of them were definitely in favor of returning a verdict in favor of the defendants, foreman Ninno being the only one favorable to the plaintiff. Ninno then set about to persuade the other jurors that their initial judgment was wrong and that a verdict should be rendered in favor of plaintiff. It appears that as the deliberations progressed and the argument between Ninno and the other jurors became more intense, Ninno became highly excited and as one juror put it, "He turned a little gray". It was in deference to Ninno's physical condition and a reluctance on the part of the other jurors to be the precipitating cause of a recurrence of his heart attacks that they finally yielded their views and agreed with him to render a verdict in favor of plaintiff. The record reveals that despite the fact that appellee was claiming damages in the maximum sum of $131,000.-00, juror Ninno insisted that the amount which the jury should award ought to be a minimum of $250,000.00. It was again on account of the timidity of the remaining members of the jury and their reluctance to cause Ninno to have another heart attack that they again yielded to his insistence and agreed to a verdict of $250,000.00 for plaintiff.

The general rule prevailing in Florida is that affidavits or sworn statements of jurors are admissible to explain or uphold their verdict but not to impeach or overthrow it. This rule is subject, however, to the qualification that the sworn statements of jurors may be received for the purpose of avoiding a verdict in order to show any matters occurring during the trial or in the jury room which does not essentially inhere in the verdict itself.[7] Although the matters of which appellants complain under this point of their brief may be said to be matters inhering in the verdict and therefore not sufficient, if standing alone, to justify setting the verdict aside, they nevertheless point up the prejudicial effect on defendants which resulted from the juror Ninno's refusal to honestly answer the questions asked of him during his preliminary examination both by the court and by counsel in the cause.

6. Consolidated Gas & Equipment Co. of America v. Carver (10th Cir. 1958) 257 F.2d 111; Photostat Corporation v. Ball (10th Cir. 1964) 338 F.2d 783.

7. Russom v. State (Fla.App.1958) 105 So. 2d 380; State v. Ramirez (Fla.1954) 73 So.2d 218; Marks v. State Road Department (Fla.1954) 69 So.2d 771; City of Miami v. Bopp, 117 Fla. 532, 158 So. 89, 97 A.L.R. 1035.

In Florida Publishing Company v. Copeland,[8] the Supreme Court of Florida laid down the proposition that: "'If the verdict reached does not square with right and justice and there is reasonable ground to conclude that the jury acted through sympathy, passion, prejudice, mistake, or other unlawful cause, it then becomes the province and the duty of the trial court to set the verdict aside and grant a new trial.'"

From a careful consideration of the record as a whole, we conclude that the jury finally selected to try the case sub judice was not properly nor lawfully constituted and that the irregularities which occurred in the selection of the jury prejudiced defendants in their opportunity for a fair trial. We are of the view that the ends of justice will best be served by setting aside the verdict rendered in this cause and reversing the judgment appealed herein with directions, upon remand, that a new trial be granted.

SPECTOR, C. J., and JOHNSON, J., concur.

Eddie HAMMONDS, Appellant,

v.

The BUCKEYE CELLULOSE CORPORATION et al., Appellees.

No. R-146.

District Court of Appeal of Florida,

First District.

Nov. 28, 1972.

Purchaser brought action for specific performance to compel conveyance of land. The Circuit Court, Taylor County, Samuel S. Smith, J., granted defendant's motion to dismiss, and purchaser appealed. The District Court of Appeal, Johnson, J., held that in view of fact that stockholder's agreement to convey land owned by corporation was conditioned on execution of timber sale contract between corporation and another party and contract was never executed purchaser did not have cause of action against corporation which refunded purchase price.

Affirmed.

1. Corporations ⇐410

In absence of information as to whether corporation involved came within statute allowing close corporations to conduct business without board of directors meetings and other management of business affairs of corporation, corporation was not bound by agreement of potential stockholder who later became owner of majority of voting stock of corporation to convey property. F.S.A. § 608.70.

2. Vendor and Purchaser ⇐343(1)

In view of fact that stockholder's agreement to convey land owned by corporation was conditioned on execution of timber sale contract between corporation and another party and such contract was never executed, purchaser did not have cause of action against corporation which refunded purchase price to purchaser.

Charlie Luckie, Jr., of MacFarlane, Ferguson, Allison & Kelly, Tampa, for appellant.

Byron Butler, Perry, Marion R. Shepard and John E. Mathews, Jr., of Mathews, Osborne & Ehrlich, Jacksonville, and Paul E. Raymond and William M. Barr, of Raymond, Wilson, Karl, Conway & Barr, Daytona Beach, for appellees.

JOHNSON, Judge.

This is an interlocutory appeal from an order of the Circuit Court of Taylor County, Florida, dismissing the amended complaint for specific performance against the

8. Florida Publishing Company v. Copeland (Fla.1956) 89 So.2d 18.

Tax School District No. 1 of Hernando County, for a writ of mandamus to J. M. Rogers, as chairman and member of the Board of Public Instruction of Hernando County, and others. An alternative writ was quashed, and relators bring error.

Writ of error dismissed.

Clyde H. Lockhart, of Brooksville, for plaintiffs in error.

Coogler & Coogler, of Brooksville, for defendants in error.

PER CURIAM.

In mandamus proceedings the alternative writ was quashed September 6, 1938. A writ of error was taken March 6, 1939, which is not "within six months from the date of" the order quashing the alternative writ. Sec. 4619, C.G.L.; Simmons v. Hanne, 50 Fla. 267, 39 So. 77, 7 Ann.Cas. 322. The order quashing the alternative writ is not a final judgment. State ex rel. Rhodes v. Goodson et al., Liberty County Commissioners, 65 Fla. 475, 62 So. 481.

The Writ of Error is dismissed.

TERRELL, C. J., and WHITFIELD, BUFORD, CHAPMAN, and THOMAS, JJ., concur.

BROWN, J., not participating as authorized by Section 4687, Compiled General Laws of 1927, and Rule 21-A of the Rules of this Court.

SEAY v. STATE.

Supreme Court of Florida, Division B.

July 25, 1939.

1. Criminal law ⇐747

Conflicts or disputes in the testimony offered on the part of the prosecution and defense are questions of fact to be settled by the jury under appropriate instructions of the trial court.

2. Criminal law ⇐1159(2)

In considering sufficiency of evidence to support verdict, the controlling factor is, not what an appellate court may think a jury ought to have done or what the appellate court would have done had it been sitting on the jury, but whether the jury as reasonable men could have found from the evidence such a verdict.

3. Criminal law ⇐1160

The trial court's ruling in denying motion for new trial will not be disturbed, if the jury as reasonable men could have found such a verdict based upon the evidence.

4. Criminal law ⇐1160

An order refusing new trial for insufficiency of evidence or because verdict is contrary to evidence will not be disturbed if record discloses evidence from which all essential elements of crime may legally have been found and jury was not influenced by considerations other than the evidence.

5. Criminal law ⇐1159(3)

The Supreme Court cannot substitute its conclusions on questions of fact for conclusions of jury, especially where evidence is sharply conflicting.

6. Larceny ⇐55

Evidence warranted conviction for larceny of a hog.

7. Criminal law ⇐923(9)

After rendition of adverse verdict, it is too late to be heard on question of legal disqualification of juror, in absence of proof of fraud, surprise, or other conduct of juror which in law may amount to bad faith.

8. Criminal law ⇐323, 923(9)

A defendant is presumed to know his own relatives, and, after concealing from his counsel during selection of jury the fact of his relationship to jurors, he cannot at a subsequent date profit by his own concealment, if any, of the disqualification of the jurors.

9. Criminal law ⇐923(9)

That jurors were related to defendant within the third degree did not warrant new trial, where jurors made known to the trial court that they were related to the defendant, and defendant did not object to selection of such jurors.

Error to Circuit Court, Union County; A. Z. Atkins, Judge.

Pearl Seay was convicted for the crime of larceny of a hog, and he brings error.

Affirmed.

H. O. Brown, of Lake Butler, for plaintiff in error.

George Couper Gibbs, Atty. Gen., and Thomas J. Ellis, Asst. Atty. Gen., for the State.

CHAPMAN, Justice.

The plaintiff in error, Pearl Seay, was informed against, placed upon trial, and convicted by a jury in the Circuit Court of Union County, Florida, for the crime of larceny of a hog, property of one C. D. Newburn, and was by the trial court sentenced to serve for a period of two years at hard labor in the State Prison. From this judgment of conviction an appeal has been perfected to this court and a number of errors assigned for a reversal.

It is contended by counsel for plaintiff in error that the evidence adduced by the State was legally insufficient to sustain a conviction. The evidence shows that Mr. Newburn owned a hog that ranged around the place occupied by Theodore James near Worthington Springs, and that plaintiff in error went to the home of Theodore James and the hog was killed at James' home by plaintiff in error and James; that after the hog was butchered it was divided between James and plaintiff in error, and fresh hog meat was found at the home of James shortly after the hog owned by Newburn disappeared.

[1-3] Plaintiff in error contends that he did not participate in butchering the hog or in the division of the meat between him and the witness James, but that on the date the hog was alleged to have been stolen and butchered he was not at the James home, but was engaged in painting and loading cross ties some distance away, and adduced testimony to corroborate his defense. It is true that there is a conflict or dispute in the testimony offered on the part of the prosecution and the defense, but under our system such conflicts and disputes are questions of fact to be settled by the jury under appropriate instructions on the part of the trial court. The rule controlling an appellate court in considering the sufficiency of the evidence to support a verdict is not what it may think a jury ought to have done, or what such court may think it would have done had it been sitting as a jury in the case, but the rule is whether as reasonable men the jury could have found from the evidence such a verdict. If the jury as reasonable men could have found such a verdict based upon the evidence, then the ruling of the trial court in denying the motion for a new trial should not be disturbed.

[4-6] If the record discloses evidence from which all the essential elements of a crime may legally have been found and upon the examination by this Court of the evidence it does not appear that the jury in considering the evidence was influenced by considerations other than the evidence, the order of the trial court refusing to grant a new trial on account of the insufficiency of the evidence, or because the verdict is contrary to the evidence, will not be disturbed. This Court has no authority at law to substitute its conclusions on questions of fact for that of the jury and especially is this true when passing upon sharp conflicts and disputes in the evidence. See Pickeron v. State, 94 Fla. 268, 113 So. 707; Bullard v. State, 95 Fla. 997, 117 So. 381.

It is next contended by counsel for plaintiff in error that some of the petit jurors sitting upon the trial of the case were related to the defendant within the degree prohibited by law from service as jurors. The record shows that T. H. Waters, Jr., and J. E. Parrish were two of the jurors trying the issues between the State of Florida and the defendant and prior to the acceptance of these jurors the court made an examination into the qualifications of each, and each of said jurors on their voir dire examination represented or made known to the court that they or either of them were related to the plaintiff in error within the third degree. The trial court, after the examination, held each of them qualified to perform jury service in the case at bar. The State of Florida accepted the proposed jurors, and likewise the defendant and his counsel, and no objections appear in the record as to the relationship between the plaintiff in error and the two jurors prior to their being sworn to try the issues between the State and the defendant.

[7-9] After the rendition of an adverse verdict, it is too late to be heard on the question of a legal disqualification of a juror, in the absence of proof of fraud, surprise or other conduct on the part of a juror which in law may amount to bad faith. Plaintiff in error is presumed to know his own relatives, and after concealing the fact of this relationship to his counsel or the failure on his part to so ad-

vise his counsel when the jury is being selected, he cannot at a subsequent date profit by his own concealment, if any, of the disqualification of a juror. The trial court held these jurors qualified and the showing on the part of the plaintiff in error as to their disqualification on a motion for a new trial is insufficient in law.

We have read the entire testimony as disclosed by the record, the briefs of counsel, and the authorities cited therein have been examined, and the Court being advised as to its judgment, it is therefore upon consideration ordered that the judgment appealed from should be and is hereby affirmed.

WHITFIELD, P. J., and BROWN, J., concur.

TERRELL, C. J., concurs in opinion and judgment.

BUFORD and THOMAS, JJ., not participating as authorized by Section 4687, Compiled General Laws of 1927, and Rule 21–A of the Rules of this Court.

LA TOUR v. STONE, Sheriff.

Supreme Court of Florida, Division A.
Aug. 1, 1930.

1. Extortion ⇐13

An information, charging city building inspector and commissioner with aiding and abetting, counseling, hiring, and otherwise procuring two other city commissioners to obtain sums of money for their personal profit under color of their offices, cannot be upheld under statute providing for punishment of any state officer guilty of malpractice in office, as allegations of information show that persons charged are not "state officers." Comp.Gen.Laws 1927, § 7489.

[Ed. Note.—For other definitions of "State Officer," see Words & Phrases.]

2. Extortion ⇐10

The statute providing for punishment of "any officer of this state" who is guilty of malpractice in office applies only to state and county officers and does not include municipal officers. Comp.Gen.Laws 1927, § 7489.

3. Extortion ⇐4

"Extortion" in general sense signifies any oppression under color of right, but technically is corrupt demanding and receiving of money or other thing of value, which is not due at all or is more than is due, or before it is due, by officer under color of his office.

[Ed. Note.—For other definitions of "Extort; Extortion," see Words & Phrases.]

4. Extortion ⇐1

At common law, extortion was regarded as heinous offense subjecting offender to indictment or information and punishment by fine and imprisonment and sometimes forfeiture of office.

5. Extortion ⇐10

In general the offense of extortion is not confined to any particular class of officers, but any person clothed with official privileges and duties may be punished therefor.

6. Extortion ⇐6

A taking under color of office is of essence of offense of "extortion," money or thing received must have been claimed or accepted in right of office, and person paying must have yielded to official authority.

7. Extortion ⇐8

To constitute "extortion," money or other thing of value must have been wilfully and corruptly demanded and received.

8. Exortion ⇐8

To constitute "extortion" at common law, money or some other thing of value must be received, and mere agreement to pay is insufficient.

9. Extortion ⇐13

The technical words to be employed in indictment for extortion are "extort" and "color of office," but allegation that defendant extorsively took unlawful fee is sufficient averment of corrupt intent.

10. Indictment and Information ⇐71

An indictment for extortion should be certain in every material allegation or charge.

11. Extortion ⇐13

An indictment for extortion must aver that nothing was due defendant or, if charge is taking of more than was due, how much was due.

Betty and George SCHOFIELD, Appellants,

v.

CARNIVAL CRUISE LINES, INC., et al., Appellees.

No. 84-173.

District Court of Appeal of Florida, Third District.

Nov. 27, 1984.

Rehearing Denied Jan. 22, 1985.

Husband and wife brought action against cruise line and corporation controlling vessel for injuries sustained when wife fell while on cruise aboard vessel. The Circuit Court, Dade County, Joseph J. Gersten, J., rendered final judgment for the defendants and denied the plaintiffs' post-trial motions for leave to take the deposition of the jury foreman and for a new trial, and the plaintiffs appealed. The District Court of Appeal, Hendry, J., held that: (1) the plaintiffs were not entitled to a new trial where the jury foreman did not conceal a material fact upon voir dire examination and plaintiffs' counsel had every opportunity to inquire into all aspects of foreman's relationship with plaintiffs' witness and chose not to, and (2) trial court did not abuse its discretion by denying the plaintiffs' motion for leave to take the deposition of the jury foreman.

Affirmed.

1. New Trial ⇐42(1)

In order to require new trial where party contends that it was denied opportunity to select impartial jury because of juror's concealment, three requirements must be met: there must have been material concealment of some fact by juror upon his voir dire examination, and failure to discover this concealment must not have been due to want of diligence of complaining party.

2. New Trial ⇐42(4)

Plaintiffs in action for injuries sustained from fall while on cruise aboard vessel were not entitled to new trial on basis that they were denied opportunity to select impartial jury because of juror's concealment, where juror did not conceal material fact upon voir dire examination but volunteered his accountant-client relationship with plaintiffs' expert medical witness, and plaintiffs' counsel had every opportunity to inquire into all aspects of that relationship and chose not to.

3. Trial ⇐344

Postverdict interview of jurors will be allowed where grounds are demonstrated which would subject jury's verdict to challenge prior to interview; however, rule of civil procedure so allowing was not intended to authorize hunting expedition. West's F.S.A. RCP Rule 1.431(g).

4. Trial ⇐344

Where record does not reveal any misconduct or irregularity on part of any juror, case is fairly and impartially tried, and each juror is polled and announces verdict to be his, it is improper to allow jurors to be interviewed. West's F.S.A. RCP Rule 1.431(g).

5. Trial ⇐344

Decision to allow postverdict jury interview is within discretion of trial court. West's F.S.A. RCP Rule 1.431(g).

lien, they made no such contention below. Ordinarily, this would preclude review of their contention. Here, however, since the laborers' claim of lien is limited to wages, it necessarily follows that the laborers are the only proper plaintiffs in the suit and that the union and the trustees' claims must be dismissed. Therefore, I do not address whether this same result would obtain were the claims of lien held to include check-off and fringe benefits. *See* § 713.06, Fla. Stat. (1981) ("no person shall have a lien under this section except those lienors specified in it ....). *Compare Trustees of Colorado Carpenters v. Pinkard Construction Co.*, 604 P.2d 683 (trustees have standing to sue under Mechanics' Lien Statute creating right of action in "subcontractors, materialmen, mechanics and *others*"), *with, Ridge Erection Co. v. Mountain States Telephone & Telegraph Co.*, 37 Colo.App. 477, 549 P.2d 408 (1976) (under prior Colorado Mechanics' Lien Statute, which did not include "others," trustees could not assert lien where not included in specified classes of persons entitled to claim liens).

6. Appeal and Error ⇐969

Standard of review for appellate court receiving trial court's denial of motion for leave to take postverdict deposition of juror is whether trial court abused its broad discretion; if reasonable men could differ as to propriety of action taken by trial court, then there is no abuse of discretion. West's F.S.A. RCP Rule 1.431(g).

7. Trial ⇐344

Trial court did not abuse its discretion in denying motion of plaintiffs who brought action for injury sustained from fall while on cruise aboard vessel to take postverdict deposition of jury foreman who was accountant for plaintiffs' expert medical witness so as to determine extent of relationship. West's F.S.A. RCP Rule 1.431(g).

Horton, Perse & Ginsberg and Arnold R. Ginsberg, Charles R. Lipcon, Miami, for appellants.

Smathers & Thompson and Rodney Earl Walton, Miami, for appellees.

Before HENDRY, BASKIN and JORGENSON, JJ.

HENDRY, Judge.

The Schofields appeal the final judgment for defendants and the trial court's denial of their post-trial motions for leave to take the deposition of the jury foreman pursuant to Rule 1.431(g), Florida Rules of Civil Procedure, and for a new trial.

Betty Schofield, suffering from amyotropic lateral sclerosis (ALS), was injured when she fell while on a cruise aboard the vessel "Festivale." The Schofields brought suit against Carnival Cruise Lines and Festivale Maritime, Inc., asserting that the fall was due to the lack of a handrail, the failure to use stabilizers, the lack of weather warnings and the excessive speed of the vessel.

On the first morning of trial, the parties selected a jury. One of the prospective jurors was a certified public accountant by the name of Elliot Kaplan. During voir dire, the Schofields' counsel read the witness list and asked if any one of the jurors knew anyone who had been named. One of the Schofields' witnesses was a Dr. Nagaswami. Mr. Kaplan stated that he was Dr. Nagaswami's accountant. Schofields' counsel elicited from Kaplan that Kaplan's relationship would not influence him. Counsel next asked Kaplan to tell the court a little about himself, to which Kaplan replied that he was divorced, a sole practitioner and a resident of Dade County for 33 years. Counsel then inquired if Kaplan had been on any cruises, to which Kaplan replied that he owned his own boat, a 25 foot Lancer. Voir dire proceeded with Schofields' counsel asking the prospective jurors if anyone had been involved in an accident where he or she had suffered injuries that were severe enough to put one in the hospital or break a bone. The jurors answered in the negative. Further inquiry was made with regard to the jurors' knowledge of handrails and whether they had had an occasion to use them. Kaplan responded that he had used stanchions around his own boat and that while he was in the army, he encountered bad weather on a troop transport and remembered that there were handrails to grab onto. Counsel's final question to the prospective jurors was whether there was anything they felt they should tell him that hadn't been discussed so far in trying to help him pick an impartial jury. The jurors answered in the negative.

Carnival Cruise Lines' counsel began his questioning of the prospective members of the jury by directing a question to Mr. Kaplan. Kaplan was asked if he "handled the books" for Dr. Nagaswami, to which Kaplan responded in the affirmative. Counsel then stated that "during the course of this case, there will be three medical experts talking about the effect of ALS on a person and two of those ...." At this point, Schofields' counsel objected to counsel discussing what the medical experts were going to testify to before they were put on the stand. The court agreed. Carnival Cruise Lines' counsel then stated

that Dr. Nagaswami's qualifications as a doctor would be challenged by his client and asked Kaplan if the fact that they were challenging the qualifications of somebody that he worked for would make it impossible for him to reach a fair conclusion in the case. Kaplan replied that he didn't think so. Neither side challenged Kaplan for cause or used a peremptory challenge. Kaplan was subsequently sworn in and became the jury foreman.

On the second day of trial, the Schofields called Dr. Nagaswami as a witness. His testimony bore solely on the issue of damages in that he stated that the fall and resultant injury suffered by Mrs. Schofield exacerbated the deteriorating effects of ALS, thus shortening Mrs. Schofield's life expectancy.

After closing argument, one of the six jurors was excused at the request of the Schofields' counsel. The remaining five jurors were sent to deliberate, and returned a verdict for Carnival Cruise Lines. The jury was polled and each juror stated that the verdict given was his or her own verdict.

The Schofields' post-trial motions for new trial and judgment notwithstanding the verdict were denied. Subsequently, two and one-half months later, Schofield moved for leave to depose Mr. Kaplan. The motion was verified and asserted that Kaplan had concealed the fact that he had been in an accident and was being treated by Dr. Nagaswami. Attached to the motion was an accident report which indicated that Kaplan had suffered a possible injury. After hearing and considering the arguments of counsel, the court denied the Schofields' motion for leave to depose Kaplan. The Schofields appeal, urging error in the trial court's denial of their post-trial motions. We agree with the trial court, and affirm.

[1, 2] The Schofields contend that they should receive a new trial as they were denied the opportunity to select an impartial jury because of Kaplan's concealment. In Florida, 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) (emphasis in original), *cert. denied*, 275 So.2d 253 (Fla.1973). These three requirements were not met by the Schofields. Juror Kaplan did not conceal a material fact upon voir dire examination. He volunteered his relationship with the Schofields' witness. Counsel had every opportunity to inquire into all aspects of that relationship and chose not to. This is not a case where a juror answered the questions on voir dire falsely, *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953); *Smiley v. McCallister*, 451 So.2d 977 (Fla. 4th DCA 1984); *Redondo v. Jessup*, 426 So.2d 1146 (Fla. 3d DCA), *pet. for rev. den.*, 436 So.2d 887 (Fla.1983), *enforcing* 394 So.2d 1031 (Fla. 3d DCA 1981); *Minnis v. Jackson*, 330 So.2d 847 (Fla. 3d DCA 1976), *Skiles v. Ryder Truck Lines, Inc., supra*, or concealed that he was related to or knew the parties or attorneys involved, *Owen v. Bay Memorial Medical Center*, 443 So.2d 128 (Fla. 1st DCA 1983); *Mobil Chemical Co. v. Hawkins*, 440 So.2d 378 (Fla. 1st DCA 1983), *pet. for rev. den.*, 449 So.2d 264 (Fla.1984), or where the juror stated that she would be impartial, but during deliberation told the panel that she knew the witness and commented on his credibility, *Carver v. Orange County*, 444 So.2d 452 (Fla. 5th DCA 1983).

[3, 4] The Schofields next contend that they should be allowed the opportunity to interview juror Kaplan to determine the extent of his relationship with the witness, Dr. Nagaswami. Under Florida's liberal Rule of Civil Procedure, 1.431(g), an interview of jurors will be allowed where grounds are demonstrated which would subject the jury's verdict to challenge prior to the interview. *National Indemnity Co. v. Andrews*, 354 So.2d 454 (Fla. 2d DCA), *cert. denied*, 359 So.2d 1210 (Fla.1978). The rule, however, was not intended to authorize hunting expeditions. *Id.* at 456.

If a verdict is pronounced in the presence of all jurors which presumptively has satisfied the enlightened conscience of each of them it is against public policy to inquire into the motives and influences by which their deliberations were governed. This rule is founded on the sound policy of preventing litigants or the public from invading the privacy of the jury room.

Velsor v. Allstate Insurance Co., 329 So.2d 391, 393 (Fla. 2d DCA) (footnotes omitted), *cert. dismissed*, 336 So.2d 1179 (Fla.1976). Where the record does not reveal any misconduct or irregularity on the part of any juror, the case is fairly and impartially tried, and each juror is polled and announces the verdict to be his, it is improper to allow jurors to be interviewed. *Cummings v. Sine*, 404 So.2d 147 (Fla. 2d DCA 1981).

[5–7] Although Rule 1.431(g) provides that jury interviews shall be allowed under appropriate circumstances, the decision to allow a jury interview is within the discretion of the trial court. *Kasper Instruments, Inc. v. Maurice*, 394 So.2d 1125 (Fla. 4th DCA 1981). The standard of review for the appellate court is whether the trial court abused its broad discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then there is no abuse of discretion. *Ford Motor Co. v. Kikis*, 401 So.2d 1341, 1342 (Fla.1981). We find no abuse of discretion in the trial court's denial of the motion for leave to take the deposition of jury foreman, Kaplan, and the denial of the motion for new trial and, accordingly, affirm.

Affirmed.

George I. SANCHEZ, Petitioner,

v.

Maynard F. SWANSON, Jr., as Circuit Judge, Sixth Judicial Circuit, Respondent.

No. 84–2227.

District Court of Appeal of Florida, Second District.

Nov. 28, 1984.

Rehearing Denied Jan. 4, 1985.

Prohibition proceeding was brought to prevent respondent from exercising its appellate jurisdiction. The District Court of Appeal, Scheb, J., held that the filing of notice of appeal at the branch office of the clerk of the circuit court within the allowable jurisdictional period under the clerk's practices in effect at that time was sufficient to confer jurisdiction on the circuit court even though the main office of the clerk of the circuit court at the county seat did not receive the notice until the next day after the time expired for filing an appeal.

Denied.

Appeal and Error ⇐428(1, 2)

Filing of notice of appeal at branch office of clerk of circuit court within allowable jurisdictional period under the clerk's practices in effect at that time was sufficient to confer jurisdiction on the circuit court even though main office of the clerk of the circuit court at the county seat did not receive the notice until the next day after the time expired for filing an appeal in a eviction proceeding which awarded damages to the tenant because of wrongful eviction; disagreeing with *Perego v. Robinson*, 377 So.2d 834. West's F.S.A. Const. Art. 8, § 1(k); West's F.S.A. § 28.222; West's F.S.A. R.App.P.Rule 9.110(b).

George I. Sanchez, pro se.

Brian B. Eisenstadt, St. Petersburg, for respondent.

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Elizabeth PERL, Appellant,

v.

K-MART CORPORATION, d/b/a K-Mart Stores, Appellee.

No. 85-2271.

District Court of Appeal of Florida, Third District.

Sept. 9, 1986.

Customer sued discount store after she slipped and fell at store. Jury in the Circuit Court for Dade County, George Orr, J., returned verdict for discount store. Customer moved for new trial. Trial court denied motion. Customer appealed. The District Court of Appeal held that juror's concealment during voir dire of prior involvement in lawsuits required new trial.

Reversed and remanded.

New Trial ⇐20

Juror's response to plaintiff's voir dire question, as to whether juror had ever been party in lawsuit, that his company had been sued once but he did not recall any other involvement in litigation when in fact juror and his company had been involved in litigation at least 20 times, was concealment of material fact on voir dire examination not due to plaintiff's negligence; therefore, new trial was required.

Fine, Jacobson, Schwartz, Nash, Block & England, P.A., and Arthur England and Charles M. Auslander, Miami, for appellant.

Peters, Pickle, Flynn & Niemoeller and Donna C. Hurtak, Miami, for appellee.

Before HENDRY, BASKIN and JORGENSON, JJ.

PER CURIAM.

The appellant, Elizabeth Perl, sued the appellee, K-Mart Corporation, after she slipped and fell at a K-Mart store. The jury returned a verdict for K-Mart. Perl moved for a new trial alleging that Frank Bower, a juror who ultimately became foreman of the jury, misrepresented material facts during voir dire. Her motion was denied. We agree with Perl that the trial court erred in denying the motion for a new trial and, for the reasons which follow, reverse and remand for further proceedings.

During the course of voir dire, counsel for Perl asked all the jurors, including Frank Bower, whether any of them had ever been 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.

In *Schofield v. Carnival Cruise Lines*, 461 So.2d 152, 154 (Fla. 3d DCA), *rev. denied*, 472 So.2d 1182 (Fla.1984), this court recognized that a three-part test must be met before a new trial will be required because of a juror's nondisclosure of information: (1) the facts must be material; (2) the facts must be concealed by the juror upon his voir dire examination; and (3) the failure to discover the concealed facts must not be due to the want of diligence of the complaining party. *See also Redondo v. Jessup*, 426 So.2d 1146 (Fla. 3d DCA), *rev. denied*, 434 So.2d 887 (Fla.1983). 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. The failure of plaintiff's counsel to discover the material, concealed facts did not result from a want of diligence on his part.

K-Mart's reliance on the result in *Schofield* is misplaced. In *Schofield*, there was

ample opportunity for counsel to make an inquiry following the prospective juror's revelation that he had had professional contact with an expert witness in the case. K-Mart's assertion that the inquiry by Perl's counsel was equivocal and that Bower's answers were honestly given is not supported by the record. We accordingly reverse and remand for a new trial.

Reversed and remanded for a new trial.

Luisa S. BELGRANO, Appellant,

v.

Michael FINKELSTEIN, Laura Finkelstein and Fred Bossert, Appellees.

No. 85-2514.

District Court of Appeal of Florida, Third District.

Sept. 9, 1986.

The Circuit Court for Dade County, James C. Henderson, J., awarded deficiency judgment against defendant and others. Defendant appealed. The District Court of Appeal held that: (1) value of property foreclosed and bid on at foreclosure sale by mortgagees was worth far in excess of amount owed to mortgagees, and (2) it was abuse of discretion to award mortgagees deficiency judgment.

Reversed.

Mortgages ⇐375

Value of property foreclosed and bid on at foreclosure sale by mortgagees was worth far in excess of amount owed to mortgagees; therefore, it was abuse of discretion to award mortgagees deficiency judgment.

Craig R. Dearr, for appellant.

No appearance for appellees.

Before HENDRY, FERGUSON and JORGENSON, JJ.

PER CURIAM.

This appeal by defendant Luisa Belgrano questions the correctness of a final judgment of deficiency entered against her and others not parties to this appeal in a mortgage foreclosure action.

It is appellant Belgrano's contention [1] that the record clearly shows that the value of the property foreclosed and bid on at the foreclosure sale by the plaintiffs/appellees Michael Finkelstein, Laura Finkelstein and Fred Bossert was worth far in excess of the amount owed to appellees and that the court abused its discretion in awarding appellees a deficiency judgment. We agree. *See Barnard v. First National Bank of Okaloosa County*, 482 So.2d 534 (Fla. 1st DCA 1986); *Wilson v. Adams & Fusselle, Inc.*, 467 So.2d 345 (Fla. 2d DCA 1985).

The final judgment of deficiency is, accordingly, reversed.

Reversed.

Walter BURRICHTER, Appellant/Cross-Appellee,

v.

Joseph DREISCH, Appellee/Cross-Appellant.

No. 85-2635.

District Court of Appeal of Florida, Third District.

Sept. 9, 1986.

An Appeal from the Circuit Court for Dade County; John Gale, Judge.

1. We note that appellees have not filed a brief in this appeal or otherwise disagreed with appellant's contention.

ley H. Leinicke, Fort Lauderdale, for appellee.

Before HUBBART, BASKIN and COPE, JJ.

PER CURIAM.

This is an appeal by the plaintiff Willie Mae Augustin from an adverse final summary judgment in an action brought against the defendant Health Options of South Florida, Inc. [Health Options], a health maintenance organization, to compel payment for medical services rendered to the plaintiff by an orthopedic surgeon [a member physician of the defendant HMO]. We reverse based on the following briefly stated legal analysis.

[1] First, the defendant Health Options refused to pay the medical bill in question on the ground that the plaintiff had unilaterally sought non-emergency treatment from a specialized physician, without a prior referral by the plaintiff's primary care physician in alleged violation of the terms of the HMO contract to which the plaintiff was a party subscriber. Because the specialist physician thereafter sought to collect his bill from the plaintiff by asserting a claim against the plaintiff's tort recovery from a third party, it is clear that (1) the plaintiff had standing to bring the instant action to protect her interests, and (2) the trial court's determination to the contrary was in error. *See, e.g., Medical Center Health Plan v. Brick*, 572 So.2d 548 (Fla. 1st DCA 1990); *Riera v. Finlay Medical Centers HMO Corp.*, 543 So.2d 372 (Fla. 3d DCA 1989).

[2] Second, the defendant Health Options, during the pendency of this action, eventually changed its entire position in this matter and made full payment to the specialized physician as prayed for in the plaintiff's complaint, which necessarily mooted the instant action. This was the functional equivalent of a judgment or verdict in favor of the plaintiff and therefore entitled the plaintiff to an award of attorney's fees under § 641.28, Fla.Stat. (1989), as the prevailing party below. *Wollard v. Lloyd's and Companies of Lloyd's*, 439 So.2d 217, 218 (Fla.1983); *Ginsberg v. Keehn*, 550 So.2d 1145, 1147 (Fla. 3d DCA 1989); *Avila v. Latin American Property & Casualty Ins. Co.*, 548 So.2d 894 (Fla. 3d DCA 1989); *Fortune Ins. Co. v. Brito*, 522 So.2d 1028 (Fla. 3d DCA 1988); *Gibson v. Walker*, 380 So.2d 531, 533 (Fla. 5th DCA 1980).

The final summary judgment under review is therefore reversed, and the cause is remanded to the trial court with directions to dismiss the instant action as moot and to award attorney's fees to the plaintiff as the prevailing party below.

Reversed and remanded.

Rosa J. BERNAL and Jose M. Bernal, Appellants,

v.

Donald H. LIPP, D.P.M. and Donald H. Lipp, D.P.M., P.A. Appellees.

No. 90-2786.

District Court of Appeal of Florida, Third District.

May 28, 1991.

Plaintiffs who obtained final adverse judgment in medical malpractice case sought new trial and submitted motion to interview juror. The Circuit Court, Dade County, Joseph M. Nadler, J., denied motion and appeal was taken. The District Court of Appeal, 562 So.2d 848, reversed and remanded. Following juror interview the Circuit Court reaffirmed earlier decision and appeal was taken. The District Court of Appeal held that juror's nondisclosure of fact that he had been defendant in personal injury action required reversal and new trial.

Reversed and remanded.

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Appeal and Error ⇐1045(1)

Failure of jury member to reveal in response to questions that he had been defendant in personal injury case required reversal of judgment for physician in malpractice case and new trial, even though jury member had been involved only in minor automobile accident which had been settled by his insurer. West's F.S.A. RCP Form 1.984.

Hinshaw & Culbertson, and John E. Herndon, Jr., Miami, for appellants.

No appearance for appellees.

Before HUBBART, BASKIN and COPE, JJ.

PER CURIAM.

Plaintiffs Rosa and Jose Bernal appeal an adverse final judgment and assign as error the denial of their motion for new trial. We reverse.

Plaintiffs sued appellee Donald Lipp, alleging medical negligence. During voir dire examination by plaintiffs' counsel, the potential jurors were asked collectively if they had sued someone or had been sued, or had been a plaintiff or defendant in a lawsuit. For each of the jurors responding affirmatively, plaintiffs' counsel asked questions to ascertain the particulars. Potential juror Alberto Parejo remained silent and did not indicate that he had been a defendant in any lawsuit. In addition, on the juror questionnaire which Parejo completed, he answered in the negative the question whether he or any member of his family ever had a claim for personal injury made against them. *See* Fla.R.Civ.P. Form 1.984.

Juror Parejo was a member of the jury, which returned a defense verdict. Subsequent to verdict, plaintiffs learned that juror Parejo had previously been a defendant in a personal injury lawsuit. Plaintiffs moved for a new trial on the basis that the jury had been improperly constituted.

A juror interview was ultimately conducted. *See Bernal v. Linn*, 562 So.2d 848, was ascertained that juror Parejo had indeed been a defendant in an automobile accident case approximately one year prior to the trial of the instant case. The juror explained that the prior case had been a minor automobile accident which was covered by insurance and had been settled by the insurance company. He explained that he did not interpret either the questionnaire or the oral question as calling for an affirmative answer, given the minor nature of the prior litigation. It is clear that the trial court believed the juror's explanation was truthful and that there had been no intentional withholding of information at voir dire. The trial court denied the motion for new trial.

The applicable test is:

> A case will be reversed because of a juror's nondisclosure of information when the following three-part test is met: '(1) the facts must be material; (2) the facts must be concealed by the juror upon his voir dire examination; and (3) the failure to discover the concealed facts must not be due to the want of diligence of the complaining party.'

Indus. Fire & Casualty Ins. Co. v. Wilson, 537 So.2d 1100, 1103 (Fla. 3d DCA 1989) (citation omitted).

The test is met in this case. For a plaintiff in a personal injury case, the failure of a juror to disclose that he had been a defendant in a personal injury case one year previously would be material. *Smiley v. McCallister*, 451 So.2d 977, 978–79 (Fla. 4th DCA 1984).

As to the second prong of the test, the information was concealed from counsel, as a result of which counsel lost "the right to make an intelligent judgment as to whether a juror should be challenged...." *Minnis v. Jackson*, 330 So.2d 847, 848 (Fla. 3d DCA 1976). Since the information was squarely asked for and was not provided, this branch of the test is satisfied. *See Skiles v. Ryder Truck Lines, Inc.*, 267 So.2d 379, 382 (Fla. 2d DCA 1972), *cert. denied*, 275 So.2d 253 (Fla.1973). Although the juror did not intend to mislead plaintiffs' counsel, the omission nonetheless prevented counsel

which would in all likelihood have resulted in a peremptory challenge.

As to the final branch of the test, in this instance the plaintiffs' counsel made careful and diligent inquiry of each of the jurors regarding any prior experience in litigation, whether as a party or otherwise. *Cf. Taylor v. Public Health Trust of Dade County*, 546 So.2d 733, 734 (Fla. 3d DCA) (where juror gave ambiguous answer and no further inquiry was made on voir dire, there was insufficient due diligence shown to warrant new trial), *review denied*, 557 So.2d 867 (Fla.1989).

Reversed and remanded for new trial.

The STATE of Florida, Appellant,

v.

Brenda Lee WARSHAN and James Ehler, Appellees.

No. 90-2041.

District Court of Appeal of Florida, Third District.

May 28, 1991.

Defendants, arrested for possession of cocaine and possession of paraphernalia, moved to suppress evidence seized on grounds of illegal stop. The Circuit Court, Monroe County, Richard G. Payne, J., granted motion. State appealed. The District Court of Appeal held that police officer had founded suspicion to make investigatory stop, and officer's further observations upon temporary detention provided probable cause for arrest of defendants.

Reversed and remanded.

Arrest ⇐63.4(15, 16), 63.5(5)

Officer had founded suspicion to make investigatory stop, and officer's further observations during temporary detention provided reasonable cause for arrest of defendants for possession of cocaine and drug paraphernalia, where based on officer's observation, training, and experience, it appeared that defendant was inhaling cocaine and once detained officer observed powdery white residue on defendant's pants and floor of car at his feet and manila envelope containing substance determined to be cocaine. West's F.S.A. §§ 901.151, 901.151(2–4).

Robert A. Butterworth, Atty. Gen., and Jacqueline M. Valdespino, Asst. Atty. Gen., for appellant.

Bennett H. Brummer, Public Defender, and Louis Campbell, Asst. Public Defender, for appellees.

Before SCHWARTZ, C.J., and NESBITT and COPE, JJ.

PER CURIAM.

The State appeals an order granting a motion to suppress. We reverse.

While on patrol at 5 a.m., the arresting officer, Sergeant Catala, saw defendants James Ehler and Brenda Warshan sitting in a pickup truck parked in a lot outside a closed bar. From a distance of about fifteen yards away and while Catala was driving by, he saw Ehler put his hand up to his nose, put his head down and then back. He thought Ehler was inhaling cocaine, so he turned and pulled up about twenty feet in front of the truck. As the uniformed officer walked up to the truck, he saw Ehler make a motion down between his legs, as if trying to conceal something. Catala stated that he was a police officer and defendants were not free to leave; he shined his flashlight into the truck. He noticed some powdery white residue on Ehler's pants and on the floor at his feet. He asked the two to get out of the truck and as Ehler stepped out, a wallet fell from between his legs to the floor. A manila envelope also fell out of the wallet onto the ground. The officer looked into the envelope and saw a Ziploc baggie which contained a white powdery substance. A cred-

Mark King Leban and William Aaron, Miami, for Kenneth Garrido.

Bennett H. Brummer, Public Defender, and Robert Burke, Asst. Public Defender, for Fernando Garcia.

Before HUBBART, NESBITT and GODERICH, JJ.

PER CURIAM.

Affirmed. *Aldazabal v. State*, 471 So.2d 639, 640 (Fla. 3d DCA 1985); *State v. Jones*, 247 So.2d 342 (Fla. 3d DCA 1971).

X.C., a juvenile, Appellant,

v.

The STATE of Florida, Appellee.

No. 89-2041.

District Court of Appeal of Florida, Third District.

June 19, 1990.

An Appeal from the Circuit Court of Dade County; Thomas K. Petersen, Judge.

Bennett H. Brummer, Public Defender, and Laura Jacobs, and Virginia Lee Stanley, Sp. Asst. Public Defenders, for appellant.

Robert A. Butterworth, Atty. Gen., and Richard L. Polin, Asst. Atty. Gen., and Simone McKenzie, Certified Legal Intern, for appellee.

Before NESBITT, BASKIN and LEVY, JJ.

PER CURIAM.

Affirmed. *See State v. McCormack*, 517 So.2d 73 (Fla. 3d DCA 1987).

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Rosa J. BERNAL and Jose M. Bernal, Appellants,

v.

Donald H. LIPP, D.P.M., and Donald H. Lipp, D.P.M., P.A., Appellees.

No. 89-2230.

District Court of Appeal of Florida, Third District.

June 19, 1990.

Professional negligence plaintiffs who had obtained final adverse judgment sought new trial and submitted motion to interview juror. The Circuit Court, Dade County, Joseph M. Nadler, J., denied motion, and appeal was taken. The District Court of Appeal, Cope, J., held that plaintiffs seeking new trial of professional negligence suit were entitled to conduct juror interview.

Reversed and remanded.

1. Trial ⇐344

Plaintiffs seeking new trial of professional negligence suit were entitled to conduct juror interview, where plaintiffs contended that juror had failed to disclose, when asked on voir dire, that he had previously been defendant in personal injury action. West's F.S.A. RCP Rule 1.431(h).

2. Trial ⇐344

While trial court had discretion to conduct posttrial juror interview, trial court could not interview juror in chambers, without counsel and without court reporter. West's F.S.A. RCP Rule 1.431(h).

Hinshaw, Culbertson, Moelmann, Hoban & Fuller, and John E. Herndon, Jr., Miami, for appellants.

Levine & Lygnos, and Arthur Joel Levine and Rick Silverman, Fort Lauderdale, for appellees.

Before COPE, GERSTEN and GODERICH, JJ.

COPE, Judge.

[1] Rosa and Jose Bernal appeal an adverse final judgment in their action for professional negligence against appellee Donald Lipp. After trial, the Bernals submitted a motion to interview one juror under Rule 1.431(h), Florida Rules of Civil Procedure, and a motion for new trial, contending that the juror had failed to disclose, when asked on voir dire, that he had previously been a defendant in a personal injury action. The trial court initially granted the motion for juror interview. Subsequently, the trial court reversed itself, denied the juror interview, and eventually denied the motion for new trial.

Based on the criteria set forth in *Industrial Fire & Casualty Ins. Co. v. Wilson*, 537 So.2d 1100, 1103 (Fla. 3d DCA 1989); *Smiley v. McCallister*, 451 So.2d 977, 978–79 (Fla. 4th DCA 1984); and *Minnis v. Jackson*, 330 So.2d 847 (Fla. 3d DCA 1976), the Bernals have made a sufficient showing to be entitled to the juror interview. The trial court should have allowed the juror interview in order to permit the Bernals to make their record in support of that part of their motion for new trial. We therefore reverse. At the present stage we do not say that the Bernals are entitled to a new trial, but only that they are entitled to the interview pursuant to Rule 1.431(h), after which the motion for new trial will be ripe for determination.

[2] Since there must be further proceedings below, we comment on a dispute which arose regarding the procedure to be employed for the juror interview. The trial judge indicated that he wished to interview the juror in chambers, without counsel and without a court reporter. The Bernals objected, and the objection was well taken.

Rule 1.431(h) allows the court to "prescribe the place, manner, conditions, and scope of the interview." While the rule allows the trial court broad discretion, it must be read against Rule 2.070(a), Florida Rules of Judicial Administration, which provides in part, "Any proceeding shall be reported on the request of any party." *See also Applegate v. Barnett Bank*, 377 So.2d 1150, 1151–52 (Fla.1979).

Rule 1.431(h) also provides the trial court discretion regarding the manner in which the interview will be conducted. Thus, the trial court may in its discretion permit counsel to ask questions, *see Minnis v. Jackson*, 330 So.2d at 848, or the trial court may conduct the examination. *See Preast v. Amica Mut. Ins. Co.*, 483 So.2d 83 (Fla. 2d DCA), *review denied*, 492 So.2d 1334 (Fla.1986). While the trial court had the discretion to choose the latter procedure, we see no basis on this record on which to exclude counsel. *See United States v. Posner*, 644 F.Supp. 885, 885–88 (S.D.Fla. 1986), *aff'd*, 828 F.2d 773 (11th Cir.1987), *cert. denied*, 485 U.S. 935, 108 S.Ct. 1110, 99 L.Ed.2d 271 (1988); *accord Kociemba v. G.D. Searle & Co.*, 707 F.Supp. 1517, 1539–40 n. 24 (D.Minn.1989). *See generally Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

We therefore reverse and remand for further proceedings consistent herewith.

SACK REALTY, INC., Appellant,

v.

Thomas ZIBELLI, Circle K. Corporation and William Brickman, Appellees.

Nos. 89–2633, 89–2953 and 89–2954.

District Court of Appeal of Florida, Third District.

June 19, 1990.

Rehearing Denied July 25, 1990.

Appeals from the Circuit Court for Dade County; John Gale, Judge.

Coffey, Aragon, Martin, Burlington & Serota and Michael G. Shannon, Miami, for appellant.

tutes reversible error. *Goodman v. Becker*, 430 So.2d at 561; *Little v. Miller*, 311 So.2d at 119; *Clooney v. Geeting*, 352 So.2d 1216, 1219 (Fla. 2d DCA 1978).

Accordingly, we reverse and remand for a new trial in accordance herewith.

The remaining points raised by the appellants are without merit.

REVERSED.

WALDEN, J., and GREEN, OLIVER L., Jr., Associate Judge, concur.

Jefferson MITCHELL, Appellant,

v.

STATE of Florida, Appellee.

No. AW-271.

District Court of Appeal of Florida, First District.

Nov. 1, 1984.

Defendant was convicted in the Circuit Court, Dixie County, Wallace M. Jopling, J., of three counts involving offenses which arose out of major disturbance at city correctional institution where he was inmate. The District Court of Appeal, Nimmons, J., held that defendant was entitled to new trial on charges arising out of major disturbance at city correctional institution at which he was an inmate, where juror who was aunt of city correctional officer responded negatively to question as to whether she had any family member, relative or friend who was employed at city correctional institution and where defendant had peremptory challenges available at time question was asked which he would have used if juror had responded in the affirmative; even if juror was not aware of nephew's employment or question was reasonably susceptible to being interpreted as inquiry about juror's immediate family, defendant was not required to explore topic further, particularly in view of admonition to counsel to avoid repetitive questioning.

Reversed and remanded.

1. Jury ⇐131(18)

Trial counsel are entitled to truthful responses to questions propounded during jury selection process.

2. Jury ⇐131(1, 3)

Examination of a juror on voir dire has dual purpose of ascertaining whether legal cause for challenge exists and also to determine whether prudence and good judgment suggest exercise of a peremptory challenge.

3. Jury ⇐135

Right of a peremptory challenge implies right to make intelligent judgment as to whether a juror should be excused; counsel have right to truthful information in making such judgment.

4. Criminal Law ⇐1166.16

Even assuming juror had no intent to deceive when falsely answering question propounded during jury selection, relief will be afforded where: question propounded is straight forward and not reasonably susceptible to misinterpretation; juror gives untruthful answer; inquiry concerns material and relevant matter to which counsel may reasonably be expected to give substantial weight in exercise of peremptory challenges; there were peremptory challenges remaining which counsel would have exercised at time question was asked; and counsel represents that he would have peremptorily excused juror had juror truthfully responded.

5. Criminal Law ⇐1166.16

Defendant was entitled to reversal for new trial on charges arising out of major disturbance at city correctional institution at which he was an inmate, where juror who was aunt of city correctional officer responded negatively to question as to

whether she had any family member, relative or friend who was employed at city correctional institution and where defendant had peremptory challenges available at time question was asked which he would have used if juror had responded in the affirmative; even if juror was not aware of nephew's employment or question was reasonably susceptible to being interpreted as inquiry about juror's immediate family, defendant was not required to explore topic further, particularly in view of admonition to counsel to avoid repetitive questioning.

6. Jury ⇐131(18)

Failure to enforce right to elicit from prospective jurors truthful answers to material questions renders hollow the right of peremptory challenge.

Michael E. Allen, Public Defender, and Carl S. McGinnes, Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen., and Henri C. Cawthon, Asst. Atty. Gen., for appellee.

NIMMONS, Judge.

Mitchell appeals from convictions of three counts involving offenses which arose out of a major disturbance at Cross City Correctional Institution where he was an inmate. We reject appellant's assertion that the trial court erred in denying his motion for judgment of acquittal on the count one charge of attempting to cause a riot under Section 944.45, Florida Statutes (1981). However, we must reverse and remand for a new trial on all three counts by reason of a juror's failure to respond truthfully to a material question propounded by defense counsel during jury selection.

Prior to allowing the attorneys to address questions directly to the prospective jurors, the trial court asked the jurors a number of questions. One of the questions was whether any of the jurors had any family member, relative or friend who was employed at the Cross City Correctional Institution. All of the jurors, including a Mrs. Newman, responded in the negative. After the trial judge completed his questioning of the jurors, he turned the voir dire over to counsel admonishing them against repetition of the areas already covered by the court. No further inquiry or comment was made during jury selection regarding any relationship between the jurors and employees at the correctional facility.

After the verdict, it was discovered by defense counsel that Mrs. Newman was the aunt of a Cross City correctional officer.[1] In fact, her nephew had been present in the courtroom during the trial assisting in security.

At the hearing on the motion for new trial, defense counsel asserted that, although he eventually used all of his peremptory challenges, he still had several challenges remaining at the time that the subject question was asked and that he would have used one of them by excusing Mrs. Newman had she given a truthful response. The trial court took testimony from Mrs. Newman who stated that she recalled being asked the subject question but responded as she did because she thought the question was limited to her immediate family. She said that she was aware that her nephew was present in the courtroom during the trial but that her relationship to him and his presence in the courtroom had no effect on her deliberations.

[1] Trial counsel are entitled to truthful responses to questions propounded during the jury selection process. Notwithstanding Mrs. Newman's after-the-fact insistence that she thought the court was referring to her immediate family, the question was obviously not so limited. The question was framed in such a way that it should have elicited a positive response from the prospective juror who knew her nephew to

1. Although the record does not indicate how defense counsel learned of the relationship, no issue is raised with respect thereto.

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be a correctional officer at the Cross City facility. The question and negative answer being both clear and straightforward, it was not incumbent upon defense counsel to explore the topic further particularly in view of the trial court's admonition of counsel to avoid repetitive questioning.

The state relies, in part, upon the Florida Supreme Court's recent decision in *Lusk v. State*, 446 So.2d 1038 (Fla.1984). That case is inapposite inasmuch as it dealt with the question of whether a juror was excusable *for cause*. The Supreme Court held that it was not error to deny the defendant's motion to excuse a correctional officer for cause on the ground, as the defendant contended, that a law enforcement position inherently creates a disability to serve as a fair and impartial juror.

[2, 3] The examination of a juror on voir dire has a dual purpose, namely, to ascertain whether a legal cause for challenge exists and also to determine whether prudence and good judgment suggest the exercise of a peremptory challenge. 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. See *Minnis v. Jackson*, 330 So.2d 847 (Fla. 3rd DCA 1976); *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953); *Skiles v. Ryder Truck Lines, Inc.*, 267 So.2d 379 (Fla. 2nd DCA 1972).

[4, 5] The state argues that the defendant should be denied relief because the juror's untruthful response was not intentional. We might abide that argument if, for example, the juror was not aware of her nephew's employment or the question were reasonably susceptible to being interpreted as an inquiry about the juror's *immediate* family. *Compare Rouede Construction, Inc. v. First National Bank of Eau Gallie*, 177 So.2d 375 (Fla. 2nd DCA 1965). No such reason appears in the instant case for the juror's untruthful response. Even assuming, as the trial court found, that the juror had no intent to deceive, nevertheless relief will be afforded where (1) the question propounded is straightforward and not reasonable susceptible to misinterpretation; (2) the juror gives an untruthful answer; (3) the inquiry concerns material and relevant matter to which counsel may reasonably be expected to give substantial weight in the exercise of his peremptory challenges; (4) there were peremptory challenges remaining which counsel would have exercised at the time the question was asked; and (5) counsel represents that he would have peremptorily excused the juror had the juror truthfully responded.[2]

[6] Failure to enforce the right to elicit from prospective jurors truthful answers to material questions renders hollow the right of peremptory challenge.

Reversed and Remanded for a new trial.

SHIVERS and WENTWORTH, JJ., concur.

2. In *Skiles v. Ryder Truck Lines, Inc.*, 267 So.2d 379 (Fla. 2nd DCA 1972), the court stated (quoting from *Drury v. Franke*, 247 Ky. 758, 797, 57 S.W.2d 969, 984–5 (1933)):

> [T]he fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; ... when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law.

See also *Redondo v. Jessup*, 426 So.2d 1146 (Fla. 3rd DCA 1983). To the extent that the phrase "regardless of the knowledge of its falsity" contained in the above quote would be deemed to encompass a situation where, for example, Mrs. Newman did not actually know that her nephew was employed at the correctional facility when she answered the subject question in the negative, we doubt that we would follow a literal application of the principal announced in the above quote. However, that is not the situation before us as Mrs. Newman *did* have such knowledge when she responded to the question.

or file any pleading until well after the entry of the final judgment, we conclude the amount of damages cannot now be contested.

Affirmed.

Harold Connor MINNIS and Dade County, a political subdivision of the State of Florida, Appellants,

v.

Minnie JACKSON, Appellee.

No. 75-999.

District Court of Appeal of Florida, Third District.

April 13, 1976.

Rehearing Denied May 12, 1976.

Passenger injured while riding on county bus brought suit for damages against county and bus driver. The Circuit Court, Dade County, David Goodhart, J., entered judgment on verdict for plaintiff and defendants appealed. The District Court of Appeal held that where jury foreman denied during voir dire examination that any member of his family had been injured in an accident when, in fact, his daughter had been injured in a county bus a year before, and during deliberations foreman had recommended that verdict be high enough to allow plaintiff to pay her attorney, new trial would be granted on issue of damages.

Reversed and remanded.

1. Jury ⇐149

Failure of juror to honestly answer material questions propounded to him on voir dire examination constitutes bad faith requiring his disqualification from serving on the jury.

2. New Jury ⇐20

Right of fair trial by an impartial jury is destroyed when the right to make an intelligent judgment as to whether a juror should be challenged is lost or unduly impaired, and when this occurs, the verdict should be set aside and a new trial granted.

3. New Trial ⇐9, 20

Where jury foreman, in suit against county and bus driver for injuries sustained by passenger while riding on a county bus, denied on voir dire examination that any member of his family had been injured in an accident, when, in fact, his daughter had been injured in a county bus a year before, and during deliberations the foreman had recommended that the verdict be high enough to allow plaintiff to pay her attorney, defendants were entitled to new trial on issue of damages.

Sam Daniels, John E. Finney, Miami, for appellants.

Horton, Perse & Ginsberg, George P. Telepas, Miami, for appellee.

Before HENDRY, HAVERFIELD and NATHAN, JJ.

PER CURIAM.

Defendants Harold Minnis and Dade County appeal a $45,000 final judgment for the plaintiff entered pursuant to a jury verdict.

Plaintiff, Minnie Jackson, was injured while riding as a passenger on a County MTA bus. She filed the instant suit for damages against defendants Dade County and the bus driver, Harold Minnis, and the County admitted liability. A trial was held on the issue of damages and the jury returned a verdict for $45,000. After entry of final judgment, defense counsel discovered that the jury foreman, Daniel Medvin, had given false answers during voir dire

examination, i. e. upon being asked whether any members of his family had been in an accident where they had been injured, Medvin replied in the negative when, in fact, his daughter had been injured in a county bus a year before. Although no legal action had been instituted, a claim had been filed with the county. Defense counsel moved for a new trial on this ground. A rule to show cause was issued and a hearing was held at which the jurors were questioned by counsel and the trial judge. Medvin denied that his fairness as a juror had been affected or that he had played an active role in the jury discussions leading to a verdict. The other remaining jurors were questioned and the fact was brought out that Medvin recommended that the verdict be high enough to allow the plaintiff to pay her attorney. The trial judge denied the motion for new trial and this appeal ensued. We reverse.

[1-3] The well established rule is that the failure of a juror to honestly answer material questions propounded to him on voir dire examination constitutes bad faith requiring his disqualification from serving on the jury in the case. *Seay v. State*, 139 Fla. 433, 190 So. 702 (1939). Further, the right of counsel to challenge a juror for cause or peremptorily being indispensible to the successful operation of our jury system, the right of fair trial by an impartial jury is destroyed when the right to make an intelligent judgment as to whether a juror should be challenged is lost or unduly impaired. When this occurs, the verdict should be set aside and a new trial granted. *Ellison v. Cribb*, Fla.App.1972, 271 So.2d 174. For the question is not whether an improperly established tribunal acted fairly, but whether a proper tribunal was established. *Skiles v. Ryder Truck Lines, Inc.*, Fla.App.1972, 267 So.2d 379.

The final judgment is reversed and the cause remanded to the trial court for a new trial on the issue of damages.

Clemence Levy BELLMAN, Appellant,

v.

Dean S. CAMPBELL and Nona O. Campbell, his wife, et al., Appellees.

No. 75-911.

District Court of Appeal of Florida, Third District.

April 13, 1976.

Rehearing Denied May 12, 1976.

Appeal from Circuit Court, Dade County; Richard S. Fuller, Judge.

Carey, Dwyer, Austin, Cole & Selwood and Steven R. Berger, Miami, for appellant.

Paige & Catlin, Miami, for appellees.

Before BARKDULL, C. J., and PEARSON, J., and CHARLES CARROLL (Ret.), Associate Judge.

PER CURIAM.

Affirmed. See: *Langley v. Irons Land & Development Co.*, 94 Fla. 1010, 114 So. 769; *Campbell v. Bellman*, Fla.App.1974, 293 So.2d 795; § 59.041, Fla.Stat.

Ruth WATSON, Appellant,

v.

John WATSON, Sr. and Jean Mary Watson, Appellees.

No. 75-594.

District Court of Appeal of Florida, Third District.

April 20, 1976.

Rehearing Denied May 12, 1976.

Natural mother appealed a final judgment of adoption rendered in the Circuit Court, Dade County, Francis J. Christie, J.,

436 So.2d 93 (Fla.1983); *Patterson v. State*, 462 So.2d 33 (Fla. 1st DCA 1985); *Zirkle v. State*, 410 So.2d 948 (Fla. 3d DCA 1982); *Robinson v. State*, 393 So.2d 33 (Fla. 1st DCA 1981).

Accordingly, the order of dismissal appealed herein is hereby affirmed.

AFFIRMED.

BARKDULL, J., and ORFINGER, Associate Judge, concur.

DANIEL PEARSON, Judge, concurring.

The majority opinion is internally inconsistent. I agree with the majority that it would be as impossible for a state attorney to make an oath to a traverse upon personal knowledge as it would be to make such an oath to an information. But if that is the case, then I obviously cannot agree with the majority when it says that the trial court correctly answered the certified question, namely, whether the oath to a sworn traverse must be based on personal knowledge. But notwithstanding that the county court incorrectly answered the certified question, it correctly dismissed the information because the oath to the traverse was, as the majority points out, otherwise inadequate. I therefore concur in the result of dismissing the action.

INDUSTRIAL FIRE AND CASUALTY INSURANCE COMPANY, Appellant/Cross Appellee

v.

James R. WILSON, Appellee/Cross Appellant,

Gerald Earl SKISLAK, Appellant/Cross Appellant,

v.

James R. WILSON, Appellee.

Nos. 86–2819, 87–0609, 86–2906 and 87–0482.

District Court of Appeal of Florida, Third District.

Jan. 31, 1989.

Pedestrian, who was struck by vehicle as he was standing along roadside, brought action against driver and driver's insurer for personal injuries sustained. The Circuit Court, Dade County, Richard S. Fuller, J., entered judgment. Driver and insurer appealed. The District Court of Appeal, Hendry, J., 472 So.2d 776 reversed and remanded. The Circuit Court, Donald E. Stone, J., entered judgment in favor of pedestrian, and denied motion of driver and insurer for relief from judgment. Appeal was taken. The District Court of Appeal held that driver and insurer were deprived of fair and impartial trial by juror's concealment of certain facts.

Reversed and remanded.

1. Appeal and Error ⇐1045(1)

A case will be reversed because of juror's nondisclosure of information when the following three-part test is met: the facts must be material; the facts must be concealed by juror upon his voir dire examination; and failure to discover concealed facts must not be due to want of diligence of complaining party.

Appeal and Error ⇐1045(1)
Jury ⇐131(18)

Personal injury defendant and his insurer were deprived of fair and impartial trial due to fact that juror concealed fact that he had been insured by defendant insurer, that he had filed claim with insurer, that insurer had denied claim for property damages since juror only had a P.I.P. policy, and that after insurer denied claim for benefits, he did not renew policy; concealment was material in that if insurer and defendant had known of juror's insurance history, they would have been in a position to ask further questions relating to juror's relationship with, and feelings towards, insurer and neither insurer nor defendant was to blame for not discovering concealed facts since they had earnestly attempted during voir dire to discover the very type of information that juror chose to conceal.

Fazio, Dawson, DiSalvo & Cannon, and Marcia E. Levine, Ft. Lauderdale, for appellant/cross appellee.

Jeanne Heyward, Miami, for appellant/cross appellant.

Horton, Perse & Ginsberg and Edward A. Perse, Miami, for appellee/cross appellant.

Before NESBITT, FERGUSON and LEVY, JJ.

PER CURIAM.

James R. Wilson was injured in March of 1979 while standing near an intersection in Homestead, Florida. He was struck by a vehicle which was driven by Gerald R. Skislak, and which was insured by Industrial Fire and Casualty Insurance Company. Skislak was travelling east on Southwest 216th Street when a phantom vehicle travelling in the opposite direction suddenly turned south (left) in front of him. Skislak tried to avoid an accident by turning north, but lost control of his vehicle and ran off the roadway and hit Wilson.

Consequently, Wilson filed a lawsuit against Skislak and Industrial Fire. The issues in that case were tried before a jury, resulting in a verdict in favor of Wilson in the amount of $200,000.00. Skislak and Industrial Fire appealed, with the appeal resulting in a reversal and the case being remanded for a new trial due to inappropriate remarks made by Wilson's attorney during the trial. *Skislak v. Wilson*, 472 So.2d 776 (Fla. 3d DCA 1985).

Accordingly, the case was retried, resulting in a verdict in favor of Wilson in the amount of $500,000.00. Skislak and Industrial Fire each moved for a Judgment Notwithstanding the Verdict or, in the alternative, New Trial or Remittitur, which motions were denied. The trial court granted Industrial Fire's renewed motion to limit the judgment against it to the amount of its policy limits, to-wit: $10,000.00. The trial court then entered a final judgment in favor of Wilson and against Skislak and Industrial Fire, jointly and severally, for $10,000.00 (the policy limits), and against Skislak alone for $484,900.00. Skislak and Industrial Fire appealed the final judgment in a timely manner.

Thereafter, Industrial Fire discovered that the jury foreperson in the second trial had concealed the existence, and nature, of his insurance history with Industrial Fire. Skislak and Industrial requested the appellate court to relinquish jurisdiction so that the matter could be raised in the trial court. That request was granted and Skislak and Industrial Fire filed their motion in the trial court seeking relief from the judgment. That motion was denied. Skislak and Industrial Fire then appealed the denial of that motion. Wilson, joined by Skislak, cross-appealed the trial court's order limiting the final judgment against Industrial Fire to the policy limits. All appeals were consolidated herein.

Appellants Skislak and Industrial Fire raise four main points on appeal, contending that any one of them, considered individually, would entitle them to a reversal and a new trial. These four points may be summarized as follows:

I. The trial court committed reversible error in refusing to instruct the jury on the "sudden emergency" doctrine;

II. The trial court erred in denying Skislak's and Industrial Fire's Motion for Relief From Judgment where, after the second trial, it was learned that, in response to voir dire questioning concerning any prior contact with Industrial Fire, the gentleman who subsequently became the jury foreperson had "concealed" his insurance history with Industrial Fire. Skislak and Industrial Fire maintained that if the juror's insurance history had been known, they would have been in a position to either ask the court to excuse the juror "for cause" or they would have excused him peremptorily. In addition, they would have been in a position to, at the very least, inquire further of the prospective juror concerning his insurance history and his prior relationship with Industrial Fire;

III. The trial court erred in denying Skislak's and Industrial Fire's motions for mistrial and for new trial where Wilson's attorney allegedly committed prejudicial error by improperly commenting to the jury, during both voir dire and closing arguments, about the jury's racial, religious, ethnic and occupational composition, which comments Skislak and Industrial Fire contend were intended to curry favor with the jury;

IV. The amount of the verdict is excessive considering the fact that the verdict in the second trial was more than twice the amount of the verdict in the first trial, even though both trials involved substantially the same evidence.

We agree that the issues raised by appellants' second point (concerning the issue of juror concealment) require a reversal and a new trial.

During voir dire, Industrial Fire's trial counsel carefully posed questions designed to discover whether any of the prospective jurors had any knowledge of, or relationship with, his client. Specifically, the panel was asked the following questions by Industrial Fire's attorney:

"And his insurance company—which is a party in this lawsuit—is Industrial Fire and Casualty Insurance Company.

Do any of you recognize that company's name? Do any of you have any policies with that company or have you worked with that company or have you had any claims with that company?"

* * * * * *

"Now, one of the defendants in this case is Industrial Fire and Casualty Insurance Company.

Does anybody on this panel have any type of a feeling one way or another against an insurance company? Be candid with us. Oftentimes people have problems with insurance companies. They file a claim, they weren't paid promptly, they maybe got less than they thought they should have gotten.

Tell us now because it's important to my client to know now before you sit as a prospective juror as to whether or not you are going to give Industrial Fire a fair shake in this case.

Nobody is raising their hands and nobody is saying they've had any problem with an insurance company, so by your not telling me now, can I fairly and safely assume you're going to give them the same consideration as you will to Mr. Wilson? Is that fair?

You're all nodding your heads, yes. All right."

Industrial Fire learned after the trial that juror Norbert Perets (who was the jury foreperson) had been insured by Industrial Fire from December 8, 1978 to December 8, 1979 and had renewed his policy from December 8, 1979 to December 9, 1980. Perets reported to Industrial Fire that he had been involved in an accident on January 31, 1980, and claimed benefits under his policy with them. Industrial Fire denied the claim because the accident resulted in property damage only (with no personal injuries) while Perets only had a P.I.P. policy, not a liability, comprehensive or collision coverage policy of insurance. Perets did not renew his insurance policy with Industrial Fire after the denial of his claim.

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At the hearing held by the trial court in connection with Skislak's and Industrial Fire's Motion for Relief From Judgment, Industrial Fire's attorney argued that defendants could have excused Perets peremptorily or asked the court to do so for cause if the defendants had known of Perets's insurance history.

[1] A case will be reversed because of a juror's nondisclosure of information when the following three-part test is met: "(1) the facts must be material; (2) the facts must be concealed by the juror upon his voir dire examination; and (3) the failure to discover the concealed facts must not be due to the want of diligence of the complaining party." *Perl v. K-Mart Corp*, 493 So.2d 542, 542 (Fla. 3d DCA 1986).

[2] Clearly, these requirements were met in the present case. The record reflects that Perets concealed the following facts: (1) that he had been insured by Industrial Fire; (2) that he had filed a claim with Industrial Fire; (3) that Industrial Fire had denied his claim for property damage, since he only had a P.I.P. policy; and (4) that after Industrial Fire denied his claim for benefits, he did not renew the insurance policy that he had with Industrial Fire.

We find the juror's concealment to be material. If Skislak and Industrial Fire had known of Perets's insurance history with Industrial Fire, they would have been in a position to ask further questions relating to Perets's relationship with, and feelings towards, Industrial Fire. However, because of Perets's concealment, they were prevented from considering whether to ask further questions of Perets concerning Industrial Fire or from having Perets excused from the jury panel, either for cause or peremptorily.

Finally, it is clear on the face of the record that neither Industrial Fire nor Skislak is to blame for not discovering the concealed facts concerning Perets's relationship with Industrial Fire. To the contrary, the questioning by Industrial Fire's trial counsel, as reflected above, earnestly attempted to discover the very type of information that juror Perets chose to conceal. Unfortunately, the efforts of Industrial Fire's trial counsel to secure a fair and impartial jury were thwarted by the concealment.

For the foregoing reasons, we conclude that Perets's concealment of material facts in response to questions posed to him on voir dire deprived the defendants of a fair and impartial trial. *See Loftin v. Wilson*, 67 So.2d 185 (Fla.1953) and *Redondo v. Jessup*, 426 So.2d 1146 (Fla. 3d DCA), *rev. denied*, 434 So.2d 887 (Fla.1983). *Cf. Blaylock v. State*, 537 So.2d 1103 (Fla. 3d DCA 1988) (wherein a juror disclosed the fact that he had been held hostage, but defendant's trial counsel made a tactical decision to intentionally refrain from pursuing the line of questioning concerning that subject).

In view of the fact that appellants' other points on appeal have been rendered moot by virtue of the foregoing, we do not address them herein. Accordingly, the Final Judgment entered in this cause is hereby reversed, and this cause is remanded for further proceedings consistent herewith.

REVERSED AND REMANDED.

Lawrence Hayden BLAYLOCK, Jr., Appellant,

v.

The STATE of Florida, Appellee.

No. 87-2086.

District Court of Appeal of Florida, Third District.

Dec. 27, 1988.

As Modified on Denial of Rehearing and Rehearing En Banc March 7, 1989.

Defendant was convicted in the Circuit Court, Dade County, Edward D. Cowart, J., of first-degree murder, and defendant ap-