O.A. 12-6-94

38

SUPREME COURT OF FLORIDA

DERRICK A. POWELL, *et ux.*,

Petitioners,

vs. Case No. 83,625

ALLSTATE INSURANCE COMPANY, *etc.*,

Respondent.
_____/

AMENDED ANSWER BRIEF

SHARON LEE STEDMAN, Attorney at Law
Florida Bar No. 0303781
Sharon Lee STEDMAN, P.A.
1516 E. Hillcrest St., Suite 108
Orlando, Florida 32803
(407) 894-7844
Attorney for Appellant

TABLE OF CONTENTS

Table of Citations. . . . . iii-v

Preliminary Statement vi

Statement of the Case and Facts 1

Summary of the Argument 10

Point On Appeal 14

The Trial Court Did Not Abuse Its Discretion In Refusing To Interview All Of The Jurors After Interviewing The Juror Who Had Alleged Misconduct On The Part Of The Jury And Was Eminently Correct In Denying The Plaintiffs' Motion For New Trial After Determining There Was No Juror Misconduct.

Conclusion 32

Certificate of Service 32

TABLE OF CITATIONS

Albertsons, Inc. v. Johnson,
442 So. 2d 371 (Fla. 2nd DCA 1983). 20

Aldridge v. United States,
283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931). . . . 30

Aldridge v. United States,
51 S.Ct. at 473 n. 3. 31

Baptist Hospital of Miami v. Maler,
579 So.2d 97 (Fla. 1991) 6,8,14,18

Branch v. State,
212 So.2d 29, 32 (Fla. 2nd DCA 1968). 15

Cummings v. Sine,
404 So.2d 147 (Fla. 2nd DCA 1981) 21

Ford Motor Company v. Kikis,
401 So.2d 1341 (Fla. 1981). 28

Johnson v. State,
593 So.2d 206 (Fla. 1992),
cert. denied, 113 S.Ct. 119, 121 L.Ed. 2d. 75 23

Keith v. Russell T. Bundy and Associates, Inc.,
495 So.2d 1223 (Fla. 5th DCA 1986). 28

Maler Ex Rel Maler v. Baptist Hospital,
559 So. 2d 1157 (Fla. 3rd DCA 1989) 15

McAllister Hotel, Inc. v. Porte,
123 So.2d 339 (Fla. 1959) 16

McDonald v. Pless,
238 U.S. 264 (1914) 10,24

Moody v. E.M.C. Services, Inc.,
828 S.W.2d 237 (Tex. App. - Houston
[14th District] 1992) 23

Mu'Min v. Virginia,
111 S.Ct. 1899 (1991) 30

Paz v. United States,
462 F.2d 740 (5th Cir. 1972). 18

Preast v. Amica Mutual Insurance Company,
483 So.2d 83 (Fla. 2nd DCA),
cert. denied, 492 So.2d 1334 (Fla. 1986). 21

Ristaino v. Ross,
424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed. 2d (1976) 30

Rosales-Lopez v. United States,
451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed. 2d 22 (1981) . . 29

Sanchez v. International Park Condominium Association,
563 So.2d 197 (Fla. 3rd DCA 1990) 24

Schmitz v. S.A.B.T.C. Townhouse Association,
537 So.2d 130 (Fla. 5th DCA 1988) 22

Schofield v. Carnival Cruise Lines, Inc.,
461, So.2d 152 (1984) 20

Sentinel Star Company v. Edwards,
387 So.2d 367 (Fla. 5th DCA),
review denied, 399 So.2d 1145 (Fla. 1980) 21

Singletary v. Lewis,
584 So.2d 634 (Fla. 1st DCA 1991) 27

Snook v. Firestone Tire and Rubber Company,
485 So.2d 496 (Fla. 5th DCA 1986) 21

Songer v. State,
463 So.2d 229 (Fla.),
cert. denied, 472 U.S. 1012,
105 S.Ct. 2713, 86 L.Ed. 2nd 728 (1985) 15

Speed v. DeLibero,
215 Conn. 308, 575 A.2d 1021 (1990) 22

State v. Fox,
79 Mo. 109 (1883) 24

State v. Hamilton,
574 So.2d 124 (Fla. 1991) 15,28

Stotts v. Meyer,
822 S.W.2d 887, 889 (Mo. App. 1991) 24

United States v. Heller,
785 F.2d 1524 (11th Cir. 1986). 19,26

United States v. Martinez,
14 F.3d 543 (11th Cir. 1984). 28

United States v. Perkins,
748 F.2d 1519 (11th Cir. 1984). 28

Velsor v. Allstate Insurance Company,
329 So.2d 391 (Fla. 2nd DCA)
cert. dismissed, 336 So.2d 1179 (Fla. 1976) 15

PRELIMINARY STATEMENT

The Fifth District Court of Appeals certified the instant case in conflict with a Third District Court of Appeals' opinion. In the brief the parties will be referred to as "plaintiffs" or by name and the respondent will be referred to as "defendant" or "respondent".

The following symbols will be used:

TR	Transcript of Hearing
Appendix 1	Opinion on Motion for Rehearing En Banc
Appendix 2	Original opinion rendered by Fifth District Court of Appeal
Appendix 3	Hearing held by trial court on jury misconduct issue

STATEMENT OF THE CASE AND FACTS

The respondent submits that the issue involved in this case cannot be viewed in a vacuum but must be viewed in light of the evidence and attendant circumstances in order for a correct determination to be made as to whether or not the trial court abused its discretion in refusing to grant additional juror interviews. The Fifth District in the majority opinion rendered on the Motion for Rehearing En Banc declared:

> There is nothing in this record that suggests that the verdict in this case resulted from racial prejudice. The amount of damages in this case was hotly contested and, although it found no permanent injury, the jury nevertheless returned a verdict of $29,320.00 which included sums for medical and wage losses as well as future medical and wage loss. But for the rearing of the ugly specter of racial intolerance, probably no one on this court would suggest the amount of damages awarded by the jury cannot be supported by the record. Should we set aside a verdict that appears appropriate on its face (where there is no correlation shown between the result of the jury deliberation and the insensitive conduct of some of the jurors) based on an assumption that one cannot at the same time be both insensitive in speech yet fair in judgment?

(Appendix 1 at page 3).

The bottom line to the jury verdict was that the jury believed the Defendant's defense, based on the evidence, and not the Plaintiffs' theory of the case.

The Defendant's position was that the accident that led to the Powell's injuries was a pretty simple accident. The accident occurred at a very busy intersection. Ms. Jellis, the tort feasor was trying to cross lanes of traffic in order to make her turn. Two lanes of the traffic stopped and waved her through. (TR 178).

Mr. Powell and Mr. and Mrs. Johnson were all in the Powell's vehicle. The passengers in Mr. Powell's vehicle saw the Jellis vehicle inching out. The damage to the 1988 Lincoln Continental that was being driven by Mr. Powell had damage from the front headlight down the side of the vehicle. The only damage to Ms. Jellis' vehicle was to the right front headlight corner panel area. (TR 178).

Mr. Powell alleged that when Ms. Jellis, the under uninsured driver, struck his vehicle it caused severe injuries to his neck and back. (TR 157). The ambulance report declared that Mr. Powell's injuries were to his neck and upper back; there was no low back complaint. (TR 180). When Mr. Powell complained at the hospital, it was again neck and upper back; no low back complaints.

The accident involved in the instant case occurred on January 8, 1989. (TR 181; 157).

Dr. Ragsdale testified that Mr. Powell had a very severe significant blood pressure problem. Mr. Powell had a stroke in January of 1991 and was out of work as a result. (TR 610).

As a result of the stroke, Mr. Powell had problems with weakness and numbness in the left hand and arm and his left leg. Dr. Ragsdale's main concern was trying to get Mr. Powell's blood pressure back under control. It had been out of control for months even before the accident, according to Dr. Ragsdale's notes. (TR 180-181).

Dr. Bittnar was the orthopaedic surgeon on call in the emergency room on the day of the accident. Dr. Bittnar testified that ten days after the accident the complaint that Mr. Powell had was still to the neck, and only to the neck. There was no complaint of low back pain. Dr. Bittnar also testified that he expected Mr. Powell to recover and did not expect any permanent injury from the accident. (TR 182).

The consistent low back complaints did not occur until some 2-1/2 to 3 months after the accident when Mr. Powell went to see a chiropractor. (TR 182).

Part of the defense was that Derrick Powell had a prior motor vehicle accident in 1985 or 1986. (TR 155).

The issues to be decided by the jury were whether or not Mr. Powell was permanently injured within a reasonable degree of medical probability as a result of the January 8, 1989 accident and whether Mr. Powell needed surgery, to be performed by Dr. Vliegenthart. (TR 184).

Based on the evidence, the jury returned the following verdict:

> Was there negligence on the part of Anona M. Jellis which was a legal cause of damage to Plaintiff Derrick A. Powell? Yes.
>
> Was there negligence on the part of Plaintiff Derrick A. Powell which was a legal cause of his damage? Yes.
>
> State the percentage of any negligence which was a legal cause of damage to Plaintiff Derrick A. Powell that you charged to Anona M. Jellis. 70%. Derrick A. Powell. 30%.

Has Plaintiff Derrick A. Powell sustained a permanent injury within a reasonable degree of medical probability as a result of the motor vehicle accident of January 8, 1989? No.

What is the amount of any damages sustained for medical expenses in the past? $5,120.00.

What is the amount of any damages sustained for lost wages in the past? $6,200.00.

What is the present value of damages for future medical expenses? $10,000.00.

What is the present value of damages for future loss wages and loss of earning capacity? $8,000.00.

What is the amount of any damages for past and future pain and suffering, disability, physical impairment, mental anguish, and convenience, aggravation of a disease of physical defect, or loss of capacity for the enjoyment of life? 0.

Total compensatory damages of Plaintiff? $29,320.00.

What is the amount of damages sustained by Plaintiff Eugenia Powell in the loss of her husband's consortium, services, comfort, society, inattentions? In the past? 0. In the future? 0. Total damages. 0.

(TR 795 - 796). Thereafter the jury was polled and each juror declared that this was their verdict. (TR 797).

In closing argument, Plaintiffs' counsel had requested a verdict in the amount of $235,000.00. The Plaintiffs' counsel acknowledged that Allstate had already paid $12,000.00 for past medical expenses and lost wages. (TR 714). Plaintiffs' counsel then declared that the value of damages for medical expenses in the future was the most important question of all. "And I don't mind telling you that's a primary reason why we are here is for surgery and it's for money to pay for the surgery and we've got all kinds

of numbers from the doctors." (TR 715). The verdict as to future medical expenses turned on the credibility of Dr. Uricchio and Dr. Vliegenthart. The jury chose to believe Dr. Uricchio.

The Defendant at trial submitted that Mr. Powell was not going to have the surgery that Dr. Vliegenthart recommended. (TR 740-741). The Defendant's theory was that Mr. Powell, if he were going to have surgery, would have made arrangements before trial. At the time of trial, almost four years had passed. (TR 742). The Defendant had submitted Mr. Powell's tax return.

Additionally, although Mr. Powell had alleged that he got laid off from Mass Electric because of the injury he received in the accident, Mass Electric's records showed that he was laid off because that there was a reduction in the work force. (TR 739). The Defendant also argued that the stroke was more responsible for any fluctuation in Mr. Powell's wages than the automobile accident was. (TR 743). The Defendants had submitted Mr. Powell's tax return as evidence.

Based on the above, the verdict rendered was based on the evidence presented and not on any perceived prejudice of the jurors against the Powells.

However, as noted in the majority's opinion rendered on Motion for Rehearing En Banc, sometime after a verdict was returned in favor of Derrick A. Powell and Eugenia Powell, a juror came forward to complain that one of the other jurors had told a racial joke and yet another juror had made a racial statement. (Appendix 1 at Page

1). The trial judge, along with counsel for the Plaintiffs and the Defendants, interviewed the juror to see if it would be appropriate to interview the remaining jurors. (Hearing held on June 12, 1992.) (Appendix 3). After the interview of Karen Dowding, the trial court refused to permit further juror interviews because the court found that the applicable law, *Baptist Hospital of Miami v. Maler,* 579 So.2d 97 (Fla. 1991), prohibited post-trial inquiry into the jurors' motives and influences. (Appendix 3 at Page 56-57). In so ruling, the trial court specifically asked Ms. Dowding two questions:

> In the course of the trial, and during the deliberations, did any two jurors or more, and I want you to name them, did any two jurors or more than two jurors expressly enter into an agreement to violate their oaths as jurors, or the instructions by the court?
>
> Did they enter into any agreement that they were going to violate their oath and instructions, and decide the verdict one way regardless of what their oaths were?
>
> And because, I am not getting into the motivation or subjective motivations. But outside of that, did anyone enter into an express agreement to violate their oaths or disregard my instructions on the law suit?
>
> **The witness:** Not that I heard. I did not hear anyone actually say, let's say he's not, you know, that he didn't get hurt or anything like that.
>
> **The court:** There may have been impure motivations.
>
> In other words, deciding the right result for the wrong reasons. Or the wrong result for the right reasons.
>
> But was there any concerted effort by the jurors, as you perceived, that they said that you and I or them and us, are going to agree that we're are not going to follow the judge's instructions or their oaths as jurors?

> **The witness:** No. I don't recall that statement or any of those kinds of statements being made, or arrangements being made between people. Not with me present.

(Appendix 3 at Pages 53-55). As declared by the Fifth District's majority opinion rendered on Motion for Rehearing En Banc,

> "While the complaining juror opines that the verdict would have been different had the Plaintiff been white, her own actions and testimony placed her conclusions in doubt. ... Even after full deliberation and the rendition of a verdict had occurred, the complaining juror could not say that the verdict resulted from prejudice. ... There is no indication that any vote was the result of racial prejudice - regardless of evidence of insensitivity on the part of some. Even the complaining witness does not state that her vote was influenced by the racial insensitivity of some of the other jurors."

(Appendix 1 at Pages 3-5). The jury verdict of $29,320.00 and 30% comparative negligence on the part of the Plaintiff did not appear to the trial judge or to the Fifth District in its original opinion to be inconsistent with the evidence. As declared by the dissent in the original opinion:

> Contrary to the trial judge, the position taken by the majority and its cited cases necessarily presumes that jurors cannot be trusted. They reject the belief that a handful of ordinary citizens can assay the evidence and honor their oath to set aside sympathies and personal prejudices in order to reason together and reach an appropriate verdict. Indeed, they go even further - they <u>conclusively presume</u> jurors are guilty of misconduct fatal to their verdict when one or more has uttered politically incorrect words while on jury duty."

The dissent further declared:

> The majority opinion, above, and the cited case authorities [*Singletary* and *Sanchez*] claim to have a better way to resolve cases than to rely on the collective sense of the personal and social responsibility of our fellow citizens when they take their juror oath and render verdicts. That better way is

> to treat the courthouse as though it were a bell jar. Like a bell jar, they believe courthouses can be and should be completely sealed off from the world outside of it. In this kind of courthouse, everything, including the jurors, can be completely sanitized. So clean is this insulated courthouse, jurors are disqualified as incapable of belief under their oaths if they have told or laughed at or fail to protest comments, usually in jokes or other attempts at humor, that contain words appellate courts consider to the politically incorrect words.
>
> One wonders at the scope of this policy of political correctness covering jurors. Would jurors be disqualified from serving if they have <u>ever</u> joined in or enjoyed what courts find to be unacceptable humor <u>before</u> they were summoned for jury service or <u>after</u> they were discharged as jurors? If so, any party or attorney dissatisfied with the verdict could conduct a private investigation of jurors after a verdict has been rendered, and if it can be turned up that any juror had ever participated in unacceptable speech, it would nullify that juror's qualifications and nullify any verdict he (or she) participated in. What does that do to juror privacy?
>
> . . . .
>
> There is a history of graffiti and not only bawdy but insulting, degrading, demeaning terms and expressions going back to Ancient Greece and Rome. There is even a body of scholarly research on these. There are less serious 'tasteless' jokes, insults and slurs in most bookstores and libraries. Are our courts going to adopt those as guides for talk that is impermissible to jurors, or are we going to publish a standard glossary of words and phrases, slurs, insults and jokes that are judicially declared to be unacceptable in courthouses? Perhaps these 'tasteless' joke books or the glossary would be available in jury rooms so that they represent the kinds of things jurors are not permitted to say.

(Appendix 2).

As declared by the majority's opinion rendered on Motion for Rehearing En Banc, the instant case is governed by this court's opinion in *Baptist Hospital of Miami, Inc. v. Maler, supra*, 579

So.2d 97. *Maler* involved the precise issue involved in the instant case, *i.e.*, in considering whether to authorize inquiry into alleged jurors' misconduct, jurors are allowed to testify about "overt acts which *might* have prejudicially affected the jury in reaching their own verdict" but are not permitted to testify as to any matter which essentially inheres in the verdict. *Id.* at 99.

The trial court made the necessary inquiry and determined that the statements attributed to the other jurors by Karen Dowding were not statements by jurors that any type of agreement was reached to disregard their oaths or to ignore the law. No facts were brought before the jury which were not introduced in evidence, which is the normal situation wherein an inquiry of the jurors would be permitted.

SUMMARY OF THE ARGUMENT

Florida, as with most jurisdictions, has codified the Mansfield Rule otherwise known as the non-impeachment rule. Section 90.607(2)(b), Fla. Stat. The federal courts have adopted the Mansfield Rule in Federal Rule of Evidence 606(b).

The non-impeachment rule prohibits jurors from testifying about activities and statements that occurred during their deliberations. A jury verdict can only be impeached if extraneous prejudicial information was improperly brought to the jury's attention or some other outside influence was improperly brought to bear upon the jurors. The influence most emanate from outside the jury and its deliberations.

The United States Supreme Court declared in 1914 that once a verdict was made and publicly returned, the verdict could not be attacked and set aside on the testimony of those who took part in their publication as all verdicts could be, and many would be, followed by the inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. "If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigations - to the destruction of all frankness and freedom of discussion and conference." *McDonald v. Pless*, 238 U.S. 264, 267 (1914).

Examples of when a verdict may be impeached is if evidence shows that the jurors actually agreed to disregard their oath and instructions when determining a verdict. Another example is if the jurors arrived at the verdict by lot or quotient or if there was improper contact with a juror. In those circumstances, interview of the jurors is proper because they involve matters extrinsic to the verdict.

In the instant case, the crass, insensitive, and intolerable remarks made by some of the jurors were not extrinsic to the verdict as they did not emanate from outside the jury and its deliberations. Consequently, the trial court was correct in not interviewing the jury after the trial court concluded that the circumstances presented fell within the non-impeachment rule. It cannot be said that the trial court or the Fifth District condoned the remarks made but only that the courts were following the well established law in Florida.

The Third District in their opinion, *Sanchez*, conflicts with Florida Rule of Evidence 90.606(b), and this court's decision in *Maler*, as well as a long line of cases that have relied on the non-impeachment rule. If this court were to overrule the Fifth District and affirm the Third District in *Sanchez*, then indeed the fear set forth by the United States Supreme Court would come to pass, *i.e.*, jurors would be harassed by the defeated party in an effort to secure from them evidence of fact which might establish misconduct sufficient to set aside a verdict. Although the remarks

made in the instant case cannot be condoned by anyone, including the respondent, the Fifth District followed the law as did the trial court.

The case relied on by the Third District, *United States v. Heller*, involved a criminal defendant that had a constitutional right to be tried by an impartial jury. There is no corresponding constitutional right to trial by jury in a civil case so that *Heller* is distinguishable from the instant case as well as the Third District opinion in *Sanchez*. This cannot be said to be a distinction without a difference.

Only if the plaintiff could have shown juror misconduct under this court's decision in *Maler*, would the plaintiff then be entitled to a new trial. The Plaintiffs have alleged that because one juror made certain allegations that the Plaintiffs declared to be juror misconduct, then the Plaintiffs are entitled to a new trial. That is not nor has it been the law in Florida. The law in Florida is that a moving party is only entitled to a new trial if juror misconduct has been proven. In the instant case, the Plaintiffs could not prove the type of juror misconduct sufficient under Florida law to warrant interviewing the remaining individual jurors. Accordingly, the Plaintiffs were not entitled to a new trial.

Additionally, this court has adopted a harmless error analysis in determining whether jury misconduct warrants a new trial. Under this doctrine, a moving party is only entitled to a new trial if it

cannot be said that there is no reasonable possibility that the misconduct affected the verdict. This rule avoids the problem of a test that demands inquiry into the thought processes of jurors - a practice forbidden by section 90.607(2)(b) of the Florida Evidence Code.

The verdict in the instant case was indeed based on the evidence presented. Consequently, even if it could be said that the conduct of the jurors rose to the level of jury misconduct, the trial court should be upheld.

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO INTERVIEW ALL OF THE JURORS AFTER INTERVIEWING THE JUROR WHO HAD ALLEGED MISCONDUCT ON THE PART OF THE JURY AND WAS EMINENTLY CORRECT IN DENYING THE PLAINTIFFS' MOTION FOR NEW TRIAL AFTER DETERMINING THERE WAS NO JUROR MISCONDUCT.

A. Jury Misconduct

Before a litigant will be afforded a new trial based on jury misconduct, there must first be a determination that there was jury misconduct. In other words, the process is a two-step process. First, the trial court, as was done in the instant case, must determine whether or not there was jury misconduct. Secondly, if the trial court finds that there was jury misconduct, then a new trial is granted. However, the Plaintiffs in the instant case could not get past the first step, *i.e.*, whether there was jury misconduct.

The trial court did what was required of the court and that was to determine whether or not there was jury misconduct pursuant to *Baptist Hospital of Miami, Inc. v. Maler*, 579 So.2d 97 (Fla. 1991). The juror who had alleged jury misconduct, Karen Dowding, testified with both counsels questioning her as well as the trial court. After the extensive hearing was held, the trial court ruled that Ms. Dowding's testimony did not rise to the level of jury misconduct necessary in order to warrant interviewing the other five jurors or the alternate juror. (Appendix 3 at Page 56). The trial court specifically relied on this court's decision in *Maler*.

The trial court was of the opinion that a jury verdict could be impeached if there was an agreement for the jurors to disregard their oath or if they decided the case based on something outside of the evidence. Otherwise there could be no inquiry into motives, mental processes or mistaken beliefs as they were inherent in the verdict and their deliberations. The trial court properly followed the law and the Fifth District Court of Appeal properly affirmed the trial court.

In *Maler*, this court cited to *State v. Hamilton*, 574 So.2d 124 (Fla. 1991), wherein this court set forth a test for gauging claims of juror misconduct. In *Hamilton*, this court stated that in considering whether to authorize inquiry into alleged jurors' misconduct, the trial court must determine exactly what type of information would be elicited from the jurors, because

> The Florida's Evidence Code, like that of many other jurisdictions, absolutely forbids any judicial inquiry into motives, mental processes or mistaken beliefs of jurors. Section 90.607(2)(b), Fla. Stat. Ann. (1978) (Law Revision Counsel Note - 1976). Jurors may not even testify that they misunderstood the applicable law. *Id; Songer v. State*, 463 So.2d 229, 231 (Fla.), *cert. denied*, 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed. 2nd 728 (1985). This rule rests on a fundamental policy that litigation will be extended needlessly if the motives of jurors are subject to challenge. *Branch v. State*, 212 So.2d 29, 32 (Fla. 2nd DCA 1968). This rule also rests on a policy 'of preventing litigants or the public from invading the privacy of the jury room.' *Velsor v. Allstate Insurance Company*, 329 So.2d 391, 393 (Fla. 2nd DCA) *cert. dismissed*, 336 So.2d 1179 (Fla. 1976).
>
> However, jurors are allowed to testify about 'overt acts which *might* have prejudicially affected the jury in reaching their own verdict.' Section 90.607(2)(b), Fla. Stat. Ann. (1987) (Law Revision Counsel Note - 1976) (emphasis added). *See Maler Ex Rel Maler v. Baptist*

Hospital, 559 So. 2d 1157, 1162 (Fla. 3rd DCA 1989) (discussing application of this principle).

Maler, 579 So.2d at 99, citing to *Hamilton*, 574 So.2d at 128.

The Plaintiffs as well as the *Amici* have attempted to elevate spoken words into overt prejudicial acts. The comments, however, no matter how crass and socially unacceptable they may be, are the subjective impressions or opinions of jurors reduced to oral words; therefore an inquiry should not have been allowed. This court stated that section 90.602(2)(b), Florida Statutes (1987) declares:

> Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

The court continued that that provision was a codification of the relevant holding of *McAllister Hotel, Inc. v. Porte*, 123 So.2d 339, 344 (Fla. 1959), which stated in pertinent part:

> The law does not permit a juror to avoid his verdict for any reason which essentially inheres to the verdict itself, as that 'he' did not assent to the verdict; that he misunderstood the instructions of the court; the statements of witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of the his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast.'

In *Maler*, Baptist Hospital submitted affidavits that disclosed a possibility of juror misconduct consisting of (a) an agreement by jurors to return a verdict out of sympathy for the brain-damaged child no matter what the evidence showed, and (b) the improper reliance on non-record evidence that Baptist Hospital had insurance covering the present liability. *Maler, supra,* 579 So.2d at 99.

This court declared that the affidavits did not support the conclusionary statements made by Baptist Hospital. The respondent in the instant case likewise alleges that the testimony of Karen Dowding does not support the conclusory allegations set forth by the petitioners as well as the *Amici*.

> The factual matters in the affidavits alleged nothing more that the purported opinions of two jurors about the reason the verdict was reached, *not* statements by jurors that any type of agreement was reached to disregard their oaths and ignore the law. Both sympathy for a child and the *reasons* why jurors reached particular verdict clearly are subjective impressions or opinions that are not subject to judicial inquiry.

Id. at 99.

Just as the jurors in *Maler* did not receive non-record evidence, neither did the jurors in the instant case. No facts were brought before the jury which were not introduced in evidence. Accordingly, as a matter of Florida law, just as was the situation in *Maler*, the testimony of Karen Dowding failed to state a legally sufficient reason to interview the jurors.

> We now clarify the meaning of *Hamilton* in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it. We hold that an inquiry is never permissible unless the moving parties made sworn, factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in *Hamilton*.[1]

This court footnoted that under this standard, the moving party first must establish actual juror misconduct in the juror interviewed. Once this was done, the party making the motion was

---

[1]*Maler*, 579 So.2d at 100.

entitled to a new trial *unless* the opposing party could demonstrate that there was no reasonable possibility that the juror misconduct affected the verdict. This court cited to *Hamilton*, 574 So.2d at 129 [quoting *Paz v. United States*, 462 F.2d 740, 745 (5th Cir. 1972)]. In the instant case, there is no reasonable possibility that any alleged juror misconduct affected the verdict as it was based on the evidence presented.

Quite contrary to the Plaintiffs' position that *Maler* has no application in the instant case, *Maler* is the law in the State of Florida in regards to when a jury should be interviewed based on alleged juror misconduct. That was the issue raised by the Plaintiffs in the Fifth District and ruled upon by the court. As stated previously, a moving party must first hurdle *Maler* before a new trial is considered. Because the trial court in the instant case specifically held that the instant Plaintiffs had not hurdled *Maler*, then there was no basis for a new trial.

The Amicus Curiae Brief of the American Civil Liberties Union Foundation of Florida, Inc. ["ACLU"], declares that this court in *Baptist Hospital v. Maler*, *supra*, 579 So.2d at 101, repeatedly cited Judge Hubbart's opinion in the Third District's opinion in *Maler* with approval and, therefore the ACLU continues, that this court should reverse what the trial court did in the instant case based on Judge Hubbart's opinion. However, a review of Judge Hubbart's opinion as well as the case relied on by Judge Hubbart for his statement that express vile racial, religious or ethnic

slurs about a party or witness compromises the integrity of the fact-finding process, *United States v. Heller,* 785 F.2d 1524 (11th Cir. 1986), is not authority for the instant case. *Heller* stands for the proposition that a mis-trial is required, after the trial court had simply asked each juror if he or she was affected by the prejudice once the jurors had admitted prejudice. Again, the trial court in the instant case probed into the situation by extensively questioning juror Karen Dowding.

Another important aspect of the *Heller* decision was the Eleventh Circuit's reasoning that the voir dire conducted by the trial judge was superficial at best. When confronted with a number of vague statements about "prejudice" amongst the jury made by several of the jurors, the trial judge simply asked if he or she was affected by prejudice, rather than probing into what was meant by these expressions. *Id.* at 1527. That did not occur in the instant case.

In the instant case, there never were any statements about "prejudice" amongst the jury members. In fact, Juror Dowding testified that the other jurors consistently declared that they were not prejudiced and gave examples of how they were not prejudiced.

What Judge Hubbart actually held in *Maler* supports the Defendant's position in the instant case. The affidavits presented to the trial court in *Maler* stated that various improper reasons were given as to why the jury had decided for the plaintiffs,

including sympathy for the brain-damaged minor plaintiff and the fact that the respondent Baptist Hospital had insurance. Judge Hubbart held that those were matters which essentially inhere within the verdict and may not be inquired into.

Although the improper reason of sympathy for the brain-damaged minor plaintiff and the fact that the respondent Baptist Hospital had insurance do not offend one's senses as do the statements made in the instant case, the same rationale applies to the instant case, *i.e.*, they are matters which essentially inhere within the verdict and may not be inquired into as the statements did not lead to the jury deciding or not deciding for the Plaintiffs. The jury, in fact, decided for the Plaintiffs and based their verdict on the evidence. All parties in the instant case uniformly agree that a verdict should be based on the evidence presented. Because the trial court was in the best position to determine whether or not the verdict was based on the evidence, the credibility of juror Karen Dowding, and the impact of any alleged juror misconduct on the fairness of the trial, this court should hold that the trial court did not abuse its discretion in refusing to interview each individual juror.

The trial court's ruling as well as the Fifth District Court of Appeal's ruling is consistent with the law in the State of Florida. *Schofield v. Carnival Cruise Lines, Inc.*, 461, So.2d 152 (1984); *Albertsons, Inc. v. Johnson*, 442 So. 2d 371 (Fla. 2nd DCA 1983); *Cummings v. Sine*, 404 So.2d 147 (Fla. 2nd DCA 1981);

Sentinel Star Company v. Edwards, 387 So.2d 367 (Fla. 5th DCA), *review denied* 399 So.2d 1145 (Fla. 1980). These cases stand for the proposition that a trial court does not abuse its discretion in refusing to interview the jury if there is no reasonable basis to believe there were grounds for a legal challenge to the verdict. If this court were to reverse the Fifth District, it would be reversing that line of cases as well as this court's decision in *Maler*. Although anyone would be incensed by the comments alleged to be made by the jurors, public policy does not allow the invasion into the privacy of the jury room.

An example of an overt act justifying the jury being interviewed can be found in *Snook v. Firestone Tire and Rubber Company*, 485 So.2d 496 (Fla. 5th DCA 1986). In *Snook*, it was alleged that juror had consulted with outside experts regarding the case in deliberate disregard of the court's instructions and had reported her finding to the remainder of the jury. The court in *Snook* held that the interview of jurors was proper only in cases involving matters extrinsic to the verdict, such as arrival at verdict by lot or quotient, improper contact with a juror, or misconduct of a juror. The investigation of the subjective decision-making process of the jury was one involving matters extrinsic to the verdict and, therefore, permissible.

Another example is *Preast v. Amica Mutual Insurance Company*, 483 So.2d 83 (Fla. 2nd DCA), *cert. denied*, 492 So.2d 1334 (Fla. 1986), where the evidence indicated that the jurors actually agreed

to disregard their oath and instructions when they determined that there was no permanent injury proven, but nevertheless awarded damages, determining the amount by lot and deliberately agreeing to circumvent the law. The court in *Preast* held: "Such blatant disregard of the court's instructions on the applicable law cannot be sanctioned, neither can it be seen as a matter which inheres in the verdict itself." *Id* at 86. *Accord*, *Schmitz v. S.A.B.T.C. Townhouse Association*, 537 So.2d 130 (Fla. 5th DCA 1988) (allegation that one juror felt pressured into rendering quick decision are not allegations of misconduct sufficient to warrant the extraordinary and intrusive procedure of questioning of a juror).

In the instant case, there was no substantial allegation that any juror was led to a verdict because of some misconduct or was improperly influenced in reaching a verdict. The jury took eight hours to consider its verdict and did so based on the evidence presented.

The reason that a trial court is accorded broad discretion in deciding whether to interview the jury is based upon the same reasoning that applies to all situations wherein a trial court has discretion. The trial court is in the best position to evaluate the testimony given by a juror and the impact of any alleged juror misconduct on the fairness of the trial. *Speed v. DeLibero*, 215 Conn. 308, 575 A.2d 1021 (1990).

B. Non-impeachment Rule

Section 90.607(2)(b), Florida Statutes, has codified what is known as the non-impeachment rule. Under the non-impeachment rule, a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations. *Johnson v. State*, 593 So.2d 206 (Fla. 1992), *cert. denied*, 113 S.Ct. 119, 121 L.Ed. 2d. 75. If the impeachment relates to what occurred in the jury room and during the jury's deliberations, then such testimony essentially inheres in the verdict and is prohibited. *Id.*

Texas basically has the same non-impeachment rule as Florida. The Texas rule, like Florida, prohibits jurors from testifying about activities and statements that occurred during their deliberations. *Moody v. E.M.C. Services, Inc.*, 828 S.W.2d 237 (Tex. App. - Houston [14th District] 1992). Under the Texas Rule of Civil Evidence 606(b) all testimony, affidavits and other evidence is excluded from court consideration when an issue regarding jury misconduct is raised unless there is evidence of outside influence brought to bear upon any juror. *Id.* at 243. Texas has defined "outside influence" as to be an influence emanating from outside the jury and its deliberations. Because the alleged jury misconduct in the instant case did not emanate from outside the jury and its deliberations, the trial court correctly ruled that the jury verdict could not be impeached. Ms. Dowding's testimony did not indicate that an outside influence was improperly brought to bear upon the jury.

The non-impeachment rule is also known as the Mansfield Rule and is adopted in most jurisdictions.[2] The rule is based on public policy grounds that jurors speak through their verdict and "it is infinitely better that the irregularities, which undoubtedly sometimes occur in the jury room, should be tolerated rather than throw open the doors and allow every discipline appointed party to penetrate its secrets." *Stotts v. Meyer*, 822 S.W.2d 887, 889 (Mo. App. 1991), citing to *State v. Fox*, 79 Mo. 109, 112 (1883).

Although the Plaintiffs and the *Amici* allege that *Sanchez v. International Park Condominium Association* 563 So.2d 197 (Fla. 3rd DCA 1990), is the more enlightened opinion, *Sanchez* would sanction what the Supreme Court has long recognized as being unwise. In *McDonald v. Pless*, 238 U.S. 264, 267 (1914), the Court stated:

> "Let it once be established that a verdict solemnly made and publicly returned into court can be attacked and set

---

[2]Federal Rule of Evidence 606(b) has likewise adopted the Mansfield Rule.

Rule 606(b) declares:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the jurors' mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon the juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

> aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort secure from them evidence of fact which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigations - to the destruction of all frankness and freedom of discussion and conference.

The rule advocated by *Sanchez,* the instant Plaintiffs, and the *Amici* would be to allow the harassment of former jurors by losing parties as well as a possible exploitation of disgruntled or otherwise badly-motivated ex-jurors. Public policy requires a finality to litigation. Common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are going to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, this court should not permit any inquiry into the internal deliberations of the jurors.

As declared by the Fifth District in the instant case:

> If we were to look behind jury verdicts to root out racial prejudice, should we not take similar measures to root out prejudice based on gender, ethnicity, religion (or lack thereof), sexual orientation, wealth, pity, or any other classification or consideration that might influence a result not based solely on the facts and law of any given case?

(Appendix 1 at Pages 5-6).

Although it is very tempting to fashion a rule based on the insensitive, crass and intolerant comments made in the instant case, the question remains as to where the line would be drawn. The respondent submits that the line should be drawn at the jury door.

The law announced by the Fifth District in the instant case is well established and is simply an affirmance of the sanctity and privacy long accorded jurors in the jury room. The principle of law is time honored. It is definitely better that the irregularities, which undoubtedly sometimes occur in the jury room as alleged in the instant case, should be tolerated rather than to throw open the doors and allow every disappointed party to penetrate its secrets. Such a rule does not condone the remarks made in the instant case but is an affirmance of a time-honored tradition.

The case of *United States v. Heller*, 785 F.2d 1524 (11th Cir. 1986),[3] does not alter this position. In *Heller*, the trial court when confronted with a number of vague statements about "prejudice" amongst the jury made by several of the jurors, simply asked each juror if he or she was affected by the prejudice. The trial court in *Heller* was chastised for not probing into what was meant by those expressions. *Id.* at 1524. In the instant case, however, the

---

[3]Heller is distinguishable because it involved a criminal defendant's constitutional right to a trial by an impartial jury. There is no constitutional guarantee of a right to a jury trial in civil cases. *Caine v. Hardy*, 715 F.Supp 166; *State v. Miyahiara*, Haw. App. 320, 721 P.2d 718.

trial court did probe into the allegations of misconduct and only after an extensive hearing ruled that there was no jury misconduct sufficient to interview the rest of the jury.

C. New Trial

The Plaintiffs have stated at page 19 of their Initial Brief that the primary relief sought throughout the entire appellate process had been for a for "new trial" and not a "jury interview." the Plaintiffs therefore continue that the Fifth District's reliance on the *Maler* opinion for denying the motion "new trial" was misplaced. What the Plaintiffs fail to recognize in that in order to get a new trial there must be found jury misconduct. The Plaintiffs requested that the trial court interview all the jurors in order to determine whether they should get a new trial based on jury misconduct. The trial court did interview along with both parties' counsels the juror who made the allegations. The court did so in reliance of *Maler*. Once the trial court determined that there was no legally sufficient basis to interview the jurors under *Maler*, it was compelled to deny a motion for new trial. *See Singletary v. Lewis*, 584 So.2d 634 (Fla. 1st DCA 1991) (reverse and remand for trial court to conduct a jury inquiry; granting of new trial would be improper).

The law in Florida is well established as to the standard of review accorded a trial court when acting on a motion for new trial. A motion for new trial is directed to the sound, broad discretion of the trial judge and his ruling thereon should not be

disturbed absent a clear showing of abuse. "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 Company v. Kikis*, 401 So.2d 1341 (Fla. 1981)." *Keith v. Russell T. Bundy and Associates, Inc.*, 495 So.2d 1223, 1225 (Fla. 5th DCA 1986).

In *State v. Hamilton, supra,* 574 So.2d at 126, this court declared that under Florida law, a trial court has wide discretion in deciding whether or not to grant a new trial. Although the Plaintiffs and the *Amici* have advocated a per se rule of reversal whenever an ethnic or racial comment occurs, this court has refused to apply a per se rule of reversal even when unauthorized materials are present in the jury room. *Id.* This court in *Hamilton* continued that the courts in Florida have applied a harmless error analysis that requires close scrutiny of the type of unauthorized material at issue, its relation to the issues at trial, and extent to which jurors actually consulted the material.

After analyzing the opinions from the different district courts of appeal and federal cases, this court adopted its own harmless error doctrine: defendants are entitled to a new trial unless it can be said that there is no reasonable possibility that the (unauthorized) books affected the verdict. *Id.* at 129. This court held that this rule avoids the problems of a test that demands inquiry into the thought processes of jurors - a practice forbidden by section 90.607(2)(b) of the Florida Evidence Code.

The Eleventh Circuit in *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1984), has likewise now adopted a harmless error analysis. *See also*, *United States v. Perkins*, 748 F.2d 1519, 1533-34 (11th Cir. 1984).

In the instant case, the trial court did not abuse its discretion in denying the motion for a new trial since the verdict was based on the evidence presented and not on any juror misconduct.

D. Voir Dire Inquiry

The Fifth District declared that historically and traditionally it had been the trial lawyer's role and responsibility during *voir dire* to delve into the potential juror's background and experiences in order to determine if a juror is likely to harbor any prejudice, bias or sympathy that may adversely affect the client's interest. The United States Supreme Court likewise agrees with the Fifth District. In *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed. 2d 22 (1981), the Court was presented with whether it was reversible error for a federal trial court in a criminal case to reject the defendant's request that the court's *voir dire* of prospective jurors inquire further into the possibility of racial or ethnic prejudice against the defendant.

The Court declared that *voir dire* played a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury would be honored. The Court continued that

without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who would not be able to impartially follow the Court's instructions and evaluate the evidence could not be fulfilled. The Court noted that there was no *per se* constitutional rule requiring inquiry as to racial prejudice. *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed. 2d (1976).

The petitioner's counsel has declared that they appropriately addressed the very sensitive issue during the voir dire process. If the petitioner's counsel failed to ask the appropriate question and ferret out any racially prejudiced prospective jurors, he is the one to blame.

As declared by the Supreme Court in *Mu'Min v. Virginia*, 111 S.Ct. 1899 (1991), *voir dire* examination serves dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising pre-emptory challenges. Further, a trial court's findings of jury impartiality may only be overturned for manifest error.

The Supreme Court's seminal case requiring inquiry as to racial prejudice is *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931). The *Aldridge* court held that there was a right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind had been upheld with respect to races other than the black race, and in relation to religious and other prejudices of a serious character. The Court declared:

> Prejudice being a state of mind more frequently founded in passion than reason, may exist with or without cause; and to ask a person whether he is prejudice or not against a party, and (if the answer is affirmative), whether that prejudice is of such a character that would lead him to deny the party a fair trial, is not only the simpliest method to ascertain the state of his mind but, is, probably, the only sure method fathoming his thoughts and feelings.

Aldridge v. United States, 51 S.Ct. at 473 n. 3.

CONCLUSION

Based on the foregoing arguments and authorities cited, respondent respectfully requests that this Honorable Court affirm the Fifth District's opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Barbara Green, Esq., Grove Place, Third Floor, 2964 Aviation Avenue, Coconut Grove, Florida 33133; Robert Gray, 1528 Palm Bay Road, N.E., Palm Bay, Florida 32905; and Richard J. Ovelmen, Esquire, 701 Brickell Avenue, Miami, Florida 33131, this 26th day of October, 1994.

Sharon Lee Stedman

SHARON LEE STEDMAN, Attorney at Law
Florida Bar No. 0303781
Sharon Lee STEDMAN, P.A.
1516 E. Hillcrest St., Suite 108
Orlando, Florida 32803
(407) 894-7844
Attorney for Respondent