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MAY 6 1994

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By

Chief Deputy Clerk

DERRICK A. POWELL AND
EUGENIA POWELL,

Petitioners,

vs.

CASE NO.: 83,625
Fifth DCA Case No.: 92-1937

ALLSTATE INSURANCE
COMPANY, A FOREIGN CORP.,

Respondent.

**PETITIONERS, DERRICK A. POWELL AND EUGENIA POWELL'S
JURISDICTIONAL BRIEF**

On Review from the District Court of Appeal, Fifth District
State of Florida

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

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STATEMENT OF THE CASE AND FACTS

This is a proceeding for review of an en banc decision of the Fifth District Court of Appeal in which Petitioners' request for a new trial or jury interview was denied. The en banc decision included four dissenting judges.

Petitioners are Black and are of Jamaican descent. 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 insurance protection. Petitioners proceeded to trial seeking money damages for personal injuries. Petitioners sought \$235,000.00 in damages. The net recovery from the verdict equated to \$10,524.00.

On the day following the verdict, Petitioners' counsel was contacted by Juror Karen Dowding. A juror interview of only Karen Dowding occurred on June 12, 1992 in the presence of counsel for Petitioners and counsel for Respondent as well as the trial judge, the Honorable Edward M. Jackson. 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. Ms. 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. (App. 7-9).

Upon learning of this incredible testimony, Petitioners filed a motion for a new trial and, in the alternative, sought to interview the entire jury panel. The trial judge denied these motions and a timely appeal to the Fifth District Court of Appeal was filed.

On November 12, 1993, the Fifth District Court of Appeal filed an opinion reversing the trial judge and granting Petitioners' motion to conduct individual juror interviews. (App. 18-24). Based primarily on the authority of Sanchez v. International Park Condominium Association, Inc., 563 So.2d 197 (Fla. 3rd DCA 1990), the Court remanded to the trial judge for the purpose of conducting individual juror interviews of all 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. 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 to deny Petitioners' motion for a new trial and Petitioners' motion to conduct jury interview. (App. 1-6). Four judges dissented with three offering written dissenting opinions. (App. 7-17).

Petitioners timely filed their Notice to Invoke Discretionary
Jurisdiction of this Court on April 27, 1994.

SUMMARY OF ARGUMENT

In this case, the Fifth District Court of Appeal has denied Petitioners' request for a jury interview finding it is improper and against public policy to permit jurors to testify as to their motives and influences by which their deliberations were governed. However, the Fifth District specifically admits in its en banc decision that, "We acknowledge conflict with Sanchez v. International Park Condominium Association, Inc., 563 So.2d 197 (Fla. 3rd DCA 1990)." (App. 5).

The decision of the Fifth District cannot be reconciled with the Sanchez opinion from the Third District Court of Appeal. Therefore, the instant decision expressly and directly conflicts with the decision of another District Court of Appeal on the same question of law.

Additionally, as Judge Diamantis adds in his dissenting opinion, "Once the jurors were selected and sworn, those jurors became judges of the facts and any discrimination or bias on their part constituted state action directed to the appellants." (App. 15). Judge Diamantis added that the Fourteenth Amendment mandates that race discrimination be eliminated from all official acts and proceedings of the State. (App. 15). Therefore, this Court's discretionary jurisdiction should also be exercised because the instant decision expressly construes a provision of the State or Federal Constitution.

ARGUMENT I

THE DECISION OF THE FIFTH DISTRICT COURT OF
APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY
CONFLICTS WITH Sanchez v. International Park
Condominium Association, Inc., 563 So.2d 197
(Fla. 3rd DCA 1990).

In this case, the Fifth District Court of Appeal reviewed the remarks made by multiple jurors both before and during deliberations. The offending juror remarks which impressed the Fifth District included the following: (1) derogatory statements about "niggers" ("There's a saying in North Carolina, hit a nigger and get ten points, hit him when he's moving, get fifteen."); (2) comparisons between Blacks and chimpanzees; (3) alleged studies indicating that White people work better than Black people; and (4) assumptions by jurors that Petitioners must be related to drug dealers as a result of their Jamaican ancestry. (App. 7-9). Initially, the Fifth District believed these remarks to be more offensive and more egregious than those comments established in Sanchez v. International Park Condominium Association, Inc., 563 So.2d 197 (Fla. 3rd DCA 1990). As a result, the Court initially granted Petitioners' request for a juror interview of all jurors. (App. 18-24).

However, following an en banc review, the Fifth District reversed itself and expressly acknowledged that its opinion directly conflicts with the case of Sanchez v. International Park Condominium Association, Inc., 563 So.2d 197 (Fla. 3rd DCA 1990). (App. 1-6). In doing so, the Fifth District struggled with

multiple so-called "troubling questions" which it suggested the Florida Supreme Court should address if review is granted. (App. 5).

In Sanchez, a slip and fall personal injury case involving a Cuban plaintiff, two derogatory comments were made by a single juror in the jury room. It was established that the single juror stated, "Cubans as a whole, whenever anything like this happens, they yell sue, sue, sue or want to sue at a drop of a hat, something like that." Sanchez, 563 So.2d at 198. This juror, later, added that Cubans were all "ambulance chasers." Id. In Sanchez, the trial judge allowed a jury interview of all jurors which established that the derogatory remarks had been made but that the remarks had not in any way influenced the jurors. In Sanchez, the Third District Court of Appeal found the racial remarks and slurs to be sufficient enough to merit a new trial even though the other participants were not influenced. The Third District concluded that because the offending juror in Sanchez was an "active participant in the deliberative process," the plaintiff was entitled to have her case heard by a different impartial jury and a new trial was granted. Id. at 199. In Sanchez, the plaintiffs, at a minimum, were afforded the opportunity to have a juror interview to determine the truth and accuracy of those statements made by the one juror who came forward.

In the case at bar, the Fifth District initially ruled correctly that, "If Dowding's testimony is accepted as true, the

jurors in this case engaged in making racial jokes, slurs, and stereotyping comments in a case involving Black plaintiffs and Black witnesses and the jury's damage and fault determinations could well have been influenced by racial prejudice." (App. 21). Originally, the Fifth District ruled that the trial judge committed error in his order denying the new trial when he stated that, even assuming the testimony of the other jurors supported her version of what had transpired, Dowding's testimony afforded no basis upon which to award a new trial. (App. 20). Originally, the Fifth District disagreed with the trial court's determination. Unfortunately, now the Court has reversed itself en banc.

The basic facts and circumstances existing in both the case at bar and Sanchez are indistinguishable. There is unquestionably a clear and express conflict between the Fifth District and the Third District as expressly mentioned by the Fifth District Court of Appeal in the case at bar. The Fifth District even admitted that it was unable to reconcile the two cases. Accordingly, this Court has jurisdiction of this cause pursuant to Fla.R.App.P 9.030(a)(2)(A)(IV). This Court should accept discretionary jurisdiction, reaffirm the original decision of the Fifth District Court of Appeal, and reverse the more recent en banc decision of March 31, 1994.

ARGUMENT II

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY CONSTRUES A PROVISION OF THE STATE OR FEDERAL CONSTITUTION.

The decision of the Fifth District Court of Appeal in this case expressly construes a provision of the State or Federal Constitution, thereby triggering this Court's discretionary review. The jurors' conduct in making ethnic jokes and racial slurs during the trial process 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. (App. 15).

Once the jurors were selected and sworn, they became "agents of the State" and the Fourteenth Amendment of the United States Constitution mandates that race discrimination be eliminated from all official acts and proceedings of the State. The applicable standard of review is one of "strict scrutiny." (App. 15-16).

Accordingly, this Court has jurisdiction of this cause pursuant to Fla.R.App.P 9.030(a)(2)(A)(II). This Court should now accept discretionary review, reverse the Fifth District's most recent opinion, and overrule any contrary decisions of other Districts below.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, because it expressly and directly conflicts with a decision of another District Court of Appeal and/or because the case construes a provision of the State or Federal Constitution. This Court should exercise that jurisdiction to consider the merits of Petitioners' argument and to address and clarify the law pertaining to the fundamental right to a new trial and/or a jury interview when racial remarks and slurs have "infected" and "influenced" the most sacred and fundamental aspect of our legal system, the jury deliberation process.

Respectfully submitted,

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

Attorney for Petitioner

By: 

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 Donna C. Wyatt, Esquire, P. O. Box 948600, Maitland, Florida 32794-8600, on this, the 5th day of May, 1994.

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

Attorney for Petitioner

By: 

ROBERT C. GRAY