OA 12-6-94

FILED
SID J. WHITE
SEP 12 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DERRICK A. POWELL AND
EUGENIA POWELL,

Petitioners,

vs.

ALLSTATE INSURANCE
COMPANY, A FOREIGN CORP.,

Respondent.

_____/

CASE NO.: 83,625

DISTRICT COURT OF APPEAL
FIFTH DISTRICT - NO. 92-1937

ON DISCRETIONARY REVIEW OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONERS, DERRICK A. POWELL AND EUGENIA POWELL'S INITIAL BRIEF

ROBERT C. GRAY
Alpizar & Gray, P.A.
Attorney for Petitioners
Florida Bar No. 0504343
1528 Palm Bay Road, N.E.
Palm Bay, Florida 32905
(407) 676-2511

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioners are black United States citizens and are of Jamaican descent. (R. 528-529). On January 8, 1989, Petitioner, DERRICK A. POWELL, was injured in a motor vehicle accident involving an underinsured motorist. Respondent, ALLSTATE INSURANCE COMPANY, provided Petitioners with underinsured motorist coverage. After collecting policy limits from the tortfeasor ($10,000.00), Petitioners proceeded to trial against Respondent seeking money damages for personal injuries. Petitioners sought $235,000.00 in damages. The net recovery from the verdict equated to $10,524.00. (R.1347).

On the day following the verdict, Petitioners' counsel was contacted by Juror Karen Dowding. (R. 828; 840-843). A juror interview of only Karen Dowding occurred on June 12, 1992 in the presence of counsel for Petitioners, counsel for Respondent, and the Circuit Court Judge, the Honorable Edward M. Jackson. (R. 801-861). Juror Dowding outlined in detail multiple accounts of jury misconduct including derogatory racial remarks made between and among the jurors concerning Petitioners and certain of Petitioners' witnesses. Miss Dowding testified under oath to juror discussions and remarks before and during the deliberation process concerning "niggers" ("There's a saying in North Carolina, hit a nigger and get ten points, hit him when he's moving, get fifteen."); how black people do not work as well as white people; comparing blacks to chimpanzees; and how relatives of the Petitioners were probably drug dealers as a consequence of their Jamaican descent.

Upon learning of this incredible testimony, Petitioners filed a Motion for New Trial and, in the alternative, sought to interview the entire jury panel. (R. 1314-1323). The trial judge denied these Motions. Thereafter, Petitioners timely filed a Notice of Appeal to the Fifth District Court of Appeal. (R. 1342-1344; 1348).

On November 12, 1993, the Fifth District Court of Appeal rendered its opinion reversing the trial judge and granting Petitioners' alternative Motion to Conduct Juror Interviews. (I. 5-23). Based primarily on the authority of Sanchez v. International Park Condominium Association, Inc., 563 So.2d 197 (Fla. 3rd DCA 1990), the Court remanded the case to the trial judge for the purpose of conducting individual juror interviews of all remaining jurors with instructions to grant a new trial if it were determined that juror misconduct had actually occurred.

Thereafter, Respondent filed a Motion for Rehearing En Banc or in the alternative, Motion for Rehearing. (I. 24-30). On March 31, 1994, in an en banc 5-4 decision, the Fifth District Court of Appeal reversed itself, withdrew its previous opinion, and affirmed the trial judge's decision denying Petitioners' Motion for New Trial and Petitioners' alternative Motion to Conduct Juror Interviews. (I. 31-47). Four Judges dissented with three offering written dissenting opinions.

On April 27, 1994, Petitioners timely filed their Notice to Invoke Discretionary Jurisdiction of this Court. On June 24, 1994, this Court granted a Joint Motion, filed by The Academy of Florida

Trial Lawyers and the Florida Association for Women Lawyers, for Leave to Appear as Amici Curiae, thereby granting permission to these organizations to file a Joint Amicus Brief in support of the Petitioners should jurisdiction be accepted.

On July 8, 1994, this Court accepted jurisdiction of this case and scheduled oral argument for December 6, 1994.

This Honorable Court has exercised its discretionary jurisdiction. The opinion for which review has been granted expressly acknowledges a conflict with the Sanchez opinion. It is respectfully submitted that the Sanchez opinion is the more appropriate and enlightened decision deserving full and complete approval by the Florida Supreme Court.

First and foremost, Petitioners continue to seek a new trial. Only in the alternative, do Petitioners request permission to conduct an interview of all remaining jurors.

SUMMARY OF ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING PETITIONERS' MOTION FOR NEW TRIAL IN LIGHT OF JURY BIAS AND MISCONDUCT CONFIRMED BY ONE JUROR'S INSISTENCE THAT THE VERDICT WAS ADVERSELY INFLUENCED BY PETITIONERS' RACE AND BY THE MANY RACIALLY DEROGATORY COMMENTS MADE BY JURY MEMBERS.

It is respectfully submitted that the trial court erred in denying Petitioners' Motion for New Trial based on the overwhelming evidence substantiating jury bias which adversely influenced one or more of the jurors. The trial judge abused his discretion in failing to grant Petitioners' requested new trial.

A new trial should have been granted because of the jury misconduct which occurred before and during the deliberations of this case. "Jury misconduct" of the type exhibited in this case has long been recognized as an appropriate ground for granting a new trial. Sanchez v. International Park Condominium Association, Inc., 563 So.2d 197 (Fla. 3rd DCA 1990).

A new trial should be granted to Petitioners based on the authority of the Sanchez opinion. In Sanchez, plaintiff was Cuban and because of derogatory remarks made by jurors about "Cubans" during deliberations, the Third District Court of Appeal reversed the trial judge and granted a new trial. In comparing Sanchez to this case, the facts of the case at bar are more distasteful and egregious in nature which, based on the authority of Sanchez, require a reversal of the trial judge and the granting of a new trial.

The Fifth District's reliance upon Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97 (Fla. 1991) is misplaced. Maler is the seminal case decided by this Court on the issue of when a "jury interview" is appropriate. Petitioners' primary relief requested in this case is for a "new trial" and the Maler Decision in no way addresses the question of when and under what circumstances a new trial shall be granted.

It is respectfully submitted that a new trial should be granted to the Petitioners because the jurors' conduct in this case deprived the Petitioners of an impartial, fair trial as guaranteed by Amendment 14, United States Constitution and Article I, Section 22 of the Florida Constitution. The Fourteenth Amendment of the United States Constitution mandates that race discrimination be eliminated from all official acts and proceedings of the State.

II

THE TRIAL COURT ERRED IN DENYING PETITIONERS' ALTERNATIVE REQUEST TO INTERVIEW THE ENTIRE JURY PANEL IN LIGHT OF THE RECORD EVIDENCE THAT OVERT PREJUDICIAL ACTS HAD OCCURRED BEFORE AND DURING JURY DELIBERATIONS AND THAT THE VERDICT WAS ARRIVED AT IN AN IMPROPER MANNER.

The primary relief Petitioners seek is that of a "new trial." It is only in the alternative that Petitioners seek a jury interview of the entire panel. The Maler opinion is not controlling on the issue of whether a "new trial" should be granted, but does offer guidance on the appropriate standard for determining whether a "jury interview" is appropriate.

The conduct for which Petitioners complain rises to the level of an "overt prejudicial act" as identified in the Maler opinion, thus allowing for the alternatively requested "jury interview." The acts and actions of multiple members of the jury in the case at bar clearly surpass and go far beyond the mere "subjective impressions" mentioned by this Court in Maler. Petitioners submit that the requirements of Maler have been met and that sufficient record evidence exists in which to justify, at a minimum, an interview of the entire jury panel.

III

SANCHEZ IS THE MORE ENLIGHTENED DECISION IN FLORIDA AND STRONG PUBLIC POLICY EXISTS FOR REVERSING POWELL AND ADOPTING THE SANCHEZ RULE.

Strong public policy exists commanding that the unfairness of Powell be addressed and that the tenets of Sanchez be affirmed in their entirety. An express conflict exists between Powell and Sanchez for which public policy and fairness require a reversal of Powell. Petitioners respectfully request that this Court send a strong message to the citizens of the State of Florida that racial bias and bigotry will not be tolerated in any jury in any court in the State of Florida.

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING PETITIONERS' MOTION FOR NEW TRIAL IN LIGHT OF JURY BIAS AND MISCONDUCT CONFIRMED BY ONE JUROR'S INSISTENCE THAT THE VERDICT WAS ADVERSELY INFLUENCED BY PETITIONERS' RACE AND BY THE MANY RACIALLY DEROGATORY COMMENTS MADE BY JURY MEMBERS.

The trial in this case was a sham and a mockery of justice. Petitioners are black, Jamaican-born United States citizens. (R. 528-529). Petitioners did not receive their constitutionally protected right to a fair and impartial jury trial in this personal injury action against Respondent, ALLSTATE INSURANCE COMPANY.

Petitioner, DERRICK POWELL, was severely injured on January 8, 1989, when he was involved in a motor vehicle accident. Petitioners settled with the underinsured tortfeasor, Anona Jellis, for her policy limits of $10,000.00. (R. 1155-1156). Thereafter, an Amended Complaint was filed against Respondent, ALLSTATE INSURANCE COMPANY, the underinsured motorist carrier. The jury trial against Respondent commenced May 18, 1992 and ended on May 21, 1992. The jury deliberated for eight and one-half (8½) hours before returning its verdict. The verdict, after deductions for collateral source payments and comparative negligence, netted Petitioners $10,524.00. (R. 1347). This was nominal compared to the $235,000.00 requested by Petitioners during closing argument. (R. 722).

Pursuant to Rule 1.530(a) of the Florida Rules of Civil Procedure, Petitioners timely requested a new trial. Petitioners'

Motion for New Trial was heard before the Honorable Judge Edward Jackson on June 30, 1992. The trial court denied Petitioners' Motion for New Trial by Order dated July 10, 1992. (R. 1342-1344).

The courts have on many occasions recognized the broad discretion vested in the trial courts in ruling upon motions for new trial, but such is not an unlimited discretion. Holland v. Watson, 215 So.2d 498 (Fla. 2nd DCA 1968). The power of the trial judge to order a new trial derives from the equitable concept that neither a wronged litigant nor society itself can afford to be without some means to remedy a palpable miscarriage of justice. Ford v. Robinson, 403 So.2d 1379 (Fla. 4th DCA 1981). Where a clear abuse of discretion is demonstrated, an appellate court has the power to reverse and grant the requested new trial. Giller v. McIntosh, 309 So.2d 218 (Fla. 3rd DCA 1975).

It is the duty of the trial court to grant a motion for a new trial when the jury has been influenced by considerations outside the record. Keith v. Russell T. Bundy and Associates, Inc., 495 So.2d 1223 (Fla. 5th DCA 1986).

The appropriate grounds for a Motion for New Trial fall into one of fourteen (14) categories. Trawick's, Florida Practice and Procedure (1991 Edition). "Misconduct of the jury" has long been recognized as fertile ground for granting a movant's request for a new trial. The conduct of this jury in the case at bar is nothing short of unconscionable. Record evidence exists demonstrating multiple examples of jury misconduct. The level of bigotry and racial intolerance demonstrated by this jury cannot be condoned.

The courts of Florida have on numerous occasions shown substantial intolerance for juries influenced by heritage or ethnicity. Sanchez v. International Park Condominium Association, Inc., 563 So.2d 197 (Fla. 3rd DCA 1990); Knepper v. Genstar Corporation, 537 So.2d 619 (Fla. 3rd DCA 1988). The case at bar is nearly identical to the facts of Sanchez.

In Sanchez, Plaintiff Sanchez sued for personal injuries as a result of her slipping and falling on a wet tile floor in a condominium building lobby. The jury returned a verdict in favor of Plaintiff Sanchez, but found her to be 96% comparatively negligent and reduced her damages accordingly. Sanchez was of Cuban extraction. Sanchez, 563 So.2d at 197.

After the Sanchez jury trial, a juror complained that another juror had made a derogatory comment about Cubans during deliberations. As a result, the trial court conducted interviews of each of the six jurors. Three of the jurors recalled one of the jurors remarking that, "Cubans as a whole, whenever anything like this happens, they yell sue, sue, sue, or want to sue at the drop of a hat, something like that." Id. at 198. Two of the jurors did not remember any remarks being made that were derogatory and the single juror accused of the remark denied having made the remark, but remembered some other juror whom he was unable to identify mentioning something about "ambulance chasing." Id. at 198. All jurors denied that the statements made had any effect on the outcome of the case. All jurors testified they were not influenced by the comments. Id. at 198. The trial Court denied Plaintiff's

motion for a new trial. On Appeal, Plaintiffs argued that the comments were so offensive as to warrant a new trial.

In Sanchez, the Third District Court of Appeal agreed with plaintiffs, reversed and granted plaintiffs' motion for a new trial. The Court relied in part on United States v. Heller, 785 F.2d 1524 (11th Cir. 1986), a case in which a juror made anti-semitic remarks to other jurors. The Court quoted directly from the Heller opinion as follows:

> The judiciary, as an institution given a constitutional mandate to ensure equality and fairness in the affairs of our country when called on to act in litigated cases, must remain ever vigilant in its responsibility. The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires.

Sanchez, 563 So.2d at 198, quoting United States v. Heller, 785 F.2d 1524, 1527 (11th Cir. 1986).

The Sanchez Court went on to state that jury service is a collegial process and while it may be that other jurors were not affected by the remarks made by the single juror, the guilty juror was an active participant in the deliberative process and the ultimate verdict included his input. The Sanchez Court concluded that the Plaintiff was entitled to have her case heard by an impartial jury and, therefore, remanded her case for a new trial on both liability and damages.

In the case at bar, the facts giving rise to Petitioners' Motion for New Trial are uncannily similar to the facts of Sanchez. The only notable distinction between the cases is that the comments by jury members in the instant case are far more egregious and detestable than the comments by the jurors in Sanchez.

In the instant case, Juror Karen Dowding, under oath, testified in a juror interview before the trial judge and counsel for the respective parties. (R. 801-861). This sworn interview occurred as a result of her independently contacting both the Petitioners' attorney and the trial judge in an effort to make known to the court her protestations and concerns about the deliberative process she had participated in as a juror in the instant case. At her sworn interview, conducted on June 12, 1992, the sickening and distasteful story of what had occurred during the eight and one-half (8½) hours of deliberation "came to light."

The following excerpts are quoted directly from the Transcript of Hearing involving Juror Karen Dowding which occurred on June 12, 1992 in Judge Jackson's Chambers. (R. 801-861). These excerpts are selected so as to illustrate for this Court only some of the "jury misconduct" which had occurred both before and during the deliberations:

DIRECT EXAMINATION

> Q. ...perhaps the best thing for us to do, Miss Dowding, is simply to ask you to go ahead today and voice whatever concerns you may have about the verdict or the deliberation process.

A. I - when I left on Thursday after we had deliberated to come up with a verdict or whatever, I felt very badly because I felt that most of the deliberations were not based on the evidence that was given in trial.

There was - before we went in to deliberations, during breaks and that type of thing, there were a number of racial jokes and statements to the point that on Tuesday afternoon there was one particular - one of the jurors made the comment,

"There is a saying in North Carolina, hit a nigger and get 10 points, hit him when he's moving get 15."

And I said, excuse me, but that really offends me. And a couple of the other participants were laughing.

I mean, everybody had this little story about how they weren't prejudiced because they had worked with somebody who was black before, up to the point where the lady said that she knew when the Regae fest was that weekend, so therefore she wasn't prejudiced.

(R. 805-806)(emphasis added).

Q. Did any of the Jurors, including the alternate, make any similar jokes or comments such as the one you've already shared with us?

A. Actually Margaret Delikat, I think was her name. During one of the breaks, I think it was when you two were kind of going round and round about the insurance or whatever.

We came in and somebody said, "Well, why - why are his grandchildren living with him anyway."

And so somebody said, "Well, maybe their parents are dead or something."

So I just said, "Well, you know, it's not unusual for people of Caribbean, for the grandparents to have the children."

And Mrs. Delikat said, "Well, maybe the parents - oh, **they're probably drug dealers."**

And everybody was like, "yeah, yeah." And they were laughing.

And I said, "You don't know that. That has nothing to do with it."

(R. 808)(emphasis added).

Q. ...Any other more specific jokes or racial remarks of the sort that you've outlined for us?

A. The only one - I guess it was on Monday, I'm trying to think of the time line.

My time line is a little - 'cause we were in and out for breaks and different things like that.

But we went - I think it was a break on Monday afternoon. I had brought a book with me, and it is - it's a book by Jane Goodall, it's called "Through A Window." It's about the chimps of Ghandi. On the cover is a picture of chimpanzees.

And when I came walking into the room, Paul and Rob were laughing. They were standing by the end of the table near the doorway to go back into the courtroom and they were laughing.

So I walked in, and I believe I was with Sally. I forgot who else was with me.

And I just said, "It must be a really good joke" or something.

And one of the guys, I think it was Paul said, "Oh, we were just making a joke about your book."

So I said, "Oh."

And then Rob started cracking up and said - no, I think it was Paul started cracking up and said, "And Mr. Johnson got out of the car and laid down on the pavement." And the two of them just went into hysterics.

So it wasn't specific, but it was kind of - I got the very general impression, or the very

strong impression, that there was some kind of relationship, but it wasn't anything specific.

So I never, you know, I just kind of let it pass.

(R. 809-810).

Q. The "Mr. Johnson" you refer to, of course, was one of the passengers in the Powell vehicle who -

A. Right.

Q. - got out of the car after the accident and laid down?

A. On the pavement.

Q. He was a black individual; is that right?

A. Yes.

Q. And so of course were Mr. and Mrs. Powell?

A. Right.

Q. Any other direct or indirect racial comment that you can recall, Miss Dowding?

A. No. But Pete thought they were talking about - during the course of talking about black people and how everybody knew somebody who was black who was just great to work with.

Pete said, "Oh, well, I don't have anything about - against black people. But when I worked" - I believe it was at IBM. **"When I worked for IBM, we did studies, and our turnover rate for white people was only two percent. And for black people it was like twenty-five percent or something."**

So he says, **"they don't - they didn't work for us as well"** or something like that.

But it was that kind of a comment. He actually made the statistical statement about relationship between white workers and black workers.

Q. And obviously there was no testimony or evidence in this case that in any way, dealt with that issue; is that a fair statement?

A. No. And at times there were other comments that were said, but I'm hard pressed to remember.

(R. 811-812)(emphasis added).

Q. Miss Dowding, I think you've done a very good job of trying to remember those individuals who perhaps overheard these various remarks, and I think at one point you said the others were laughing when the very distasteful remark about niggers was made.

Do you recall if everyone overheard that, or just a few?

A. No. I believe everyone in the room overheard it. As far as who was laughing, I mean, I really couldn't say for sure. There was a couple people I know laughed, but I can't say that everyone laughed.

(R. 817-818).

Q. What prompted you to make that statement to him?

What prompted you to go to him and specifically say, "don't you think it would have been different if Mr. Powell had been white?"

A. Because his behavior beforehand.

A number of - one of the things that was brought up, was that this was - I think it was at that time somebody said well, this is about - we're judging this based on facts. And we're going for the liability issues based on facts.

And I think that his behavior had indicated that he was racially biased before he went into the deliberations.

And that although others had shown some racial bias also, just his - his numbers seemed to be really high. That he really felt that his

plan was very responsible for the accident.

And of course, I was way on the low end. And so I just said that to him and -

Q. So before you made that direct question to him, at least in your mind he had shown some very definite prejudiced or bias type of behavior before that comment was made?

A. Right.

(R. 822-823).

Q. Last question Miss Dowding, if my clients, the Powells had been white, in your opinion, would the outcome have been different?

A. That was what prompted me to make the phone call the next day, was to get in touch, because I felt if they had been white, that the determination would have been different.

(R. 828).

CROSS-EXAMINATION

A. But it became - once we started into deliberations or whatever, to me, it became clear to me, there were a couple people that were racially biased.

That it was not just that they were making a joke, but that they felt that they were truly superior or whatever to these people.

(R. 830).

Q. ...Was everybody in agreement with that verdict?

A. Under duress, yes.

Q. Who was under duress?

A. I was.

(R. 835).

REDIRECT EXAMINATION

Q. ...is it your opinion that that verdict was influenced by race?

A. Yes.

(R. 847).

Sanchez v. International Park Condominium Association, Inc., 563 So.2d 197 (Fla. 3rd DCA 1990) remains good law. There exists no Florida decision more succinctly on point than the Sanchez opinion. In Sanchez, we have one juror complaining of misconduct. In the case at bar, we have one juror complaining of misconduct. In Sanchez, there is effectively one single, general derogatory remark made about "Cubans." In the case at bar, there are multiple, specific derogatory remarks made about "blacks" and "niggers." In Sanchez, several jurors interviewed denied the derogatory remarks ever had occurred. In the case at bar, the unrefuted record evidence, before this Court, indicates that indeed these multiple derogatory remarks occurred. In Sanchez, even the complaining juror indicated that the derogatory remark about Cubans did not affect the verdict. In the case at bar, on multiple occasions, Juror Dowding indicates that had Petitioners been white, the result would have been different and that indeed the derogatory remarks did influence the verdict. In Sanchez, the Court concluded that even though the five other jurors may not have been affected by the single derogatory remark about Cubans, it nevertheless reversed and required a new trial because the offending juror was "an active participant in the deliberative process, and the verdict included his input." Sanchez, 563 So.2d at 199. In the case at

bar, we have sufficient proof that at least one of the non-offending jurors was affected by the racial remarks made by the offending jurors. In fact, the effect was so great, this juror testified that she was "under duress." (R. 835).

In Singletary v. Lewis, 584 So.2d 634 (Fla. 1st DCA 1991), the jury returned a defense verdict for a white doctor in a medical malpractice case where the plaintiffs were black. Through testimony of a juror it was shown that other jurors were making racial comments and slurs in the jury room. In ruling favorably to the plaintiffs, the First District Court of Appeal adopted the rationale set forth in United States v. Heller, 785 F.2d 1524 (11th Cir. 1986). In Heller, ethnic jokes and slurs during the trial process deprived the defendant of an impartial, fair trial. The Eleventh Circuit Court of Appeals concluded that whether actual prejudice to the individual jurors occurred is not relevant. Instead, it is evidence that the juror's conduct actually occurred that commands the granting of a new trial. Heller, 785 F.2d at 1529. Such jury misconduct in itself is objective and extrinsic, and does not "inhere" in the verdict. The fact that it happened deprived the litigant of a fair trial. Powell v. Allstate Insurance Company, 19 FLW D735 (5th DCA 4/8/94)(J. Sharp, dissenting).

The opinion rendered by the Fifth District Court of Appeal on March 31, 1994, which is the subject of this appeal, denies Petitioners' request for a new trial based exclusively on Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97 (Fla. 1991). (I. 31-

47). Citing to language in Maler, the Fifth District concludes that its inquiry should not be, "...whether some insensitive clods were permitted to serve on the jury by trial counsel, but rather **whether some juror or the jury committed some objective act which compromised the integrity of the fact-finding process."** (I. 31-47) (emphasis added).

Petitioners, again, urge the Florida Supreme Court to consider that the primary relief sought throughout this entire appellate process has been for a "new trial" and not a "jury interview." It is respectfully submitted that the Fifth District's reliance on the Maler opinion for denying the motion for "new trial" is misplaced. Clearly, Maler represents this Court's most recent pronouncement for determining whether or not an "interview" of jurors is justified. Clearly, the test for determining whether or not Petitioners are entitled to a "new trial" is not the same test for determining the propriety of granting a "jury interview."

In Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97 (Fla. 1991), after a jury verdict was rendered on a medical malpractice action, unsolicited comments were made by jurors to counsel for the defendant hospital. As a result of those conversations, defendant hospital filed a motion to interview all the jurors. Id. at 98. The Maler decision is completely silent as to whether or not defendant hospital filed a motion for new trial. The trial court granted the motion to interview jurors and Plaintiff Maler then filed a petition for writ of certiorari in the Third District Court of Appeal. Id. at 98-99. The Third District

Court of Appeal quashed the trial court's order after ruling that the questions proposed for the jurors during the interview inhered in the verdict itself and were impermissible under Florida law. Id. at 99. The Florida Supreme Court affirmed the Third District Court of Appeal's opinion to the extent that if an inquiry will only elicit information about "subjective" impressions and opinions of jurors as opposed to "overt" prejudicial acts, such inquiry may not be allowed. Id. at 99.

In the instant case, the Fifth District's reliance on the Maler opinion is erroneous for two reasons. First of all, the Fifth District's denial of Petitioners' motion for new trial based exclusively on Maler is erroneous when clearly the Maler decision in no way attempts to define for the Court the grounds by which a "new trial" may be granted. The Maler decision is strictly and solely to be interpreted as helpful in understanding under what circumstances and when a "jury interview" should occur. At no point in Maler does the Supreme Court attempt to re-define the time-honored grounds and/or case law succinctly defining the circumstances under which a "new trial" shall be granted.

Secondly, even if the Maler opinion did apply in determining the propriety of a requested "new trial," the acts for which Petitioners in the case at bar complain clearly rise to the level of an objective "overt prejudicial act" which compromised the integrity of the fact-finding process as discussed by the Maler Court. This is discussed in greater detail in Argument II.

In the instant case, the Fifth District implicitly suggests that insensitive clods were **permitted** to serve on the jury by trial counsel and that perhaps through more correct voir dire questioning these individuals could have been excused. In fact, the Fifth District goes on to suggest that perhaps appropriate questioning during voir dire should include the question, "Do you tell or have you told racial or ethnic jokes?" (I. 32). The Fifth District admits that if any jurors were to deny racial prejudices and then later go on to exhibit these prejudices, perjury then would be established and a new trial would be in order (I. 33). Without Petitioners herein debating the practicality and/or appropriateness of asking potential jurors whether or not they have ever told "ethnic jokes," questioning was indeed conducted in this area during voir dire, the purpose of which was to hopefully determine, in a less direct and more subtle way, precisely who might harbor certain prejudices against "Jamaicans" or "blacks." (R. 79-82; 105-106). During voir dire, Petitioners' counsel asked the following questions:

Mr. Gray:	Have any of you ever been to Jamaica?
Mr. Brooks:	Yes.
Mr. Gray:	Just one, two, three, four. Okay. Start with you, Mr. Sheesley. Did you go?
Mr. Sheesley:	Yes.
Mr. Gray:	How long.
Mr. Sheesley:	A week.
Mr. Gray:	Any bad experiences?
Mr. Sheesley:	I didn't like it.
Mr. Gray:	What was it you didn't like about it?
Mr. Sheesley:	I didn't like the hygiene and how dirty it was.
Mr. Gray:	Mr. Brooks, what was your experience in Jamaica like?
Mr. Brooks:	I have been there several times in business. I used to live in Barbados for

three years. Ran a plant for Harris there. Been to Jamaica several times on business, maybe once on pleasure. I have had good experiences mainly because I know the islands and I know what to expect.

Mr. Gray: **What did you think of Jamaican people as a whole? Any thoughts one way or the other?**

Mr. Brooks: **I think all the Caribbean people are great.**

Mr. Gray: Ms. Sheesley, how about you? Your thoughts.

Ms. Grimes: No, I'm Grimes.

Mr. Gray: I'm sorry. This is so difficult at times.

Ms. Grimes. I'm sorry. What do (sic) think about any opinions formed about the Jamaican people as a whole?

Ms. Grimes: I just told you. I didn't really care for it. I mean, there was a lot of other places I would rather go than Jamaica. It was just kind of a dirty place. Of course, I was - I guess I - I didn't go to Kingston where they say it's really nice.

Mr. Gray: There were two other hands back here, I think. Ms. Haidet?

Ms. Haidet: Yes.

Mr. Gray: How do you feel about Jamaica?

Ms. Haidet: I enjoyed it. I went with my husband. It was a business trip. We also went out to the beach area too.

Mr. Gray: **Did you form any negative feelings about the Jamaican culture or Jamaican people while you were there?**

Ms. Haidet: **It wasn't quite what I expected but I think a lot it was the cleanliness I didn't like.**

Mr. Gray: Who was the other person right next to you? Ms. - you know, I wrote down Peachtree. Ms. Petree.

Ms. Petree: Petree. P-E-T-R-E-E.

Mr. Gray: Any bad experiences for you in Jamaica?

Ms. Petree: No.

Mr. Gray: Enjoyed it? Was it a vacation?

Ms. Petree: We lived in Panama. We went to get up and get out of the country.

Mr. Gray: **Yes. No negative feelings about the people?**

Ms. Petree: **None whatsoever.**

(R. 79-82).

Mr. Gray: **This is a question I probably should delete. We have so many New Yorkers. My clients are from, New York, originally from Jamaica, principally live in New York now. Is there anything about that fact that they were originally from Jamaica - Mr. Powell has lived in this country since 1970 as a United States citizen, as a taxpayer, as a voter, as an electrician earning very good money anywhere from $23.00 to $27.00 an hour; but he is of Jamaican descent, has a very thick Jamaican accent as does his wife. You will learn about their living relationship different than ours. H e lives part time in New York, part time in Palm Bay. Is there anything about that right off the bat any of you feel perhaps only entitles him to partial justice in a situation like this as opposed to full justice?**

The prospective jury: (Prospective jurors shake heads).

(R. 105-106).

Petitioners' counsel was attempting to elicit any negative feelings about "Jamaicans" that the prospective jurors harbored. The subject matter was approached in the most sensitive way that Petitioners' counsel could think of in addressing the topic of prejudice and racial bias. Juror Sheesley was one of the six jurors who participated in this verdict and was one of the jurors actively answering questions about "Jamaica" and "Jamaicans." His actual prejudice toward Jamaicans (as confirmed by the Dowding interview) was not candidly admitted during voir dire. Notwithstanding the Fifth District's comments concerning voir dire, it is respectfully submitted that Petitioners' counsel appropriately addressed this very sensitive issue during the voir

dire process.

Perhaps the most compelling distinction between the Maler opinion and the instant case concerns the fact that Petitioners, unlike the Maler Petitioners, have been deprived of a fair trial as a consequence of **racial bias** and **prejudice.** "Racial bias" and "prejudice" were not issues in Maler and historically allegations of racial bias have been reviewed differently. As Judge Diamantis of the Fifth District points out in his dissenting opinion, "The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system." Powell v. Allstate Insurance Company, 19 FLW D735 (5th DCA 4/8/94)(J. Diamantis, dissenting) quoting from Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed. 2d 411 (1991). Further, "where racial bias is likely to influence a jury, an inquiry must be made into such bias."

ARGUMENT

II

THE TRIAL COURT ERRED IN DENYING PETITIONERS' ALTERNATIVE REQUEST TO INTERVIEW THE ENTIRE JURY PANEL IN LIGHT OF THE RECORD EVIDENCE THAT OVERT PREJUDICIAL ACTS HAD OCCURRED BEFORE AND DURING JURY DELIBERATIONS AND THAT THE VERDICT WAS ARRIVED AT IN AN IMPROPER MANNER.

Regardless of whether the Maler opinion serves as controlling authority on the question of whether a "new trial" and/or "jury interview" should be granted, Petitioners submit that the Maler test has been established in the instant case and, therefore, the Maler precedent serves as sufficient grounds to grant Petitioners' request for a new trial or, at a minimum, an interview of the entire jury panel.

Maler commands an analysis concerning whether or not the acts committed by the jury rise to the level of being considered "objective acts" as opposed to merely representing "subjective matters." We need not concern ourselves with the question of whether or not "actual prejudice" occurred as a consequence of these jurors' actions, but instead need only determine that the objective overt acts "actually occurred." Snook v. Firestone Tire and Rubber Company, 485 So.2d 496 (Fla. 5th DCA 1986). According to Maler, if it is determined that actual extrinsic "overt acts" were committed by the jury that were improper, then a jury interview of all jurors would be appropriate. This Court, perhaps, then only needs to determine the question of whether or not the

activities complained of by Juror Dowding, if accepted as true, represent sufficient "objective acts" so as to satisfy the test of Maler and thus require a jury interview. Petitioners urge this Court to consider the multiple examples of misconduct complained of by Juror Dowding in arriving at the correct decision that, indeed, these activities do satisfy the Maler test and qualify as sufficient "extrinsic overt objective acts."

For example, Petitioners in the case at bar were seeking money damages for past and future loss of earnings and loss of earning capacity. The "wage claim" was a significant and substantial portion of Petitioners' claim for damages. (R. 713-715; 717-718). Convincing the jurors that Petitioner's serious injuries would limit his employability and ability to earn wages was discussed at length by an expert vocational counselor and was a substantial part of Petitioners' closing argument on damages. While addressing the wage claim, Juror Dowding testified that one of the jurors discussed and made statistical comparisons between "blacks" and "whites" in the work place when indeed there was absolutely no evidence presented at trial making any such statistical comparisons between blacks or any other ethnic group. The following is a brief excerpt from the June 12, 1992 Transcript of Hearing, involving the sworn interview of Juror Dowding:

> **Q.** Any other direct or indirect racial comment that you can recall, Miss Dowding?
>
> **A.** No. But Pete thought they were talking about - during the course of talking about black people and how everybody knew somebody who was black who was just great to work with. Pete said, "Oh, well, I don't have anything

about - against black people. But when I worked" - I believe it was at IBM. "When I worked for IBM, we did studies, and our turnover rate for white people was only two percent. And for black people it was like twenty-five percent" or something.

So he says, "They don't - they didn't work for us as well", or something like that.

But it was that kind of a comment. He actually made the statistical statement about relationship between white workers and black workers.

Q. And obviously there was no testimony or evidence in this case that in any way dealt with that issue; is that a fair statement?

A. No. . . . . .

(R. 811-812).

Juror Dowding went on to state during her sworn testimony that the verdict was arrived at "under duress." (R. 834-835). She testified that she acquiesced after eight and one-half hours (8½) of deliberation "under duress." She recalled the "overt act" of one juror who had become disgruntled with her refusal to compromise and the following excerpt illustrates the tactic used by one juror in perfecting the end result he had hoped for:

Q. Okay. When everybody came to the verdict, was the verdict unanimous when you finally decided, okay, we're ready and we're going out. Was everybody in agreement with that verdict?

A. Under duress, yes.

Q. Who was under duress?

A. I was.

Q. And what was the matter - what was the nature of the duress?

> **A.** I felt that it was not - that this hasn't been examined, based on the facts. . . .
>
> I mean, how long would we have been there. How long would this go round and round. How long would we have to banter this whole thing back and forth and up and down and side to side . . .
>
> **And so then Paul said, it was about four o'clock, and he threw his watch on the table. He says, "Well, I'm only giving him ten thousand dollars for the surgery until four-thirty. And if it goes beyond four-thirty, it goes down.**
>
> And I mean, I was looking at him because I couldn't believe he said that.
>
> And there was a couple of people going, yeah, we want to get out of here or something like that. . . .

(R. 835-836).

As stated by the Majority in the original November 12, 1993 opinion in this case, Judge Sharp was correct when she stated,

> The jurors' racial jokes and comments testified to by Juror Dowding in this case are as egregious as those established in Singletary, Sanchez and Heller. Thus, Dowding's testimony merited a full judicial inquiry of the other jurors to determine what actually happened in this case. Accordingly, we remand this case to conduct such interviews. If it is established that the jurors in this case cracked racial jokes and made racially biased comments (as Dowding testified) while acting in their capacity as jurors in this case, a new trial should be ordered. Such behavior is objective and extrinsic and does not "inhere" in the verdict. The fact that it happened deprived the litigant of a fair trial. Singletary; Sanchez; Heller.

(I. 11).

The "objective fact" that such remarks and slurs **were made** by one juror was sufficient to merit a new trial in Sanchez. Such jokes and slurs made by jurors while conducting their official duties prevents impartial decision-making from taking place. To allow such behavior in the jury room would erode public confidence in the equity of our system of justice. Heller, 785 F.2d at 1527-1529. The 11th Circuit in Heller concluded, "The people cannot be expected to respect their judicial system if the judges do not, first, do so." Heller, 785 F.2d at 1529.

Maler is clear that it in no way intends to preclude jury interviews when it can be shown that there exists an agreement by the jurors to "decide the case by aggregation and average, by lot, by game or chance, by any other artifice or improper manner, or by a simple overt agreement to ignore the law and the court's instructions." As illustrated by the Dowding testimony above, one of the jurors resorted to "game or chance" as a method to resolve the case by specifically stating toward the end of the eight and one-half (8½) hours of deliberation that he was only willing to give Petitioners $10,000.00 for surgery, but that if the remaining jurors did not agree on that amount within 30 minutes, he was going to start going down from the $10,000.00. (R. 835-836). This juror made these statements while throwing his watch on the table in a very animated way, demanding that a compromise be reached within 30 minutes! This clearly falls within the Maler opinion's discussion of deciding cases "by lot, by game or chance."

The Majority in the March 31, 1994 Powell decision, relies somewhat on the case of Rabun and Partners, Inc. v. Ashoka Enterprises, Inc., 604 So.2d 1284, 1286 (Fla. 5th DCA 1992) for an example of jury misconduct which does not rise to the level of "overt objective acts" and instead represents the emotions and mental processes of the jurors which therefore constitute matters which essentially "inhere" in the verdict and should not warrant a jury interview. In Rabun, the complaining juror's allegation was that the jury decided to rule against a party because he was a rich doctor and did not need money. In Rabun, we do not have evidence of "overt objective acts" such as those illustrated for us by Juror Dowding nor can a fair comparison be made between jurors commenting on the perceived wealth of a "rich doctor" and jurors telling "nigger jokes;" comparing Petitioners to chimpanzees; making overt statistical comparisons between "blacks" and "whites;" and sworn testimony from a juror indicating that her verdict was reached "under duress" as a consequence of "games" played by other jurors in an effort to bring the deliberations to a conclusion (throwing the watch on the table and deducting money from Petitioners as time passes).

Certainly, Judge Diamantis (dissenting opinion) would urge that Petitioners herein, unlike Petitioners in Rabun, have been deprived of a fair trial as a consequence of their race and, therefore, Petitioners's review should be that of "strict scrutiny" in order for this Court to assure that their right to a fair and impartial jury trial has been preserved. (I. 45-47). There can be

no doubt that had the jurors in Rabun accused the physician of being a "Jew bastard," or "kike," "nigger," "gook," "nip," "spic," "mic," or some other ethnic derogatory term, the result would have been different. These type of allegations are a far cry from the subjective opinions of a jury that the plaintiff is "rich" and perhaps not deserving of money. There is a clear distinction between the case at bar and Rabun.

Lastly, Rabun appears silent as to the question of whether or not the Petitioners were seeking a "new trial" and Petitioners herein, again, remind this Court that the primary relief sought is that of a "new trial" as opposed to a "jury interview" and that the tests for obtaining these forms of relief are different.

Petitioners respectfully request this Court rule that if the Maler decision is controlling on either their request for a "new trial" or "jury interview," that the test has been satisfied and that a new trial should be granted or, at a minimum, a jury interview should be granted.

ARGUMENT

III

SANCHEZ IS THE MORE ENLIGHTENED DECISION IN FLORIDA AND STRONG PUBLIC POLICY EXISTS FOR REVERSING POWELL AND ADOPTING THE SANCHEZ RULE.

This Honorable Court has accepted jurisdiction based on an express conflict which exists in the State of Florida between Sanchez and Powell. There can be no doubt but that these two cases are indistinguishable and yet reach entirely different results. Petitioners urge that this Court adopt the tenets of Sanchez as being the most appropriate and enlightened method by which we determine whether an aggrieved petitioner should be granted either a requested new trial or jury interview. Strong public policy exists favoring an affirmance by this Court of Sanchez and a resounding reversal of Powell.

Petitioners respectfully encourage this Honorable Court to carefully consider the Sanchez decision and the well-reasoned dissenting opinions in the Powell decision, which offer strong admonitions concerning the appropriateness of affirming the decision of the Powell majority. Petitioners respectfully request that this Court send a strong message to all District Courts of Appeals in the State of Florida to carefully scrutinize and consider allegations of "jury misconduct" based on racism and bigotry. All citizens and potential future jurors in the State of Florida should be made aware by this Court's decision that this type of behavior and open racism will no longer be tolerated in the

State of Florida and that violations will be brought to the attention of the attorneys, the judges, and ultimately the public-at-large if necessary. In this case, this Court can rest assured that the media will report the outcome and that the message will be sent State-wide that racial jokes and open bigotry will no longer be tolerated in the judicial process.

If Maler is to remain the law, Petitioners respectfully urge that public policy be served by this Court by now specifically identifying "racist remarks" during jury deliberations as sufficient "objective overt acts" to satisfy the Maler test for a jury interview. Alternatively, at a minimum, Petitioners request that the public be served by this Honorable Court carving out an exception to the Maler rule and treating racist remarks during jury deliberations as a unique circumstance deserving of "strict scrutiny." Petitioners feel confident that this Honorable Court, in addressing the conflict between Powell and Sanchez, will agree that the public should feel as the Judges felt in United States v. Heller, 785 F.2d 1524 (11th Cir. 1986) that,

> The judiciary, as an institution given a constitutional mandate to insure equality and fairness in the affairs of our country when called on to act in litigated cases, must remain ever vigilant in its responsibility. The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires.

Heller, 785 F.2d at 1527.

Petitioners submit that there are multiple examples contained within the Juror Dowding interview to suggest that one or more of the jurors in Powell were all too willing to disregard the instructions of the trial judge along with the facts and the law in order to arrive at "partial justice" for the Powells and that "partial justice" was served as a consequence of Petitioners ancestry and skin color.

Granting a new trial is an extraordinary remedy. The facts of this case are extraordinary and Petitioners deserve fairness, justice and a new trial among six peers from the community who harbor no prejudice against them.

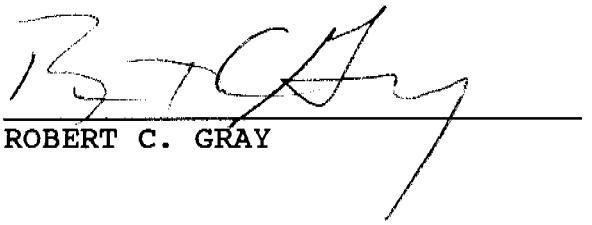
CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the en banc decision of the Fifth District Court of Appeal below and grant Petitioners a new trial based on Miss Dowding's sworn interview and the Sanchez opinion. Alternatively, Petitioners request that this Court grant an interview of each and every juror that "served" on Petitioners' jury at the trial of their case.

Respectfully submitted,

ROBERT C. GRAY
Florida Bar No. 0504343
1528 Palm Bay Road, N.E.
Palm Bay, Florida 32905
(407) 676-2511

Attorney for Petitioners



ROBERT C. GRAY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon Sharon Lee Stedman, Esq., 1516 E. Hillcrest St., Suite 108, Orlando, FL 32803; Barbara Green, Esq., 999 Ponce de Leon Blvd., Suite 1000, Coral Gables, FL 33133; Roy Wasson, Esq., 44 West Flagler Street, Suite 402, Courthouse Tower, Miami, FL 33130, and Richard J. Ovelmen, Esquire, 701 Brickell Avenue, Miami, Florida 33131 on this, the 9th day of September, 1994.

ROBERT C. GRAY
Florida Bar No. 0504343
1528 Palm Bay Road, N.E.
Palm Bay, Florida 32905
(407) 676-2511

Attorney for Petitioners

ROBERT C. GRAY