OA 12-9-94

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 83,369

DISTRICT COURT CASE NO.: 91-02909

CIRCUIT COURT CASE NUMBER: 89-42410

LOURDES DE LA ROSA, etc.,

Petitioner,

vs.

MARCOS A. ZEQUEIRA, M.D.,

Respondent,

_____/

BRIEF ON THE MERITS OF
MARCOS A. ZEQUEIRA, M.D.

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INTRODUCTION

The Petitioner, LOURDES DE LA ROSA, as Personal Representative of the Estate of Manuel De La Rosa, will be referred to as Plaintiff. Respondent MARCOS A. ZEQUEIRA, M.D., will be referred to as Dr. Zequeira.

References to the Record on Appeal will be indicated by the symbol (R. -).

STATEMENT OF THE CASE AND FACTS

Plaintiff LOURDES DE LA ROSA, as Personal Representative of the Estate of Manuel de la Rosa, her husband, filed a wrongful death claim against DR. ZEQUEIRA and Hialeah Hospital. (R 2-6). The Plaintiff alleged negligence on the part of DR. ZEQUEIRA and Hialeah Hospital in the care and treatment of her husband's lung cancer, which allegedly resulted in Manuel de la Rosa's death. (R 2-6). DR. ZEQUEIRA was the thoracic surgeon who operated on Manuel de la Rosa, on November 16, 1987, at Hialeah Hospital to remove the tumor. Shortly after the surgery, Manuel de la Rosa died.

Plaintiff's case proceeded to trial.[1] (R Vols. XVI - XXV, pp. 1 - 1489)[2]. The jury returned a verdict in favor of the defendants, finding no negligence on the part of DR. ZEQUEIRA or Hialeah Hospital, and final judgment was entered on October 22, 1991. (R Vol XXV at 1228 - 1229; R 811). The sole issue presented to the District Court was confined to the voir dire proceedings and whether the alleged "juror misconduct" required a new trial, as granted by the lower court. (R Vol. XVI at 18 - 221; R 786 - 804).

Counsel conducted voir dire of two panels of potential jurors

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[1] The otherwise unremarkable trial lasted for several days, from September 30, 1991 through October 8, 1991, and was conducted fairly in all respects. (R Vols XVI - XXV, pp. 1 -1489). Indeed, as confirmed by the lower court's Order, other than the pro forma suggestion that the verdict was against the "manifest weight" of the evidence, the Plaintiff sought a new trial solely on the "juror misconduct" issue. (R 2471; 786 - 804).

[2] The trial transcript was requested as a supplement to the record on appeal and was designated as Volumes XVI thru XXV, embracing pages 1 to 1489. Therefore, references to the trial transcript will appear as (R Vol - at).

from which the jury was eventually selected. (R Vol XVI at 18 - 221).[3] Plaintiff's counsel began his voir dire of both panels by asking a series of personal questions directed to each juror individually. (R Vol XVI at 18 - 53; 147 - 158). Following these individual questions, counsel asked a series of general questions of the panels as a whole, at which time individual jurors would respond, if appropriate. (R 54 - 77).

At one point, counsel inquired of the entire 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 friend, whether it's been for personal injury, a commercial dispute where you have been involved in litigation? (R Vol XVI at 177-178)(emphasis added).

In response to that question, two jurors provided the following responses:

1) Juror Moore indicated that he had filed a worker's compensation claim because he lost the "top joint" of one of his fingers in a work related accident. (R Vol XVI at 177). The only follow up question asked of Juror Moore was whether or not that matter was resolved to his satisfaction; he responded that it was, and no further questions were asked of Juror Moore by Plaintiff's counsel. (R Vol XVI at 177).

2) Juror Smith indicated that she had been involved in an auto accident and had filed suit, which was resolved to her

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[3] The juror whose conduct is the subject of this appeal is Louis Edmonson. Mr. Edmonson was one of the potential jurors from the second panel of jurors, to which voir dire was directed in the afternoon. (R 150).

satisfaction. (R Vol XVI at 178). Again, there were no further questions posed to Juror Smith concerning her involvement in that lawsuit. (R Vol XVI at 178).

3) Finally, Juror Weber indicated that he had been involved as a nominal plaintiff in a good number of "condominium type" lawsuits wherein he represented the condominium as the plaintiff. (R Vol XVI at 178). Plaintiff's counsel then questioned Juror Weber as to whether there was anything about that experience which would influence his ability to listen to this case, to which Juror Weber responded in the negative. (R Vol XVI at 179).

At that point, Plaintiff's counsel then asked:

> 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? (R Vol XVI at 179).

There was no response from any of the jurors, and Plaintiff's counsel then moved on to another line of questioning. (R Vol XVI at 179). Upon the completion of voir dire, the jury was empaneled, consisting of Joseph Vernet, Sylvia Muhtar, Louis Edmonson, Shelton Mankin, Antonio Pino and Johnny Elmore. (R Vol XVI at 227).[4]

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[4] Jean Doubles was agreed upon by counsel as the alternate juror. (R Vol XVI at 250). During voir dire of an additional five potential jurors for the alternate juror's seat, Plaintiff's counsel did not even inquire as to prior involvement in lawsuits, whether as plaintiff or defendant. (R Vol XVI at 230 - 240). However, when questioned about involvement in prior lawsuits by Defendants' counsel, Ms. Doubles responded that she settled a prior claim against the insurer of a motorcyclist who had hit and killed her daughter on a bicycle in 1971. (R Vol XVI at 240, 245).

The trial proceeded, unremarkably, concluding on October 8, 1991 with a verdict in favor of the Defendants. (R Vol XXV at 1226). Shortly thereafter, Plaintiff's counsel conducted a search of the public records of Dade County which revealed that a "Louis Edmonson" had been the defendant in five minor collections actions, dating as far back as 1979, and a five year old divorce action which had been filed by Mr. Edmonson's wife, but dismissed for lack of prosecution. (R 787 - 788).[5] Of these six actions, two were dismissed for lack of prosecution, three resulted in the entry of default judgments against Mr. Edmonson, and one concluded to final judgment in small claims court for which a Satisfaction of Judgment

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[5] The six "lawsuits" in which Mr. Edmonson had been involved were:

1. Household Finance Company v. Louis Edmonson, Case No. 90-16117 CC 05. (Default Final Judgment entered October 16, 1990).

2. Eastern Financial Federal Credit Union v. Audrey Edmonson and Louis Edmonson, Case No. 89-49696 (08) (Default Final Judgment entered February 2, 1990).

3. Mayor's Jewelers, Inc. v. Louis Edmonson, Case No. 89-14394-SP-28 (Dismissed for lack of prosecution on August 20, 1990).

4. Gars, Dixon & Shapiro, P.A. v. Louis Edmonson, Case No. 88-5374-SP25A (Judgment entered March 13, 1989 - Satisfaction of Judgment entered March 31, 1989).

5. Audrey Moss Edmonson v. Louis Edmonson, Case No. 86-47647-FC-01 (Dismissed for lack of prosection on January 21, 1988.

6. Ford Motor Credit Co. v. Louis Edmonson, Case No. 79-904122-SP-05 (County Court records no longer available because of the age of the file.)

(R 786 - 804).

was entered. (R 787 - 788). The court files of one of these small claims cases had been destroyed because the case was twelve years old. (R 788). Therefore, the disposition of the case was unknown.

Plaintiff's search also revealed a thirteen year old suit in which a "Louis Edmonson" was the plaintiff, **LOUIS EDMONSON v. SATURNERY MARTELO.**[6] The case was so old that the court records had been destroyed. (R 788). Thus, even the nature of this case is unknown. (R 788).

The sole basis of Plaintiff's Motion for New Trial (R 786 - 804) was "juror misconduct" as the result of Mr. Edmonson's alleged act of omission in failing to respond to Plaintiff's counsel's general questions concerning prior lawsuits. The trial court granted Plaintiff's motion for new trial (R.2471-73).

Zequeira appealed and the Third District Court of Appeal reversed and remanded the matter for entry of judgment in favor of Dr. Zequeira. **ZEQUEIRA v. DE LA ROSA, 627 So.2d 531 (Fla. 3d DCA 1993).** By a 4 to 3 margin this Court accepted jurisdiction, apparently upon express and direct conflict. (Order accepting jurisdiction issued September 7, 1994)[7]

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[6]Case No. 78-11104-CA-01.

[7]Consistent with the position taken in our jurisdictional brief, we do not concede nor believe that the District Court's opinion conflicts expressly or directly with any other decision of this or any other appellate court in the State of Florida. Thus, we believe that this Court has improvidently accepted jurisdiction, and would urge the court to discharge that jurisdiction.

ISSUE ON APPEAL

I. WHETHER THE DISTRICT COURT CORRECTLY REVERSED THE TRIAL COURT'S NEW TRIAL ORDER WHICH WAS BASED SOLELY ON THE NON-RESPONSE OF ONE JUROR TO PLAINTIFF'S COUNSEL'S NON-SPECIFIC VOIR DIRE QUESTION REGARDING PRIOR INVOLVEMENT IN PERSONAL INJURY OR COMMERCIAL LAWSUITS WHERE THE JUROR HAD PREVIOUSLY BEEN INVOLVED IN MINOR COLLECTIONS PROCEEDINGS AND A DISSOLUTION OF MARRIAGE PROCEEDING WHICH HAD BEEN DISMISSED FOR LACK OF PROSECUTION.

> a. A juror's non-disclosure of minor involvement in prior lawsuits is not per se juror misconduct requiring a new trial, particularly where it has not been established that the juror heard or understood the question.

II. PLAINTIFF DID NOT EXERCISE DUE DILIGENCE (A) BY FAILING TO REQUEST A JUROR INTERVIEW AND (B) BY INVESTIGATING THE JURORS ONLY AFTER THE ADVERSE VERDICT WAS RENDERED.

SUMMARY OF THE ARGUMENTS

The Petitioner asserts express and direct conflict between the District Court opinion, **ZEQUEIRA v. DE LA ROSA, 627 So.2d 531 (Fla. 3d DCA 1993)**, and **MOBIL CHEMICAL CO. v. HAWKINS, 440 So.2d 378 (Fla. 1st DCA 1980)**, **MITCHELL v. STATE, 458 So.2d 819 (Fla. 1st DCA 1984)**, and **SKILES v. RYDER TRUCK LINES, INC., 267 So.2d 379 (Fla. 2d DCA 1972)** (Petitioner's initial brief at Page 20).

However, each of these decisions is readily distinguishable from the District Court's opinion in this case. In each of those three decisions there was reference in the opinion to actual concealment by virtue of a negative response to a question posed during voir dire. **MITCHELL, 458 So.2d 819, (Fla. 1st DCA 1984)** (juror responded in the negative to counsel's question of whether she or any family member, relative or friend was employed by Cross City Correctional Institute; juror's nephew was a Cross City correctional officer); **MOBIL CHEMICAL CO., 440 So.2d 378, (Fla. 1st DCA 1983)** (juror answered "no" to inquiry of whether she knew anything about the case or anyone involved where she was a second cousin of the plaintiff's wife and had been a client of the plaintiff's former attorney as recently as one year before the trial); **SKILES, 267 So.2d 379, (Fla. 2d DCA 1972)** (juror replied "no" to counsel's question regarding whether he had ever been a party to a lawsuit).

The record references in these and other cases to actual responses to questions posed to the jurors during voir dire is a crucial step in proving all three prongs necessary to obtain a new

trial in a case such as this. Quite simply, if there is no response at all it cannot be determined with any accuracy that there was in fact any concealment. Without interviewing the juror, it is impossible to determine whether the juror actually "concealed" anything. Furthermore, the less "material" an apparent omission the more important a jury interview becomes for purposes of determining whether the prospective juror actually concealed anything. Here, the district court appropriately determined that the undisclosed information was not material, as it was "so foreign to the case being tried." **ZEQUEIRA, 627 So.2d at 532.**

This Court should discharge jurisdiction as having been improvidently granted. Alternatively, this Court should affirm the decision of the district court.

ARGUMENT

A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy is guilty of misconduct. **LOFTIN v. WILSON, 67 So.2d 185 (Fla. 1953)**. The three-part test that has been established to determine whether a case will be reversed because of juror misconduct requires: 1) that the concealed facts be material; 2) that the material facts were concealed during voir dire; and 3) that the failure to discover the concealed facts was not due to want of diligence of the complaining party. **BERNAL v. LIPP, 580 So.2d 315 (Fla. 3d DCA 1991)**.

Plaintiff has failed to show that Juror Edmonson's failure to respond to ambiguous questions concerning prior personal injury or commercial litigation by disclosing collections actions and an abandoned dissolution of marriage proceeding was material to a determination of his alleged bias or impartiality. In fact, Juror Edmonson's prior litigation experiences were not material and, for all we know, were not concealed.

The district court's opinion, which appropriately applied existing case law to the record in this case, and therefore does not expressly or directly conflict with any other decisions, concisely and correctly distinguished this case from those relied upon by the Plaintiff below and before this Court. In reference to the six cases to which Mr. Edmonson had been a party, the district court noted:

> 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 ever 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.

ZEQUEIRA, 627 So.2d at 532. Thus, the court held that neither materiality or concealment had been demonstrated, and reversed the trial court's order. **Id.**

The Plaintiff treats the district court's opinion as if it were the decisional equivalent of a meteor, having dropped out of the sky with no warning. To the contrary, the district court's opinion is nothing more than an application of longstanding rules of law, see, e.g., **SCHOFIELD v. CARNIVAL CRUISE LINES, INC., 461 So.2d 152 (Fla. 3d DCA 1984), pet. for rev. den'd., 472 So.2d 1182 (Fla. 1985)**, to a particular set of facts. The district court appropriately distinguished its prior decisions in **PERL v. K-MART CORP., 493 So.2d 542 (Fla. 3d DCA 1986)**, and **BERNAL v. LIPP, 580 So.2d 315 (Fla. 3d DCA 1991)** both because concealment was actually confirmed on the record in those cases and because the concealment was material in light of the fact that the concealed litigation involved personal injuries, as did the trials in which the jurors improperly participated.

While misrepresentation or concealment of prior involvement in lawsuits may constitute juror misconduct, Juror Edmonson's failure to respond to plaintiff's counsel's generally posed question here did not constitute juror misconduct. There is a palpable difference between misrepresentation or concealment and the failure to respond in the instant case. Juror Edmonson did not represent

or misrepresent anything at all - he simply did not respond to the question for reasons unknown to us since Plaintiff never requested a juror interview. A number of possible reasons exist for Juror Edmonson's failure to disclose his involvement in the prior lawsuits, not the least of which is the fact that he might not have been paying attention, and thus did not hear the questions.

Initially, we note that Juror Edmonson's failure to respond to questions concerning prior involvement in personal injury litigation would not constitute a misrepresentation or concealment of anything, since he had not previously been involved in personal injury litigation.[8] Second, Plaintiff's counsel's reference to "commercial disputes," or "commercial litigation," is itself ambiguous. Judges and attorneys themselves are likely to disagree as to precisely what is considered to be a commercial dispute or commercial litigation. Most commercial litigators would certainly not consider collections actions to fall within their bailiwick. Attorneys who handle collections actions for creditors are typically referred to as "collections" attorneys, not commercial litigators.

New trials have been denied on the basis of less ambiguous

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[8]Even if the 13 year old case where Mr. Edmonson was a plaintiff was a personal injury case, a matter which we do not know both because (a) the case was so old that the records had been destroyed and (b) no juror interview was requested or conducted by Plaintiff, that action would be too remote to be considered material. See, e.g., **DREW v. COUCH, 519 So.2d 1023 (Fla. 1st DCA), rev. den'd, 529 So.2d 693 (Fla. 1988)** (new trial not warranted by juror's failure to reveal during voir dire that senior partner of the law firm representing the plaintiff had represented the juror's husband in her dissolution of marriage action 15 years previously).

questions than these. In **TAYLOR v. PUBLIC HEALTH TRUST OF DADE COUNTY, 546 So.2d 733 (Fla. 3d DCA 1989)**, also a medical malpractice action, a juror answered "no" to the question posed by plaintiff's counsel concerning involvement in prior lawsuits. Clearly, the juror heard that question, as there was a response. Nevertheless, the juror did not reveal that he was involved in a pending lawsuit. The trial court denied the motion for new trial, and the denial was affirmed by the Third District Court of Appeal. **546 So.2d at 734.**[9]

Assuming that Juror Edmonson heard the questions posed, it seems eminently more reasonable that he considered his minor involvement in collections actions not to be pertinent or responsive to the questions posed by Plaintiff's counsel, than it was for the juror in the **TAYLOR** case to decide for himself that the question posed to him concerning prior lawsuits did not require an affirmative response simply because his lawsuit was still pending.

There Has Been No Concealment Established

The majority of the cases upon which Plaintiff relies (here or below) are factually distinguishable in that they deal with some affirmative misrepresentation in response to voir dire questioning - that is, in each of those cases, the juror affirmatively represented that he or she had not been involved in prior

[9]**TAYLOR** supports our argument with respect to both the first and third prongs of the test. Whether or not a question is ambiguous can have an affect upon the initial determination of whether there was any concealment at all, and can likewise be an indication of failure to exercise due diligence. We rely upon **TAYLOR** for both purposes.

litigation by verbally responding to counsel's questions. As mentioned earlier, Juror Edmonson did not represent or misrepresent anything - rather, he did not respond. Thus, these cases are distinguishable because a "misrepresentation" is not the issue in this case. See **ELLISON v. CRIBB, 271 So.2d 174 (Fla. 1st DCA 1972)** (in auto accident case jury foreman responded in the negative to counsel's direct question of whether he or any family member had ever been involved in an auto accident); **MINNIS v. JACKSON, 330 So.2d 847 (Fla. 3d DCA 1976)** (in county bus accident case jury foreman responded in the negative to counsel's question regarding whether any family members had been involved in accidents even though juror's daughter had been injured in a county bus accident the prior year); **MITCHELL v. STATE, 458 So.2d 819 (Fla. 1st DCA 1984)** (juror responded in the negative to counsel's question of whether she or any family member, relative or friend was employed by Cross City Correctional Institute where juror's nephew was a Cross City correctional officer); **PERL v. K-MART, 493 So.2d 542 (Fla. 3d DCA 1986)** (jury foreman responded that his auto company had been sued once for improperly repairing a car, where company had actually been sued at least twenty times; **REDONDO v. JESSUP, 426 So.2d 1146 (Fla. 3d DCA 1983)** (juror responded to question regarding the termination of his prior employment by the defendant/store by replying that he left voluntarily to pursue a business opportunity where he had actually been terminated for stealing money from the store; **MOBIL CHEMICAL COMPANY v. HAWKINS, 440 So.2d 378 (Fla. 1st DCA 1983)** (juror answered "no" to inquiry of whether she knew

anything about the case or anyone involved where she was a second cousin of the plaintiff's wife and had been a client of the plaintiff's former attorney as recently as one year before the trial.)

As is evident in the "misrepresentation" cases, materiality is a key issue in determining whether juror misconduct warrants a new trial. In the remaining "concealment" cases which Plaintiff cites, the court's reasoning was based at least in part on the materiality of the nondisclosure.

SMILEY v. McCALLISTER, 451 So.2d 977 (Fla. 4th DCA 1984), was an appeal from a denial of a motion for a juror interview. In **SMILEY**, an auto accident case, counsel interrogated the jurors regarding involvement of their families or relatives in automobile accidents. One juror "never acknowledged any incident involving her family or relatives." 451 So.2d at 978. Subsequent to rendering a verdict for the plaintiff, defense counsel overheard the juror advising one of the plaintiff that her son-in-law had "been involved in the same type of accident." Id. The court reasoned that:

> [i]n a case of this nature similar accidents and injuries in which other relatives and family members of prospective jurors have been involved are of utmost interest to the parties for it can have a strong influence on a juror's approach to the resolution of litigation arising out of such incidents.

451 So.2d at 978 (emphasis added.) There is no such similarity between Edmonson's collection actions and the Plaintiff's medical malpractice action.

In **INDUSTRIAL FIRE AND CASUALTY INSURANCE COMPANY v. WILSON,**

537 So.2d 1100 (Fla. 3d DCA 1989), a juror failed to disclose that he had ostensibly been insured -- yet denied benefits by -- the very insurance company involved as a defendant in the case about to be tried. The question posed on voir dire was:

> [Plaintiff's] insurance company - which is a party in this lawsuit - is Industrial Fire and Casualty Insurance Company. Do any of you recognize that company 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?

537 So.2d at 1102.

In light of the defendant/insurance company's status as a party in the suit, the court found the juror's concealment to be material. **537 So.2d at 1103.**[10]

The types of lawsuits in which Juror Edmonson had been involved are not even remotely similar to the nature of the case at bar, a medical malpractice claim. Plaintiff has not shown how Juror Edmonson's prior collections actions or the erstwhile

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[10]**INDUSTRIAL FIRE** is the only case cited by the Plaintiff where a new trial was ordered due to concealment of a material fact where it does not appear from the face of the opinion that a juror interview was conducted. Nevertheless, there was reference in the record that all the jurors were "nodding [their] heads," to the question of whether any of them had any problems with an insurance company. This may explain why the plaintiff in **INDUSTRIAL FIRE** never argued -- as we have argued at all stages of these proceedings -- that it was quite possible that the juror did not hear the questions.

As another major point of distinction, it is difficult to imagine a more material concealment than the concealment in **INDUSTRIAL FIRE AND CASUALTY**. The juror had recently had a claim rejected which was a party to the lawsuit for which he was to serve as fact finder. Small wonder that the verdict in that case, which had previously been tried, see **KISLAK v. WILSON, 472 So.2d 776 (Fla. 3d DCA 1985)**, was 2 1/2 times the verdict in the original trial. **537 So.2d at 1101.**

dissolution of marriage action were material to a determination of his partiality or bias in this medical malpractice case. Instead, Plaintiff has made a bare bones assertion that Juror Edmonson's "concealment" of prior involvement in lawsuits constitutes juror misconduct which automatically requires a new trial, while ignoring the two most important requirements in determining whether a new trial is necessary because of juror misconduct - whether a material fact has been concealed by the juror. The district court was left with no alternative but to reverse given the record before it.

The Collections Actions Are Not Material

The Plaintiff urges this Court to reverse the District Court simply because one of the jurors had been involved in several minor collections actions as a "defendant." One of those actions was 12 years old at the time of the trial in this matter, and no records were available from the county court for that reason. Yet another "action" was the abandoned divorce proceeding, which had been filed 5 years previously. A third action was apparently brought (for the princely sum of $616.77) by the law firm that represented Mr. Edmonson in that abandoned dissolution proceeding. That judgment was satisfied within a few weeks. Another action (brought by Mayor's Jewelers) was dismissed for lack of prosecution. Thus, there remained only two collections actions -- which resulted in default final judgments in February and October of 1990 respectively -- which could be considered not to be too remote in time to even merit mention.

It is reasonable to assume that Juror Edmonson may not have

considered himself to be a "party" to these collection actions. Juror Edmonson is a layperson who works at a car dealership. The fact that default judgments -- which by definition do not require any involvement whatsoever on the part of the defendant -- may have been entered by a court would more than likely be considered extensions of Juror Edmonson's obvious cash flow problems, rather than involvement as a "plaintiff" or "defendant" in a "personal injury" or "commercial" case.

However, granting the Plaintiff the benefit of doubt, and assuming that Juror Edmonson purposely concealed these collections actions from Plaintiff's counsel during voir dire (perhaps out of embarrassment), the information concealed is nevertheless not material to the medical malpractice action which was about to be tried.

Plaintiff's "materiality" argument is necessarily based upon speculation. The Plaintiff claims that this speculation is a result of Juror Edmonson's "refusal" to respond to the questions posed to the entire panel on voir dire. We submit, however, that the speculation is based upon Plaintiff's failure to request a juror interview. Plaintiff goes on to argue that it is "not unreasonable to suppose that Mr. Edmonson had developed a strong antipathy toward lawyers," as a result of his involvement in his collection actions. (Plaintiff's Brief on the Merits Page 15-16). Yet this does not suggest how any such generalized feelings toward "lawyers" would have cut in favor of Dr. Zequeira or against Plaintiff. The simple fact that Mr. Edmonson was a "defendant" in

a collections actions and Dr. Zequeira is a "defendant" in a medical malpractice action does not suggest that Mr. Edmonson should have an affinity towards Dr. Zequeira. To the contrary, an individual who has been sued in small claims court by large corporations might have a great deal more sympathy for a personal injury plaintiff than for a doctor or a large hospital. Again, we have no idea what Juror Edmonson feels about any of these issues because nobody ever asked him.

Contrary to what the Plaintiff argues, the courts of this state have long required some type of "similarity" between the type of "concealed" information and the cause of action involved in a given case in order to require a new trial.[11] For instance, in the cases relied upon by the Plaintiff and by the dissent below, not only was the information dispositively determined to have been concealed, it was also material. See, **PERL v. K-MART, CORP., 493 So.2d 542 (Fla. 3d DCA 1986)**. "Bower's denial of personal involvement in any lawsuit and his extremely limited response with

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[11]So too have courts in other jurisdictions. See, e.g., **ALEXANDER v. F.W. WOOLWORTH, CO., 788 S.W.2d 763 (Mo. Ct. App. 1990)** (failure of a juror to admit that he or she was sued on an overdue charge account or for dissolution of marriage in response to the common question regarding involvement in a lawsuit is generally no indication that juror would not or could not sit impartially upon a tort action seeking damages for personal injury; determining that information would be so patently irrelevant that it did not warrant exploration or consideration in exercising peremptory challenges); **HASSON v. FORD MOTOR CO., 32 Cal. 3d 388, 650 P.2d 1171 (Cal. 1982)** (court "easily dispose[d]" of contention that new trial was required where a juror failed to disclose that he had been "a defendant in several lawsuits brought by large corporate creditors"). See generally, **ANNOT., Effect of Jurors False or Erroneous Answers on Voir Dire Regarding Previous Claims or Actions Against Himself or His Family, 66 A.L.R.4th 509.**

respect to lawsuits against his company involving personal injuries amount to a concealment of material facts." **ZEQUEIRA, 627 So.2d at 532 n.3 (emphasis in original)**; see also, **BERNAL v. LIPP, 580 So.2d 315 (Fla. 3d DCA 1991)**. The **BERNAL** court summed up the material concealment as follows:

> A juror interview was ultimately conducted.... 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.

BERNAL, 580 So.2d at 316; ZEQUEIRA, 627 So.2d at 532 n.4.(emphasis supplied by Zequeira court).

Conversely, the issue involved in **MOBIL CHEMICAL CO. v. HAWKINS, 440 So.2d 378 (Fla. 1st DCA 1983)**, was whether a particular juror had concealed her kinship to the plaintiff's wife and her association with the plaintiff's former attorney, matters which are peculiarly material to every cause of action. Questions designed to elicit this information could not be "misinterpreted", i.e., determined to be "ambiguous" by any person "sufficiently perceptive and alert to be qualified to act as a juror." **440 So.2d at 381**.

Likewise, **MITCHELL v. STATE, 458 So.2d 819 (Fla. 1st DCA 1984)**, also relied upon by the Plaintiff for conflict jurisdiction, involved a request for new trial by a criminal defendant where a juror had "responded in the negative" to a question concerning whether she was related to anyone who was employed at the Cross City Correctional Institution. **458 So.2d at 820**. There, the

criminal prosecution was over a disturbance that occurred at the Correctional Institution where the defendant was an inmate. **Id**. Thus, it is not at all surprising that -- after having the concealment explored and confirmed by a juror interview -- and given the unambiguous nature of the question, a new trial was required.

Finally, in **SKILES v. RYDER TRUCK LINES, INC., 267 So.2d 379 (Fla. 2d DCA 1972)**, the concealed information involved not only prior litigation, but also prior representation by a partner of plaintiff's counsel, whose name was specifically mentioned during voir dire. Thus, although the particular litigation in which the juror had been involved was not identical to the matter to be tried, a personal injury action, there was a second "concealment." There was also ample evidence of concealment by virtue of (1) initial negative responses during voir dire and (2) confirmation of concealment during a jury interview. Here, we have neither a negative response or confirmation of any type of conscious concealment via jury interview.

II. Plaintiff did not exercise due diligence (a) by failing to request a juror interview and (b) by investigating the jurors only after the adverse verdict was rendered.

The third prong of the test for determining whether a party is entitled to a new trial on the basis of alleged juror misconduct is the "due diligence" requirement. This requirement is inextricably interwoven with the first two requirements. For one cannot properly analyze whether due diligence was employed without reference to the issues of materiality and concealment.

In this regard, it must be noted that the term "concealed" connotes an element of scienter, or purposefulness. Black's Law Dictionary (5th Ed. 1983) defines "concealed" as follows:

> To hide, secrete, or withhold from the knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery of.[12]

We believe that the Plaintiff's refusal to request a juror interview bears upon the third prong of the test, i.e., diligence of counsel. First, it is clear that the decision not to request a jury interview was tactical. Plaintiff's counsel had unearthed evidence of prior involvement in litigation on the part of juror Edmonson. It is reasonable to assume that Plaintiff's counsel knew that he could request a jury interview.[13]

However, requesting and obtaining a jury interview involved risk. It is quite possible, as the district court pointed out, that juror Edmonson simply was not paying attention and did not hear the question. Juror Edmonson may have had a very good explanation for why he did not respond to the question as phrased. Perhaps he did not -- as most laypersons, and even lawyers would not -- consider the term "commercial" lawsuit to include what most

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[12]Webster's Third New International Dictionary defines "conceal" as "to prevent disclosure or recognition of; avoid revelation of; refrain from revealing; withhold knowledge of...".

[13]Obviously, the trial court would have granted the interview, in light of the fact that he granted the new trial even without the interview.

lawyers refer to as a "collections" or a "creditor" action. Certainly his "involvement" in a divorce proceeding with his wife which was dismissed for lack of prosecution could not have been interpreted by Mr. Edmonson to correspond to any of the questions had he heard them.[14]

Having failed to request a jury interview within ten days of the verdict, the Plaintiff is no longer entitled to one. At this point, even if this Court were to consider remanding this matter for a jury interview, such an interview would not be conducted until well-over three years after the conclusion of the trial. It is extremely doubtful that a jury interview would prove anything at this late date. See, e.g., **CARVER v. ORANGE COUNTY, 444 So.2d 452, 454 (Fla. 5th DCA 1983)** (noting practical problems with jury interview on remand, including possible problems with locating jurors).

In this regard, the observation in Judge Baskin's dissent below that "There is no record basis supporting a conclusion that the juror did not listen to or hear any of counsel's questions," **627 So.2d at 533 (Baskin, J. dissenting)** -- has it backwards. The plaintiff was the movant on a motion for new trial. It was thus the plaintiff's burden of proof to establish both that concealment had occurred and that the concealment was material. See, **SINGLETARY v. LEWIS, 619 So.2d 351 (Fla. 1st DCA 1993)** (trial court

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[14]A divorce action is not even really a "lawsuit." It is referred to as a "dissolution proceeding." The "parties" are referred to as Petitioner and Respondent, not Plaintiff and Defendant.

properly looked to plaintiff claiming juror misconduct to establish actual misconduct).

In this regard, the court should keep in mind that counsel for Dr. Zequeira did request a jury interview -- in an abundance of caution -- at the hearing on Plaintiff's Motion for New Trial, in the event that the court was considering granting the Motion. Unfortunately, the trial court either did not rule upon that request, or denied it implicitly when he granted the Plaintiff's Motion for New Trial.[15]

The importance of a jury interview should not be discounted. Indeed, several of the cases upon which the Plaintiff relies, see, e.g., **BERNAL v. LIPP, 580 So.2d 315 (Fla. 3d DCA 1991)**; **REDONDO v. JESSUP, 426 So.2d 1146 (Fla. 3d DCA 1983)**, were decided only after a prior appeal established the necessity for a jury interview. See, **BERNAL v. LIPP, 562 So.2d 848 (Fla. 3d DCA 1990)** (plaintiffs were entitled to conduct jury interview in a medical malpractice case where it was contended that juror had failed to disclose that he had previously been a defendant in a personal injury action); **JESSUP v. REDONDO, 394 So.2d 1031 (Fla. 3d DCA 1981)** (trial court

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[15]As a matter of law, the Plaintiff is not entitled to a jury interview at this stage of the proceedings. If, as the Third District ruled, the trial court incorrectly granted a motion for new trial, it did so at the urging of the Plaintiff, without a request on the part of the Plaintiff for a jury interview, and in the face of a request for an interview by opposing counsel. Thus, even if the Plaintiff were able to argue (which she cannot) that the Plaintiff relied upon the trial court's order granting the motion for new trial, and therefore did not request from the Third District a remand for a jury interview, the Plaintiff cannot avoid the implications of an erroneous trial court ruling which Plaintiff's counsel himself secured. See, **ARKY v. BOWMAR INSTRUMENT CORP., 537 So.2d 561 (Fla. 1988)**.

required to conduct an evidentiary hearing to determine whether juror lied or concealed information concerning the manner in which he left his employment). See also, **SINGLETARY v. LEWIS, 584 So.2d 634 (Fla. 1st DCA 1991)** (remanding for jury interview).

Thus, although the "due diligence" prong of the **SKILES** test has typically been utilized to determine whether the questions posed by counsel during voir dire were sufficiently particularized to have elicited the specific information alleged to have been concealed by the prospective juror, we think that particularly where, as here, the record does not reveal a response of any kind, it was imperative for Plaintiff's counsel to "prove" both of the first two prongs, i.e., concealment of a material fact, through a jury interview.

Indeed, it is for this very reason that the Plaintiff's second argument, i.e., that the district court improperly usurped the trial court's function as finder of fact, must fail. Here, the trial court did not make any factual findings. For a trial court to exercise his or her discretion on a motion for new trial premised upon possible juror misconduct, it is crucial to have actually observed the juror. Otherwise, a trial court is not entitled to the appellate deference typically accorded to a credibility determination. Furthermore, this observation must occur after the alleged misconduct has occurred. For although the trial judge was certainly present at voir dire, it could hardly be said -- nor did he assert in his new trial order -- that he had specifically observed juror Edmonson during the time of Mr.

Edmonson's non-response to the subject questions.

Here, as in **REDONDO v. JESSUP, 426 So.2d 1146, 1147 (Fla. 3d DCA 1983)** the appellate court was not required to accept the trial court's determination of a witness' credibility where the trial court had no opportunity to observe the witness' demeanor. The trial court simply branded Mr. Edmonson a liar without giving Mr. Edmonson the courtesy of appearing before the court to answer questions, which, had they been asked and answered, would have provided the trial court with the necessary opportunity to make a credibility determination that would have entitled the Plaintiff to the "broad discretion" type of appellate review which the Plaintiff is not entitled to under the present circumstances.

Although the Plaintiff is correct to point out that an appellate court typically should not disturb the broad discretion of the trial court in granting a new trial, see, e.g., **BANKERS MULTIPLE LINE INS. CO. v. FARISH, 464 So.2d 530 (Fla. 1985)**, it has been universally held that where the trial court's ruling is grounded on a question of law the appellate court is on the same footing as the trial court in determining the correct law to be applied and therefore the trial court's broad discretion will lose much of its force and effect. See, **STATE FARM MUTUAL AUTO INS. CO. v. GAGE, 611 So.2d 39 (Fla. 4th DCA 1992); OFFICE DEPOT INC. v. MILLER, 584 So.2d 587 (Fla. 4th DCA 1991); YALE CONTRACTORS OF AMERICA v. STINSON, 524 So.2d 1148 (Fla. 3d DCA 1988); AMERICAN EMPLOYERS INS. CO. v. TAYLOR, 476 So.2d 281 (Fla. 1st DCA 1985); BOUTWELL v. BISHOP, 194 So.2d 3 (Fla. 1st DCA 1967).**

Thus, the trial court's determination that Juror Edmonson's involvement in collections actions was material is a determination of law, and an erroneous one at that. Furthermore, the "determination" that there had been concealment in this case was based upon nothing more than an assumption, and it cannot truly be said that the trial court appropriately exercised its discretion. In fact, as the district court has held, the trial court abused its discretion when it determined that Mr. Edmonson had concealed something without even knowing whether Juror Edmonson had heard or understood the specific questions. It can hardly be said that the appellate court usurped the trial court's fact finding function when the trial court never exercised that function to begin with.

A Word About Footnote 6

In the exercise of due diligence, the Plaintiff should have - and could easily have - researched the six chosen jurors at some point in time earlier than the day after the jury rendered its adverse verdict. Since the record does not reflect any basis for assuming that something peculiar occurred at trial,[16] it must be presumed that Plaintiff's counsel routinely investigates juror litigation history after every loss. Otherwise, there would be no need to wait until after the six-day trial was completed, and the adverse verdict rendered, to conduct juror investigations. There

[16]Indeed, the trial court specifically noted that the case was otherwise fairly tried by several of "the best" trial lawyers in Dade County, and that the case could have gone either way. This was simply not a case where an adverse verdict "smacked" of some type of improper influence.

is simply no other explanation for the Plaintiff's waiting until after the trial - and an adverse verdict - to conduct a jury investigation, when to do so at the earliest possible time would have been expedient given the resources available, and infinitely more cost-effective in the long run for the court as well as the parties. Had the search been conducted during trial, an interview of juror Edmonson could have been conducted very quickly in chambers to ascertain whether he had heard or understood the question to apply to his collections actions. If necessary, he could have been replaced by an alternate.

The district court stopped short of adopting as law a requirement that litigants conduct a computer search of the public records during each and every trial. Nevertheless, the court obviously shared our frustration with what, at least in Dade County, has become de rigueur where a plaintiff does not prevail at trial. We simply do not think it is reasonable to conclude that prospective jurors in this State are wily-nilly concealing prior litigation history in an effort to be placed on a jury. There are, of course, some notable exceptions, such as **INDUSTRIAL FIRE**, where the juror whose insurance claim had been denied had an axe to grind, and in **MITCHELL v. STATE,** where a juror concealed the fact that a close relative worked at the very correctional institute where the defendant, as an inmate, had been involved in an uprising.

But this is not one of those cases. It is reasonable to conclude -- as the district court has held -- that the minor

involvement of juror Edmonson in completely unrelated collections actions could not possibly have been material to Mr. Edmonson's fitness to serve on the jury. Given that lack of materiality, and the waiver by Plaintiff's counsel of his opportunity to question juror Edmonson, it was indeed an abuse of discretion on the part of the trial court to order a new trial. The district court properly reversed the trial court for abusing that discretion.

CONCLUSION

For the reasons stated in the foregoing brief we respectfully request that this court either discharge its jurisdiction or affirm the district court's opinion.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Appellant's Initial Brief has been mailed this 22nd day of November, 1994 to: HERMAN J. RUSSOMANNO, ESQ., and MICHELE A. MARACINI, ESQ., Floyd, Pearson, Richman, Greer, Weil Brumbaugh & Russomanno, Courthouse Center, Suite 2600, 175 N.W 1st Avenue, Miami, Florida 33128.

Respectfully submitted,

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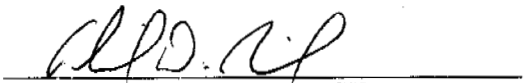
By: 
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