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IN THE SUPREME COURT OF FLORIDA

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

DERRICK A. POWELL and
EUGENIA POWELL,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY,
A FOREIGN CORPORATION,

Respondent.
_____/

RESPONDENT, ALLSTATE INSURANCE COMPANY'S JURISDICTIONAL REPLY BRIEF

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

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STATEMENT OF THE CASE AND FACTS

Respondent respectfully submits that the ***en banc*** decision of the Fifth District Court of Appeal in its favor in the matter of ***Powell v. Allstate*** does not expressly and directly conflict with the decision of the Third District Court of Appeal's opinion of ***Sanchez v. International Park Condominium Association, Inc.***, 563 So. 2d 197 (Fla. 3rd DCA 1990). The Respondent's disagreement with certain aspects of the Petitioners' Statement of the Case and Facts is irrelevant and, for the purpose of the jurisdictional argument, inconsequential.

However, the Respondent would respectfully submit to this Court that the issue of liability and damages was highly contested in the Circuit Court trial of this matter. After eight hours of deliberation, the jury returned a total verdict in favor of Petitioners in the amount of Twenty-Nine Thousand Three Hundred Twenty and 00/100 Dollars ($29,329.00). Inclusive in the verdict, was an award for past medical and wage loss, as well as, future medical and wage loss, despite the jury's finding of no permanent injury. The verdict was then reduced by the amount of the tort-feasor's policy limits previously tendered in the amount of Ten Thousand and 00/100 Dollars ($10,000.00), and further reduced by the thirty percent (30%) comparative negligence assigned by the jury against the Petitioners. Petitioners' net recovery was Ten

Thousand Five Hundred Twenty-Four and 00/100 Dollars ($10,524.00).

Thereafter, Petitioners' counsel was contacted by a juror. Petitioners' motion to interview this juror was granted. The interview was held with counsel for the parties and the trial judge present. Thereafter, the Petitioners moved for an interview of the entire jury panel and/or, in the alternative, a new trial. The trial judge denied Petitioners' Motions.

On appeal, the Fifth District Court of Appeal in its first opinion dated November 12, 1993, found the lower court to be in error and reversed and remanded. The Respondent timely filed a Motion For Rehearing *En Banc*, or in the alternative, a Motion for Rehearing on November 29, 1993. Upon Rehearing ***En Banc***, the Fifth District Court withdrew its previous opinion of November 12, 1993 and substituted a second opinion, dated March 31, 1994. In withdrawing from its previous opinion, the Fifth District Court of Appeal upheld the lower court's denial of Petitioners' motions relying upon the Supreme Court's decision of ***Baptist Hospital of Miami, Inc. v. Maler,*** 579 So. 2d 97 (Fla. 1991) and its own previous decision of ***Rabun and Partners, Inc. v. Ashoks Enterprises, Inc.,*** 604 So. 2d 1284 (Fla. 5th DCA 1992).

SUMMARY OF ARGUMENT

The Petitioners herein seek review of the most recent Fifth District Court of Appeal's opinion *en banc* based upon a conflict with the Third District Court of Appeal's opinion of ***Sanchez v. International Park Condominium Association, Inc.,*** 563 So. 2d 197 (Fla. 3rd DCA 1990). The Respondent would respectfully submit to this Court that the ***Powell en banc*** opinion does not expressly and directly conflict with the Third District Court of Appeal's ***Sanchez*** opinion thereby invoking the jurisdiction of this Court.

Petitioners fail to address this Court's opinion of ***Baptist Hospital of Miami, Inc. v. Maler,*** 579 So. 2d 97 (Fla. 1991), decided after the ***Sanchez*** opinion, which sets forth the standard by which juror interviews should be conducted. Moreover, Petitioners, also fail to address the Fifth District Court of Appeal's opinion of ***Rabun and Partners, Inc. v. Ashoka Enterprises, Inc.,*** 604 So. 2d 1284 (Fla. DCA 5th 1992) which is directly in line with the ***Baptist*** decision and the ***Powell en banc*** decision.

Finally, Petitioners seek to invoke the jurisdiction of this Court by contending that the ***Powell en banc*** opinion expressly construes a provision of the State or Federal Constitution. A reading of the ***Powell en banc*** decision clearly reveals that such a contention has no basis, in fact, and relies upon a dissenting opinion of the first appellate ***Powell*** decision. This dissent was expressly renounced in the second ***en banc*** decision of March 31, 1994.

ARGUMENT

I. PETITIONERS' RELIANCE UPON A CONFLICT WITH THE THIRD DISTRICT COURT OF APPEAL'S OPINION OF *SANCHEZ v. INTERNATIONAL PARK CONDOMINIUM ASSOCIATION, INC.*, 563 SO. 2D 197 (FLA. 3RD DCA 1990) IS MISPLACED AND FAILS TO ACKNOWLEDGE THE PREVIOUS PRECEDENT SET FORTH IN *BAPTIST HOSPITAL OF MIAMI, INC. v. MALER*, 579 SO. 2D 97 (FLA. 1991)

Petitioners seek review of the most recent Fifth District Court of Appeal opinion *en banc* based upon an alleged conflict with the Third District Court of Appeal's opinion of *Sanchez, supra*. The Respondent is cognizant of the fact that the Fifth District Court of Appeal stated in its *en banc* opinion that it acknowledges a conflict with *Sanchez*. However, Petitioners fail to point out to this Court that the Fifth District went on to state that the Third District, in rendering the *Sanchez* opinion, ignored this Court's decision of *Baptist Hospital of Miami Inc., supra*.

The Supreme Court in the *Baptist* opinion, decided after the Third District Court of Appeal *Sanchez* opinion, acknowledged the existence of a strong public policy against allowing litigants either to harass jurors or upset a verdict by attempting to ascertain some improper motive underlying it, unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial. *Baptist*, 599 So. 2d at 100. Under this standard, the moving parties first must establish

actual juror misconduct in the juror's interview and once that is done, the party making the motion is entitled to a new trial, unless the opposing party can demonstrate that there is no reasonable possibility that the juror's misconduct affected the verdict. *Id.* at 100.

In ***Baptist***, two jurors indicated to the Petitioner Hospital's lawyers, that, although the Petitioner's hospital should have won, a verdict was rendered against it as a result of sympathy for the child Plaintiff in the medical malpractice action and an assumption that the child was injured. The Supreme Court affirmed the district court's quashing of the trial court's allowance of the jurors' interviews. In so doing, the Supreme Court held:

> "[T]o the extent an inquiry will illicit information about overt prejudicial acts, it is permissible; to the extent an inquiry will illicit information about subjective impressions of jurors, it may not be allowed."

Id. at 99.

The Court went on to clarify "overt prejudicial acts" as any actual, express agreement between two or more jurors to disregard their oath and instruction.

The distinction, as pointed out by this Court, is between overt prejudicial acts and subjective impressions or opinions of jurors about a reason the verdict was reached. The ***Baptist*** opinion found that the allegations of juror misconduct, consisting of an

agreement by jurors to return a verdict out of sympathy for a brain damaged child no matter what the evidence showed, was nothing more than 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 the jurors reached a particular verdict clearly are subjective impressions or opinions that are not subject to juridical inquiry."

Id. at 100.

Secondly, the Petitioners fail to address the Fifth District Court of Appeal's opinion in ***Rabun v. Partners, Inc. v. Ashoka Enterprises, Inc.,*** 604 So. 2d 1284 (Fla. 5th DCA 1992). ***Rabun*** considered a circuit court's order granting the Defendant/Appellee Ashoka's Motion to Interview a juror following the trial on the architectural firm's action for collection fees. Ashoka alleged that the jury decided to rule against the corporation because its president was, "a rich doctor who didn't need the money." The trial court granted the motion with the ***proviso*** that an evidentiary hearing would be scheduled and that either party could ***subpoena*** the jurors. Petition for ***certiorari*** review and quashing of the order was sought by the Plaintiff/Appellant. The Fifth District Court of Appeal granted Appellant's petition and quashed the order, citing ***Baptist, supra.***

Based upon the ***Baptist*** decision, the ***Rabun*** court found that Ashoka's allegations of juror bias against it, due to its president's economic status, fit within the category of prohibited inquiry into the emotions and mental processes of the jurors. Matters which, according to this Court, essentially inhere within the verdict. ***Rabun,*** at 1286.

The ***Rabun*** court, in denying the appellant's motion for post trial jury interview, found that Ashoka's affidavit alleging juror bias was insufficient because it failed to allege that the jury expressly agreed to ignore the evidence in the case and refused to look at documentary evidence. As a result, the court found the allegations of bias to be inconsistent with the jury's actions during deliberations and their ultimate verdict.

In line with the above cases, the ***Powell en banc*** decision in the present action clarifies its previous opinion and states the following:

> "We find that the trial court's refusal to grant additional juror interviews does not indicate that it condones racial insensitivity, but rather reflects its commitment to follow the law announced, both by our Supreme Court and this court. We wish to make it clear, that we, just as much as the dissent, deplore the crass and intolerant comments attributed to some members of the jury, but our inquiry is not (and should not be) whether some insensitive clods were permitted to serve on the jury by trial counsel, but rather whether some jurors or the jury committed some objective act which compromised the integrity of the fact finding process . . . ." (App. 2).

Petitioners' reliance upon an express and direct conflict with the Third District Court of Appeal's opinion of ***Sanchez, supra,*** to confer the jurisdiction of this Court, is misplaced. Petitioners improperly rely upon ***Sanchez*** to the exclusion of the Supréme Court's decision previously discussed herein of ***Baptist*** and the Fifth District's own opinion of ***Rabun.***

II. PETITIONERS' CONTENTION THAT THE *POWELL EN BANC* DECISION, CONSTRUES A PROVISION OF THE STATE OR FEDERAL CONSTITUTION HAS NO BASIS, IN FACT OR CASE LAW.

Petitioners' contention that the ***Powell en banc*** decision, construes a provision of the State or Federal Constitution, is not supported by fact or case law. Instead, Petitioners' rely upon a dissenting opinion in the first ***Powell*** decision of November 12, 1993.

There is no basis for contending that jurors once sworn become agents of the State. The Fifth District Court of Appeal, in fact, rejects its fellow member's dissenting opinion, in its ***en banc*** decision, stating:

> "[T]hat this concept is contrary to the time honored practice of having jurors of our peers-not state agents." (App. 6).

CONCLUSION

This Court does not have discretionary jurisdiction pursuant to ***Fla. R. App. P.*** 9.030(2)(a)(IV), in that the Fifth District Court's ***en banc*** decision of ***Powell v. Allstate Insurance Co.*** dated March 31, 1994 does not expressly and directly conflict with a decision of another District Court of Appeal or the Supreme Court on the same question of law, specifically, as cited by Petitioners, ***Sanchez v. International Park Condominium Association, Inc., supra.*** The present ***en banc*** decision is directly in line and follows the previous precedent as stated by this Court in its decision of ***Baptist*** and the Fifth District Court of Appeal's own opinion of ***Rabun.***

Further, Petitioners have presented no factual or legal basis for asserting that the ***Powell en banc*** decision expressly construes a provision of the State or Federal Constitution to invoke the jurisdiction of this Court pursuant to ***Fla. R. App. P.*** 9.030(2)(a)(ii).

Respectfully submitted,

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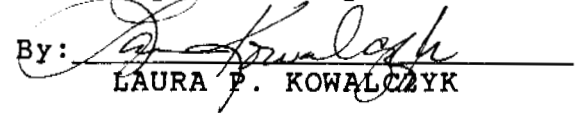
By: 
LAURA P. KOWALCZYK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondent, Allstate Insurance Company's Jurisdictional Reply Brief has been served by U.S. Mail upon ROBERT C. GRAY, ESQUIRE, P.O. Box 1528 Palm Bay Road, N.E., Palm Bay, Florida 32905, this 24th day of May, 1994.

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APPENDIX TO
RESPONDENT, ALLSTATE INSURANCE COMPANY'S
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1994

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

DERRICK A. POWELL and
EUGENA POWELL,

Appellant,

v.

CASE NO. 92-1937

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Appellee.

Opinion filed March 31, 1994

Appeal from the Circuit Court
for Brevard County,
Edward M. Jackson, Judge.

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Palm Bay, for Appellants.

Donna C. Wyatt and Laura P. Kowalczyk, of
Beers, Jack, Tudhope & Wyatt, P.A.,
Maitland, for Appellee.

ON MOTION FOR REHEARING EN BANC

PER CURIAM

We grant appellee's motion to rehear the cause *en banc*, withdraw our previous opinion and substitute this opinion.

Sometime after a verdict was rendered in favor of Derrick A. Powell and Eugena Powell (who are black) a juror came forward to complain that one of the other jurors (all of the jurors were white) had told a racial joke and yet another juror had made a racial statement. The trial judge, along with

counsel for the plaintiff and the defense, interviewed that juror to see if it would be appropriate to interview the remaining jurors. After this initial interview, the trial court refused to permit further juror interviews because it found that the applicable law prohibits post-trial inquiry into the juror's motives and influences. The Powells appeal. We affirm.

We find that the trial court's refusal to grant additional juror interviews does not indicate that it condoned racial insensitivity, but rather reflects its commitment to follow the law announced both by our supreme court and this court. We wish to make it clear that we, just as much as the dissent, deplore the crass and intolerant comments attributed to some members of the jury, but our inquiry is not (and 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 as where:

> [1] a juror was approached by a party, his agent or attorney; [2] that witnesses or others conversed as to the facts and merits of the cause out of court and in the presence of jurors; [3] that the verdict was determined by aggregation and average or by lot, game or chance or other artifice or improper manner.[1]

Historically and traditionally it has 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 the juror is likely to harbor any prejudice, bias or sympathy that might adversely affect the client's interest. This, indeed, is where (and when) such inquiries should be made: "Do you tell or have you told racial or ethnic jokes?" If the juror answers "yes," then

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[1] *Maler v. Baptist Hosp. of Miami, Inc.*, 559 So. 2d 1157 (Fla. 3d DCA 1989), *approved*, 579 So. 2d 97 (Fla. 1991).

the lawyer must decide whether to excuse him or her because of a fear of prejudice or, because of other considerations such as memberships in favorable organizations or contributions to favorable causes, to believe that, on balance, the juror would be beneficial to the client's cause. If the juror answers "no," and lies, then a new trial would be justified because of the juror's perjury. There is no indication in this record that such inquiry ever took place. Racial, gender, ethnic, or religious insensitive statements are less likely to be made if the jury is itself composed of both genders and is multi-racial, multi-ethnic and multi-religious. Cases such as *State v. Nail*, 457 So. 2d 481 (Fla. 1984), and *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d DCA), *cause dismissed*, 469 So. 2d 748 (Fla. 1985), give trial lawyers additional tools to select a fair and impartial jury.

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 which included sums for medical and wage loss as well as future medical and wage loss. But for the rearing of the ugly spectre of racial intolerance, probably no one on this court would suggest that 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 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?

While the complaining juror opines that the verdict would have been different had the plaintiff been white, her own actions and testimony place

her conclusion in doubt. In explaining why she did not earlier report her concern to the court (while the trial judge could still take appropriate action), she testified:

> Well, number one, some people will participate in jokes of that nature, just to kind of be a part of the gang, whatever. That one person will say something, and somebody will kind of laugh and that's it. Kind of an, I don't know, just trying to kind of get along or whatever. That maybe they are not that truly, really racially biased.
>
> But it -- you know, they're just trying to kind of polite laughter or whatever. Not to cause the problem.
>
> And when I -- the only way that I could see, I mean, I thought I was going to have better instructions before any of this went on, I couldn't talk to the Bailiff.
>
> And for me to stand there in court and say, I think these people are bigots, kind of a big accusation to make without really knowing if that is the case or if it was just -- I mean, there was a comment made about the jokes, and well, if you can't laugh or something, you know, it's boring and we're sitting here listening to a lot of information. If we can't come in here and relax a little bit, you know, what's the problem. Or what's the point or something, you know, its no big deal.
>
> And I wasn't sure if it really was, if it was really racially biased or if it was just somebody, you know, like some people will say racial or Pollock [sic] jokes or whatever and people laugh at it. And they really don't mean anything by it.

Even after full deliberation and the rendition of a verdict had occurred, the complaining juror could not say that the verdict resulted from prejudice. Clearly, the complaining juror, along with all of the other jurors, voted for the verdict at issue in this appeal and, upon being polled, reaffirmed in public their approval of the verdict. There is no charge that <u>any</u> of the jurors were threatened or in any way unduly influenced to vote for this verdict. There is no indication that any vote was the result of racial

prejudice -- regardless of evidence of racial 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.

We acknowledge conflict with *Sanchez v. State*, 563 So. 2d 197 (Fla. 3d DCA 1990). We think *Sanchez* ignored the supreme court's opinion in *Maler*. Perhaps if our supreme court grants review of this matter, it will address the following troubling questions. Is it worse to rule against someone because of prejudice or to rule in favor of someone because of prejudice? For example, in *Maler*, the supreme court held that prejudice (sympathy) for the child inhered in the jury verdict. If a W. C. Fields-type juror[2] had been seated, would the prejudice <u>against</u> the child also inhere in the verdict? This court held in *Rabun and Partners, Inc. v. Ashoka Enterprises, Inc.*, 604 So. 2d 1284, 1286 (Fla. 5th DCA 1992), that prejudice against Patel, a rich doctor [because he did not need the money] "clearly fits within the category of prohibited inquiry into the emotions and mental processes of the jurors, matters which essentially inhere within the jury verdict."[3] If the jury had ruled against Patel because he was Indian, would their verdict have been, from the standpoint of a fair and impartial trial, more repugnant?

If we are 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

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[2] Anyone who hates children and dogs can't be all bad. Leo C. Rosten, (1908-) in tribute to Fields at a banquet (1939).

[3] For some reason counsel for neither party brought this case to our attention.

other classification or consideration that might influence a result not based solely on the facts and law of any given case?

We reject Judge Diamantis's position that prejudice based on racial consideration must be treated differently because the jurors are, in effect, agents of the state requiring a "strict scrutiny" standard. This concept is contrary to the time honored practice of having jurors of our peers -- not state agents.

The current law of Florida seems to be the following:[4]

> It is improper and against public policy to permit jurors to testify to motives and influences by which their deliberations were governed. [citation omitted]. To allow such an inquiry concerning the motive and influence of jurors would extend litigation to attempt to determine the imponderable issue of what, in fact, motivated and influenced each juror in arriving at his own independent judgment in reaching a verdict.

If this policy is to change, it should be changed by the supreme court.

AFFIRMED.

HARRIS, C. J., COBB, PETERSON, GRIFFIN, and THOMPSON, JJ., concur.
SHARP, W., J., dissents, with opinion.
GOSHORN, J., dissents, with opinion.
DIAMANTIS, J., dissents, with opinion in which DAUKSCH, J., concurs.

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[4] *Maler v. Baptist Hosp. of Miami, Inc.*, 559 So. 2d 1157, 1160 (Fla. 3d DCA 1989).

SHARP, W., J., dissenting.

I respectfully dissent. Based on *Singletary v. Lewis,* 584 So. 2d 634 (Fla. 1st DCA 1991), *International Union of Operating Engineers, Local 675 v. Kinder,* 573 So. 2d 385 (Fla. 4th DCA 1991), *appeal dismissed,* 598 So. 2d 76 (Fla. 1992); *Sanchez v. International Park Condominium Ass'n., Inc.,* 563 So. 2d 197 (Fla. 3d DCA 1990), and *Snook v. Firestone Tire & Robber Co.,* 485 So. 2d 496 (Fla. 5th DCA 1986), I agree with appellants that the trial judge should have granted their motion to conduct individual juror interviews to determine whether the juror misconduct as described by juror Dowding actually occurred in this case. If it did, the trial judge should have granted a new trial. *See United States v. Heller,* 785 F.2d 1524 (11th Cir. 1986).

The record establishes that following the completion of a personal injury suit brought by Derrick Powell and his wife in which he received a modest monetary recovery,[1] a juror (Dowding) contacted Powell's attorney and the trial judge concerning racial jokes and statements made by the jurors in the jury room or on breaks while the trial was in progress. Powell and his wife (who sued for loss of consortium) and Powell's primary witnesses, Leonard Johnson and his wife (who both were passengers in Powell's car at the time he was struck by another car) are all blacks, of Jamaican descent. The defendant's insured (the driver of the other car involved in the accident) and the jurors are white.

The trial judge held an in-court interview of Dowding, attended by attorneys for both parties. It was transcribed and is part of the record on

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[1] $10,560.00

appeal. Dowding testified that various jurors had made a number of racial jokes and statements to each other during the trial. They laughed and participated in the jokes, although when challenged by her in the jury room, they denied they meant anything by their "jokes", or that they were, in fact, prejudiced against Powell because of his race.

For example, Dowding testified that the juror, who was later elected to be foreman of the jury, told an old "saw" of a joke: "There's a saying in North Carolina, hit a nigger and get ten points, hit him when he's moving, get fifteen." The alternate female juror supposed that because the Powells had their grandchildren living with them, their children were "probably drug dealers. And, everybody was like, yeah, yeah. And they were laughing."

Two men on the jury laughed about Johnson's testimony at the trial. They pointed to the book Dowding was carrying (*Through a Window* by Jane Goodall) which had a picture of chimpanzees on the cover, and made some sort of reference to Johnson. One said: "[a]nd Mr. Johnson got out of the car and laid down on the pavement." They went into hysterics.

Another juror, who had worked for IBM, told the others that the turnover rate for black employees with the company was twenty-five percent but only two percent for whites. He concluded blacks "didn't work for us as well." Powell's loss of wages and earning power were issues in this case. Another concluded Powell "just wants to retire."

The trial judge denied the appellants' motion to interview the rest of the jurors in this case. He stated his reasons on the record: The jurors' motives and opinions why they reached their verdict cannot be the subject of inquiry; and, there was no showing the jurors considered evidence outside the record, or agreed to violate their oaths in some way. He concluded that

Dowding's testimony afforded no basis upon which to award a new trial, even assuming the testimony of the other jurors supported her version of what had transpired. I disagree.

In *Baptist Hospital of Miami, Inc. v. Maler,* 579 So. 2d 97 (Fla. 1991), the Florida Supreme Court said no jury interview procedure should be undertaken unless the sworn factual allegations urged as a basis, if found to be true, would require a trial court to order a new trial, using the standard pronounced in *State v. Hamilton,* 574 So. 2d 124 (Fla. 1991). In the *Baptist Hospital* case, the inquiry revealed only that some of the jurors were influenced by their sympathy for the brain-damaged child in the case, and their assumption that the hospital (defendant in the medical malpractice case) had insurance. Mere juror opinion as to why they reached the verdict rendered in a case is not a permissible field of inquiry. As the court explained, such subjective matters "inhere" in the joint decision-making process engaged in by a jury, and there is a strong public policy against allowing litigants to discover and use such matters to overturn a verdict.

But, the rule is otherwise for objective acts committed by or in the presence of the jury. In *Hamilton,* defense counsel argued two car magazines were present in the jury room while the jury was there, and because one or more advertisements depicted a beautiful blond model, the jury may have been "distracted." The court said this was insufficient to have merited juror interviews, not because such matters were subjective or inhered in the verdict, but because the magazines in the jury room were irrelevant to the legal and fact issues in the case, and would have had slight, if any, potential to prejudice the outcome of the case. However, the court said overt acts, extrinsic and objective matters, which potentially might prejudice the

jury, can be inquired into, and proof of whether or not the jurors actually were influenced by these happenings is not relevant.

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 apportionment of fault determinations could well have been influenced by racial prejudice. In *Singletary v. Lewis,* the jury returned a defense verdict for a white doctor in a medical malpractice case where the plaintiffs were black. The appellate court ruled that the trial court erred in not ordering juror interviews when a showing was made by juror Lumpkin that the jurors made racial comments and slurs in the jury room.

In *Singletary,* one juror allegedly said: "They ought to sewed her up. She was a fool for having so many babies." Another asked: "Who talked her (the plaintiff) into suing a doctor?" Some of the jurors supposedly said they preferred that the plaintiff get help from welfare rather than recover damages from the doctor. The court held that if such juror misconduct in the jury room was proven, a new trial would be apropriate.

Similarly, in *Sanchez,* two derogatory comments made by one juror in the jury room about Cubans in a slip and fall case involving a Cuban plaintiff was held to be sufficient misconduct to require a new trial. There, the trial judge conducted juror interviews but failed to order a new trial. It was established that one juror (who was later elected to be the foreman) said to the others: "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." He later said Cubans were "ambulance chasers."

The appellate court in *Sanchez* explained that the trial court mistakenly relied on the juror's representations to the court that although the derogatory remarks had been made, they had not been influenced by them. Whether or not jurors were, in fact, prejudiced or influenced "inheres" in the verdict and is not a proper area of inquiry. The objective fact that such remarks and slurs were made by one juror was sufficient to merit a new trial in *Sanchez*. The court said:

> Jury service is a collegial process. It may be that the other jurors were not affected by the remark, made by juror six. Juror six was, however, an active participant in the deliberative process, and the verdict included his input. The jury's verdict included not only a determination of liability, but also the amount of damages and percentages of comparative fault. The plaintiff was entitled to have her case heard by an impartial jury. We therefore reverse the final judgment and remand for a new trial.

Sanchez at 199.

Both *Sanchez* and *Singletary* adopted for their districts the rationale set out in *Heller*. In that case, a Jewish defendant was convicted of tax evasion by a jury that engaged in anti-Semitic jokes and slurs. One juror told another person he was on a jury which was trying a Jewish defendant, and he said: "Let's hang him." Another commented on the number of the defendant's witnesses who had Jewish surnames, and the jurors broke into "gales of laughter." Another laughed that a Rabbi witness had come to "bless" the defendant. Others evidenced prejudice by enjoying the defendant's discomfort in the courtroom during presentation of the prosecutor's case.

The trial judge in *Heller* conducted juror interviews but concluded, as did the trial court in *Sanchez*, that the jurors could disregard the jokes and comments and reach a fair and impartial verdict. Not so, said the Eleventh

Circuit, speaking through Judge Tuttle: "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." 785 F.2d at 1527. "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." The Eleventh Circuit concluded: "The people cannot be expected to respect their judicial system if its judges do not, first, do so." 785 F.2d at 1529.

The court in *Heller* held that the juror's conduct in making ethnic jokes and slurs during the trial process deprived the defendant of an impartial, fair trial.[2] Once this course of conduct was shown to have occurred, actual prejudice to the individual jurors was not relevant. It reversed and ordered a new trial.

The jurors' racial jokes and comments testified to by Juror Dowding in this case are far more egregious than those established in *Singletary*, *Sanchez* and *Heller*. The participants in the racist comments were apparently multiple, not just one or two. Further, it is clear, if Dowding's account is accurate [which the court below should determine *via* juror interviews], that the racial slurs and comments were directed at these plaintiffs and their witnesses. *Compare U.S. v. Caporale*, 806 F.2d 1487 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987). In my view, Dowding's testimony merited a full judicial interview of the other jurors to determine

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[2] Amend. 7, U.S. Const, Art. I, § 22, Fla. Const.

what actually happened in this case.[3] Accordingly, we should remand this case to conduct such interviews.[4] 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. It does not "inhere" in the verdict. The fact that it happened deprived the litigants of a fair trial. *Singletary; Sanchez; Heller.* Amend. 7, U.S. Const; Art. I, § 22, Fla. Const.

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[3] *See International Union of Operating Engineers Local 675 v. Kinder,* 573 So. 2d 385 (Fla. 4th DCA 1991), *appeal dismissed,* 598 So. 2d 76 (Fla. 1992).

[4] *See Snook v. Firestone Tire & Rubber Co.,* 485 So. 2d 496 (Fla. 5th DCA 1986).

GOSHORN, J., dissenting. 92-1937

I concur with the procedure and result outlined in Judge Diamantis's dissenting opinion. I write, however to express my disagreement with his statement that "[o]nce the jurors were selected and sworn . . . any discrimination or bias on their part constituted state action directed to the appellants." (Emphasis added). That assertion seeks to extend Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) beyond the boundaries of its holding. Edmonson does, however hold:

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

111 S. Ct. at 2087 (citations omitted). Therefore, I agree that we should reverse and remand with direction to the trial court to determine if racial bias or prejudice infected the jury verdict.

DIAMANTIS, J., dissenting.

I respectfully dissent.

I agree with the majority opinion's forceful statement that every member of this court (and, I would add, the trial judge) "deplore[s] the crass and intolerant comments attributed to some members of the jury" and that the people who made these comments were "insensitive clods". However, I would reverse and remand the present case to the trial court to hold a hearing to determine whether the jury verdict was based on racial bias or prejudice which manifested itself after the jury was selected and sworn.[1]

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. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, ____, 111 S. Ct. 2077, 2082-87, 114 L. Ed. 2d 660, 673-79 (1991). In Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the court made the following comments regarding racial discrimination in our judicial system:

> 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. *Rose v. Mitchell, supra*, 443 U.S., at 555, 99 S.Ct., at 2999-3000. We have held, for example, that prosecutorial discretion cannot be exercised on the basis of race, *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985), and that, where racial bias is likely to influence a jury, an inquiry must be made into such bias. *Ristaino v. Ross*, 424 U.S. 589, 596, 96 S.Ct. 1017, 1021, 47 L.Ed.2d 258

[1] Any racial bias exhibited or racial statements made by any of the jurors before being selected should be inquired into and discovered during voir dire.

(1976); see also *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986).

Powers, 499 U.S. at 415-16.

Accordingly, I would reverse and remand this case to the trial court for a hearing in which all the jurors are interviewed to determine if the verdict as to liability or damages (or both) was based on racial bias or prejudice, as the trial court did in United States v. Caporale, 806 F.2d 1487, 1504-05 (11th Cir. 1986), cert. denied, 483 U.S. 1021, 107 S. Ct. 3265, 97 L. Ed. 2d 763 (1987).[2] See also United States v. Heller, 785 F.2d 1524, 1527-28 (11th Cir. 1986). At this hearing the trial court should look at such factors as (1) whether the racial comments were aimed at the appellants or any of the appellants' witnesses; (2) the manner in which these remarks were made; (3) the time and place during the trial that the remarks were made, i.e., were these remarks made during deliberations or during a recess; (4) the context in which these remarks were made; (5) the evidence concerning both liability and damages; and (6) any other factor the trial court determines to be relevant.

The trial court should make findings concerning whether the verdict as to liability or damages was affected by the manifested racial bias or prejudice and should order a new trial on any of those matters if the court, in its discretion, deems necessary. In this regard, I would give the trial court the same discretion which is afforded the trial court in determining whether a peremptory challenge is based on race-neutral reasons. See Files v. State, 613 So. 2d 1301, 1303 (Fla. 1992); Fotopoulos v. State, 608 So. 2d 784,

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[2] I submit that the cases of Baptist Hospital of Miami v. Maler, 579 So. 2d 97 (Fla. 1991), and Rabun & Partners, Inc. v. Ashoka Enterprises, 604 So. 2d 1284 (Fla. 5th DCA 1992), are not persuasive in the juror racial or ethnic bias situation. Because such bias cases involve state action, the applicable standard is one of "strict scrutiny."

788 (Fla. 1992), cert. denied, _____ U.S. _____, 113 S. Ct. 2377, 124 L. Ed. 2d 282 (1993); Mitchell v. State, 622 So. 2d 1156, 1157 (Fla. 5th DCA 1993).

DAUKSCH, J., concurs.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1993

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

DERRICK A. POWELL
and EUGENA POWELL,

Appellants,

v.

CASE NO. 92-1937

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Appellee.

Opinion filed November 12, 1993

Appeal from the Circuit Court
for Brevard County,
Edward M. Jackson, Judge.

Robert C. Gray of Alpizar & Gray, P.A.,
Palm Bay, for Appellants.

Donna C. Wyatt and Laura P. Kowalczyk,
Maitland, for Appellee.

SHARP, W., J.

Based on *Singletary v. Lewis,* 584 So. 2d 634 (Fla. 1st DCA 1991), *International Union of Operating Engineers, Local 675 v. Kinder,* 573 So. 2d 385 (Fla. 4th DCA 1991), *appeal dismissed,* 598 So. 2d 76 (Fla. 1992); *Sanchez v. International Park Condominium Ass'n., Inc.,* 563 So. 2d 197 (Fla. 3d DCA 1990), and *Snook v. Firestone Tire & Robber Co.,* 485 So. 2d 496 (Fla. 5th DCA 1986), we agree with appellants that the trial judge should have granted their motion to conduct individual juror interviews to determine whether juror misconduct in this case actually occurred. If it did, the trial judge should have

granted a new trial. *See United States v. Heller,* 785 F.2d 1524 (11th Cir. 1986).

The record establishes that following the completion of a personal injury suit brought by Derrick Powell and his wife in which he received a modest monetary recovery,[1] a juror (Dowding) contacted Powell's attorney and the trial judge concerning racial jokes and statements made by the jurors in the jury room or on breaks while the trial was in progress. Powell and his wife (who sued for loss of consortium) and Powell's primary witnesses, Leonard Johnson and his wife (who both were passengers in Powell's car at the time he was struck by another car) are all blacks, of Jamaican descent. The defendant's insured (the driver of the other car involved in the accident) and the jurors are white.

The trial judge held an in-court interview of Dowding, attended by attorneys for both parties. It was transcribed and is part of the record on appeal. Dowding testified that various jurors had made a number of racial jokes and statements to each other during the trial. They laughed and participated in the jokes, although when challenged by her in the jury room, they denied they meant anything by their "jokes", or that they were, in fact, prejudiced against Powell because of his race.

For example, Dowding testified that the juror, who was later elected to be foreman of the jury, told an old "saw" of a joke: "There's a saying in North Carolina, hit a nigger and get ten points, hit him when he's moving, get fifteen." The alternate female juror supposed that because the Powells had

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[1] $10,560.00

their grandchildren living with them, their children were "probably drug dealers. And, everybody was like, yeah, yeah. And they were laughing."

Two men on the jury laughed about Johnson's testimony at the trial. They pointed to the book Dowding was carrying (*Through a Window* by Jane Goodall) which had a picture of chimpanzees on the cover, and made some sort of reference to Johnson. One said: "[a]nd Mr. Johnson got out of the car and laid down on the pavement." They went into hysterics.

Another juror, who had worked for IBM, told the others that the turnover rate for black employees with the company was twenty-five percent but only two percent for whites. He concluded blacks "didn't work for us as well." Powell's loss of wages and earning power were issues in this case. Another concluded Powell "just wants to retire."

The trial judge denied the appellants' motion to interview the rest of the jurors in this case. He stated his reasons on the record: The jurors' motives and opinions why they reached their verdict cannot be the subject of inquiry; and, there was no showing the jurors considered evidence outside the record, or agreed to violate their oaths in some way. He concluded that Dowding's testimony afforded no basis upon which to award a new trial, <u>even assuming the testimony of the other jurors supported her version of what had transpired</u>. We disagree.

In *Baptist Hospital of Miami, Inc. v. Maler,* 579 So. 2d 97 (Fla. 1991), the Florida Supreme Court said no jury interview procedure should be undertaken unless the sworn factual allegations urged as a basis, if found to be true, would require a trial court to order a new trial, using the standard pronounced in *State v. Hamilton,* 574 So. 2d 124 (Fla. 1991). In the *Baptist Hospital* case, the inquiry revealed only that some of the jurors were

influenced by their sympathy for the brain-damaged child in the case, and their assumption that the hospital (defendant in the medical malpractice case) had insurance. Mere juror opinion as to why they reached the verdict rendered in a case is not a permissible field of inquiry. As the court explained, such subjective matters "inhere" in the joint decision-making process engaged in by a jury, and there is a strong public policy against allowing litigants to discover and use such matters to overturn a verdict.

But, the rule is otherwise for objective acts committed by or in the presence of the jury. In *Hamilton*, defense counsel argued two car magazines were present in the jury room while the jury was there, and because one or more advertisements depicted a beautiful blond model, the jury may have been "distracted." The court said this was insufficient to have merited juror interviews not because such matters were subjective or inhered in the verdict, but because the magazines in the jury room were irrelevant to the legal and fact issues in the case, and would have had slight, if any, potential to prejudice the outcome of the case. However, the court said overt acts, extrinsic and objective matters, which potentially might prejudice the jury, can be inquired into, and proof of whether or not the jurors actually were influenced by these happenings is not relevant.

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. In *Singletary v. Lewis*, the closest case in point that we have found, the jury returned a defense verdict for a white doctor in a medical malpractice case where the plaintiffs were black. The appellate court ruled that the trial

court erred in not ordering juror interviews when a showing was made by juror Lumpkin that the jurors made racial comments and slurs in the jury room.

In *Singletary,* one juror allegedly said: "They ought to sewed her up. She was a fool for having so many babies." Another asked: "Who talked her (the plaintiff) into suing a doctor?" Some of the jurors supposedly said they preferred that the plaintiff get help from welfare rather than recover damages from the doctor.

Similarly, in *Sanchez,* derogatory comments made by the jurors in the jury room about Cubans in a slip and fall case involving a Cuban plaintiff were held to be sufficient to require a new trial. There, the trial judge conducted juror interviews but failed to order a new trial. It was established that one juror said to the others: "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." Another said Cubans were "ambulance chasers."

The appellate court in *Sanchez* explained that the trial court mistakenly relied on the juror's representations to the court that although the derogatory remarks had been made, they had not been influenced by them. Whether or not jurors were, in fact, prejudiced or influenced "inheres" in the verdict and is not a proper area of inquiry. But the objective fact that such remarks and slurs were made is sufficient to merit a new trial. Jury service is a collegial process, and persons seeking justice in a court of law, are entitled to a fair trial by an impartial jury.[2] A jury that makes racial jokes and slurs in reference to a party to the litigation is not such a jury.

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[2] Amend. 7, U.S. Const, Art. I, § 22, Fla. Const.

Both *Sanchez* and *Singletary* adopted for their districts the rationale set out in *Heller.* There, a Jewish defendant was convicted of tax evasion by a jury that engaged in anti-Semitic jokes and slurs. One juror told another person he was on a jury which was trying a Jewish defendant, and he said: "Let's hang him." Another commented on the number of the defendant's witnesses who had Jewish surnames, and the jurors broke into "gales of laughter.". Another laughed that a Rabbi witness had come to "bless" the defendant. Others evidenced prejudice by enjoying the defendant's discomfort in the courtroom during presentation of the prosecutor's case.

The trial judge in *Heller* conducted juror interviews but concluded, as did the trial court in *Sanchez,* that the jurors could disregard the jokes and comments and reach a fair and impartial verdict. Not so, said the Eleventh Circuit. "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." 785 F.2d at 1527. 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. The Eleventh Circuit concluded: "The people cannot be expected to respect their judicial system if its judges do not, first, do so." 785 F.2d at 1529.

The court in *Heller* held that the juror's conduct in making ethnic jokes and slurs during the trial process deprived the defendant of an impartial, fair trial. Once this course of conduct was shown to have occurred, actual prejudice to the individual jurors was not relevant. It reversed and ordered a new trial.

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.[3] Accordingly, we remand this case to conduct such interviews.[4] 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.*

REVERSED and REMANDED

DAUKSCH, J., concurs.

BAKER, J. P., Associate Judge, dissents with opinion.

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[3] *See International Union of Operating Engineers Local 675 v. Kinder*, 573 So. 2d 385 (Fla. 4th DCA 1991), *appeal dismissed*, 598 So. 2d 76 (Fla. 1992).

[4] *See Snook v. Firestone Tire & Rubber Co.*, 485 So. 2d 496 (Fla. 5th DCA 1986).

BAKER, J. P., Associate Judge, dissenting.

Preamble on Words and Things

I respectfully dissent. The majority opinion of this court is based on some very simple assumptions about human languages that are very popular, and they are also very false.

One of the things we can say is a universal characteristic of human languages is that they can be used for discourse in the absence of the persons, things, events and places they are referring to. We all routinely converse both orally and in writing about things that are not present.

In courts at all levels our business is handling words, and the closest we usually come to the events that gave rise to lawsuits is testimony about what occurred in the past and about places and things most of which cannot be brought into court. All of us in the legal system find it so convenient to work with writings, we even transform testimony into writing with transcripts. A danger we must continuously guard against is that we become so accustomed to focusing on what is compiled and written in the court record that we may disregard the events and persons they came from or refer to.

This is something we do in all courts, but the tendency to treat our written court records as a substitute for the real parties and witnesses and events is something appellate courts should and usually do concern themselves with. They know only transcripts and other parts of the written record on appeal are available for review. We all know that the situs of judicial decision making cannot be confined to the surface of the page as if we were solving algebra problems.

We must be very careful about our judicial tendency to focus only on the words on the page. One reason for concern is that focussing on our written records can lead us to the false assumption that speaking and writing are completely separable and distinct aspects of human conduct. Before an appellate court, there is nothing else to consider, except these words on the page in the record, some of which were originally spoken but are now transcribed. No one has ever disputed that this record on appeal is an incomplete recreation of what it purports to represent. The real people involved are hollowed out in being transcribed and transformed into words on a page. We all know there is a profound difference between words and things, between written records and real people.

Would anybody claim that all of the faults and virtues of the individuals, their failings and strengths, their habits and other aspects of their behavior, their traits of character and conduct, good and bad, can be captured in print, even if it is their own transcribed words? Note well -- the majority opinion in this case and the line of cases it cites depend on assuming they can answer this last question, "Yes," without qualification.

On "Dirty Words and Politics Incorrectness

It takes only the slightest reflection to recognize there is a big difference between words and things they are used to refer to. Even so, it is very common practice to ignore the difference and sometimes even to deny it, which leads to words being treated the same as whatever they are used to refer to.

The most common example of this confusion of words with things is "dirty" words. As we all know, some animal wastes, body functions, body parts

and sex acts are considered "dirty" because they are unacceptable in social settings by our rules of common decency. There are many four-letter words in common use that refer to these body parts and products and activities. These have come to be called "dirty words" because what they are used to describe or refer to are considered "dirty."

The next best example of confusing words with things is with what has come to be called "politically incorrect" words. Our state and the rest of the nation have become very sensitive to prejudice and discrimination based on race, religion, ethnic origin and gender. Not only have those prejudices become unacceptable in most private and nearly all public settings, but the words with which those prejudices are usually expressed have become taboo. The majority opinion focuses on some of these words from the transcription of what one juror said he remembered that other jurors had said during breaks in the trial. It also gives other examples of politically incorrect taboo words from other cited cases.

Note well -- the majority opinion and cases it cites limit their inquiry into the jurors conduct by completely focussing on words themselves. No consideration whatsoever is permitted in the majority opinion or its cited authorities as to the jurors' integrity, character, or any other aspect of the jurors' conduct except allegedly using these forbidden words. The unmistakable premise of the majority and all of the cases they cite is that if there is evidence of use of taboo words, these words themselves are so politically incorrect, anything other than those words is irrelevant. No inquiry will be permitted as to how responsibly and honorably the jurors conducted themselves in what else they said and did in carrying out their oaths and duties on jury service including jury deliberations.

The Conclusive Presumption of Juror Misconduct In *Sanchez, Singletary* I and II

The trial judge's written opinion that is now on appeal says, in part:

> The Plaintiff's Motion to Interview all of the jurors is not permissible unless the Plaintiffs through the sworn testimony of Juror Dowding, supports factual allegations which, if true, would require this Court to order a new trial. The Court fails to find in Juror Dowding's testimony any agreement by the jurors to breach their oaths as jurors in reaching their verdict in this case or any overt act which prejudicially affected the jurors in reaching their verdict. Juror Dowding testified as to subjective impressions or opinions, though unsavory, which did not rise to the level of any agreement by the jurors to violate their oaths nor any overt prejudicial act.

This quotation suggests that the trial judge was operating on the traditional assumption that jurors acted with integrity under their jurors' oaths as individuals and collectively as a decision-making group. The jury verdict of $29,320 and 30% comparative negligence of the plaintiff did not appear to the trial judge or this court to be inconsistent with the evidence.

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 conclusively presume jurors are guilty of misconduct fatal to their verdicts when one or more has uttered politically incorrect words while on jury duty.

Sanchez v. International park Condominium Assn., 563 So. 2d 197 (Fla. 3d DCA 1990), reversed a jury verdict and judgment and ordered a new trial

because of some derogatory remarks one juror said that another juror had made about Cubans. Plaintiff-appellant Mercedes Sanchez was Cuban. During the post-trial jury interview conducted by the trial court, the juror to whom the alleged comments were attributed denied making them. Some jurors said he did say them, some didn't remember the comments, and all of the jurors independently testified that they were not influenced by any of the objectionable statements, if they were made. The trial judge found the verdict untainted and denied the motion for new trial.

The district court disclaimed making its own finding from the record of what was probably said by a juror during the time he was on jury duty. Instead, it wrote that the parties to the appeal had "proceeded on the assumption that the derogatory remarks were in fact made." The opinion of the district court turned this "assumption" (for the sake of argument) into a "conclusion," though no findings were made by the trial judge.

Based on this "conclusion" (?), the first district court decided that these words, alone, required nullifying the jury verdict and ordered a new trial. If we grant that the statements reiterated in the opinion were made, the district court assumed that any juror who had uttered these words while on jury duty was so flawed by prejudice and bias it permeated any verdict such a juror participated in. The verdict then became so flawed it was invalid, regardless of who the jurors were and regardless what the jurors testified to. I cannot agree with this sad comment on jurors that assumes they cannot rise above their prejudices when called upon to do so for one jury trial, while acting in concert with other citizens who have also solemnly sworn they will do so.

The *Sanchez* decision has four premises. First, it assumes an appellate court can ascertain certain words and phrases that are unmistakable signs of bias and prejudice. Second, it declares that anyone who uses these words is so imbued with unacceptable bias and prejudice it necessarily taints any trial they participated in. Implicit in those two assumptions is a third one that anyone who has spoken these words and phrases has given such signs of bias and prejudice that they cannot be overcome by the juror, even in one single case, when giving an oath to do so. A fourth assumption implicit in the others is that by speaking politically incorrect taboo words, one juror dirties all of the other members of the jury in a way that is conclusively presumed to be collectively insurmountable, regardless of what the jurors say about how their verdict was reached. It should be obvious all four premises are unsound.

The world outside the courthouse is often rude, crude, rough, nasty, insensitive and full of disparities. Ordinary people of all races, religions and origins know that, and it is reflected in ordinary language. I do not agree that we can or should change jurors' ordinary behavior, such as by prohibiting them from using their ordinary language, in order to insulate our courts from the world outside the courthouse. The most that courts can do is minimize, as best they can, the influence of inequities and injustices within our society.

One way to minimize their affect is to recognize prejudices and biases that might arise during the trial of a case through thoroughly examining jurors during *voir dire* about them. Another way is to try and have racial and ethnic diversity on juries, which is a policy being developed and pursued in our courts and elsewhere. However, it is not possible to eliminate prejudice entirely form jury *venires* or from ordinary language that jurors use among

themselves. We should not try to isolate ourselves from the real world outside our courthouses, and we should not censor common, ordinary talk among jurors; to do so would result in our courts losing touch with the society we are here to serve.

In *Singletary v. Lewis,* 584 So. 2d 634 (Fla. 1st DCA 1991), hereafter called *Singletary* I, the district court remanded the case to the trial court and said at 637:

> The trial judge should interview all the jurors and make the initial factual determination as to whether the evidence supports a finding of misconduct on the part of the jury.

In the context of that opinion, one must construe "misconduct" in that case involving a black plaintiff and a white defendant to mean using words and terms that expressed not uncommon prejudices against black people (similar to those that received wide publicity when made by a Jacksonville chief circuit court judge). The implicit ruling of the district court is that the words alone, where they are words with invidious racial, religious or ethnic overtones, are misconduct, without regard to the persons involved, the context, the circumstances and the influence or lack of influence on anyone.

When it came up on appeal a second time, *Singletary v. Lewis,* 619 So. 2d 351 (Fla. 1st DCA 1993), hereafter called *Singletary* II, the trial court had conducted the juror interview. From the abstract of the juror interview as reported in *Singletary* II, it appears that whatever remarks were made by jurors were cryptic and ambiguous at best. The trial judge concluded that there may have been crude and even offensive remarks from one or another juror, but they were not racial or ethnic slurs.

A majority of two agreed with the trial judge on his interpretation of the remarks, and his denial of a new trial was affirmed. The opinion is only dicta as to what the district court ruling would have been had the remarks been interpreted as racial or ethnic slurs, but it seems the first district court agreed in principle with the third district in *Sanchez*.

In footnote one (p. 354) of *Singletary* II, the court considered the *Sanchez* decision. It recognized the *Sanchez* decision held that where racial, ethnic or religious slurs or insults are concerned, the words of jurors, in effect, speak for themselves and are equated with insurmountable bias and prejudice that automatically nullify any verdict such jurors participated in. The footnote in *Singletary* II found this argument academic, since they could not find such racial or ethnic slurs in the record, but the footnote reflects on the *Sanchez* rationale this way:

> Indeed, one could legitimately maintain that the participation of a juror whose bias has been demonstrated by racial, ethnic or religious comments, precludes the court from finding that the comments did not affect the verdict; thus, where juror misconduct is in the form of biased comments, a new trial will be necessary despite any subsequent showing of "harmlessness" by the nonmovant.

It calls for emphasis in this quotation that bias is "demonstrated by racial, ethnic or religious comments." Once there is evidence these forbidden words have been uttered, juror bias has been established, beyond question. Later in that brief quotation, one form of juror "misconduct" is equated with "biased comments." Unmistakably, it is the words themselves that are to be the sole subject of inquiry in the motion for new trial. It is merely a question of what was said, or, more properly, what was probably said, by one or several jurors.

Except for the assumptions of political correctness, words alone, without regard to the occasion of their being uttered, the audience, the speaker and the context, would hardly be counted on as a reliable test of character. Examining and interpreting words uttered informally in conversation, alone, does not establish misconduct. By limiting its test of jury conduct only to politically incorrect taboo words, appellate courts avoid any inquiry into and assessing of the character and moral fiber of jurors and the credibility of jurors under oath to well and truly and impartially decide a case.

The dissent in *Singletary* II asserts that *Singletary* I was the "law of the case" and required reversing the trial judge, setting aside the verdict and granting a new trial. As I read his dissent, Judge Ervin believes the opinion and decision in *Sanchez* did not go far enough. It seems that he would have the general principle to be that jury verdicts are nullified and must be set aside where there is nothing more than a suggestion that something was probably said that might be construed as racial or ethnic or religious slurs or insults.

Political Correctness And the Bell Jar

The majority opinion, above, and these cited case authorities claim to have a better way to resolve cases than to rely on the collective sense of personal and social responsibility of our fellow citizens when they take their juror oaths 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 failed to protest comments, usually in jokes or other attempts at humor, that contain words appellate courts consider to be politically incorrect taboo words.

One wonders at the scope of this policy of political correctness covering jurors. Would jurors be disqualified from serving if they had ever joined in or enjoyed what courts find to be unacceptable humor before they were summoned for jury service or after they were discharged as jurors? If so, any party or attorney dissatisfied with a verdict can 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?

Apparently, the majority opinion, above, and its cited cases recognize this problem and would limit the remedy of reversing the verdict and judgment only to when jurors can be found to have been politically incorrect while in the bell jar, that is, in the courthouse on jury duty. Will it be necessary to set aside special areas in the courthouse for indulging in free but impolite speech, as we now do for those who want to indulge themselves in smoking? Wouldn't this be necessary in order to preserve the First Amendment rights of jurors?

Sooner or later, courts are going to have to settle on what expressions about which races, religions and ethnic groups a juror is not permitted to make. Does it also apply to women and gays? Then, is the verdict to be set aside if a participating juror used (or perhaps used) taboo words, and it is

not a party, but one or more of the attorneys who is a member of the group being insulted?

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 collections of "tasteless" jokes, insults and slurs in most book stores and libraries. Are 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 the "tasteless" joke books or the glossary would be available in jury rooms along with a warning that they represent the kinds of things jurors are not permitted to say.

Conclusions

Whatever else judges and attorneys may be able to do to ordinary citizens when they appear for jury duty, we should not stifle their senses of humor. There is a well-established strain of irreverence in American humor, which commonly deals with problems great and small, from death to taxes, war and other conflicts, marriage and other battles, and personal traits we all share, more than we like to admit, such as ignorance and prejudice.

Racial stereotypes and prejudice go back to slavery, and ethnic eccentricities have been attributed going back to prehistory. Males and females go back to the origin of the species. Who knows when humor evolved, but is a sure bet among the earliest forms of humor was one of those divisions of people using it at the expense of the other. This humor is often offensive to some, but to recognize social problems and to talk about them, for some of us to sometimes laugh about them, is better than to deny the problems or

ignore them, or fight over them, which are the all-too-common alternatives today.

One strong current of our American heritage, as reflected even in our United States Constitution, is that we are a country of many races and ethnic groups and conflicts between them. One of our greatest writers, Mark Twain, created a fictional person of moral strength, loyalty, strength of character and integrity unsurpassed in American literature, and that was "Nigger Jim." This literary character made and still makes a travesty of slavery and the ongoing prejudices of our society against Negroes. Even so, because of the name alone, carrying the epithet "nigger," *Huckleberry Finn* has been banned from some schools and libraries, and even colleges and universities shy away from using it in their courses. The majority opinion in this case and all of its cited authorities would ban it from courthouses as well.

There are many commonly held beliefs and prejudices among my fellow citizens and my fellow judges I don't agree with. I am not proud of some of my own beliefs and prejudices. I must conscientiously try to overcome much of what I was taught in the officially and rigidly segregated schools of this state when it was politically incorrect to speak of integration and when Protestant Christianity was taught as part of the public school curriculum. Many other judges try as I do to identify and overcome our prejudices, and we succeed, for the most part. Are jurors a lesser breed that we? From my experience, I think not!

The trial judge should have been affirmed.

SHAW, C.J., and OVERTON, McDONALD, GRIMES and KOGAN, JJ., concur.

BAPTIST HOSPITAL OF MIAMI, INC., Petitioner,

v.

James MALER, Jr., etc., et al., Respondents.

No. 76094.

Supreme Court of Florida.

May 2, 1991.

Parents sought petition for writ of certiorari to review an order of the Circuit Court, Dade County, Richard Y. Feder, J., granting posttrial interview of jurors to be conducted in open court by trial judge, after jury had returned verdict for parents in medical malpractice action on behalf of brain damaged minor child against hospital. The District Court of Appeal, 559 So.2d 1157, quashed petition. Application for review was granted. The Supreme Court held that affidavits of defendants' attorneys alleged nothing more than purported opinions of two jurors about reason they reached verdict and did not provide basis for judicial inquiry.

Order quashing trial court determination approved.

Kogan, J., filed a concurring and dissenting opinion in which Harding, J., concurred.

1. Trial ⇐344

To the extent an inquiry directed to jurors will elicit information about overt prejudicial acts on their part, it is permissible; however, to the extent inquiry will elicit information about subjective impressions of opinions of jurors in deciding case, it may not be allowed.

2. Trial ⇐344

Affidavits of medical malpractice defendants' attorneys, who had spoken with several jurors after case, alleged nothing more than purported opinions of two jurors that they reached verdict for plaintiffs because of sympathy for child patient and defendant hospital had insurance and showed subjective impressions or opinions that were not subject to judicial inquiry.

3. Trial ⇐344

Inquiry of jurors after trial is never permissible unless moving party has made sworn factual allegations that, if true, would require trial court to order new trial using standard adopted by Supreme Court in *Hamilton*; under that standard moving parties first must establish actual juror misconduct in juror interview and once that is done, party making motion is entitled to new trial unless opposing party can demonstrate that there is no reasonable possibility that juror misconduct affected verdict.

4. Trial ⇐344

Any actual, express agreement between two or more jurors to disregard their oaths and instructions constitutes neither subjective impression nor opinion, but an overt act and is thus subject to judicial inquiry, even though inquiry may not be expanded to ask what impressions or opinions motivated jurors to enter into agreement in first instance.

5. Trial ⇐344

Any receipt by jurors of prejudicial nonrecord information constitutes an overt act which is subject to judicial inquiry even though inquiry may not be expanded to ask jurors whether they actually relied upon nonrecord information in reaching their verdict.

Parenti & Falk, P.A., and Marc Cooper and Sharon L. Wolfe of Cooper, Wolfe & Bolotin, P.A., Miami, for petitioner.

Christopher Lynch of Adams, Hunter, Angones, Adams & McClure, Miami, for respondents.

PER CURIAM.

We have for review *Maler ex rel. Maler v. Baptist Hospital of Miami, Inc.*, 559 So.2d 1157 (Fla. 3d DCA 1989), based on certified conflict with *Preast v. Amica Mutual Insurance Co.*, 483 So.2d 83 (Fla. 2d DCA), *review denied*, 492 So.2d 1334 (Fla. 1986). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Joni and James Maler brought a malpractice action on their own behalf and that of their brain-damaged child. They alleged that Baptist Hospital of Miami and its agents improperly diagnosed a bacterial infection caught by their child at birth, which resulted in brain damage to the infant. At trial, the jury found Baptist Hospital sixty percent negligent for total damages of $1.5 million. Jurors agreed in open court that this was their verdict. The trial judge then dismissed them and said "You are free to discuss this case with anyone who will listen."

Upon leaving the courthouse a short while later, counsel for Baptist Hospital chanced upon two jurors. The jurors initiated the conversation and allegedly stated that their verdict had been influenced by sympathy for the brain-damaged child and the fact that the hospital had insurance. Two days later, the attorney filed a motion to interview all the jurors. In support of the motion, he attached his own affidavit and that of his cocounsel, who had witnessed the conversation with the jurors. In pertinent part, the affidavit from Baptist Hospital's attorney states:

> a. [Juror] Lemus stated that the undersigned won the case, but the jury felt so sympathetic for the child that it awarded money thinking that an insurance company would pay the verdict and not the hospital itself. He also commented that some members of the jury wanted to award even more money than they did and he tried to hold the verdict down believing that a verdict in the range of $800,000 would be enough.
>
> b. [Juror] Prellezo stated that he was at the other end of the jury from Mr. Lemus and wanted to award money to this child. He also said in response to a question by the undersigned about the experts for the plaintiffs and the defendant that Dr. Abramson was a "joke" and Dr. Eichenwald was impressive. Lastly, he was asked by the undersigned whether the jury concluded that the pediatrician was called on the day after discharge and he stated that this issue was not discussed by the jury.

The other attorney who witnessed the conversation with the jurors filed an affidavit containing the following pertinent statement:

> 6. Mr. Lemus told us that he did not think that anyone at Baptist Hospital had done anything wrong. He also told Mr. Parenti that he did not think that the plaintiffs had proved their case. Mr. Lemus stated that some of the jurors wanted to award $5,000,000 or $6,000,000, which he felt was outrageous. One of the two jurors said that we knew the hospital had insurance which other jurors mentioned also, and we had to award money because someone had to take care of this child.
>
> 7. Mr. Parenti asked the jurors what they thought of Dr. Abramson. Mr. Prellazo [sic] said that they thought he was a joke. Mr. Parenti asked both Lemus and Prellazo [sic] whether they believed Dr. Abramson. Both indicated they did not.
>
> 8. Mr. Parenti asked the jurors what they thought of Dr. Eichenwald. Mr. Prellezo said he was the only person the jury felt was a real doctor.

The trial court granted the motion to interview jurors and entered an order stating that the following two questions would be posed to the jurors:

> 1. Did the jury agree before the actual signing of the verdict form to find for the child, James Maler, Jr., for reasons outside of the evidence, such as sympathy, insurance, etc.?
>
> 2. Did the jury agree to find for the child, James Maler, Jr., although the greater weight of the evidence supported a verdict for the Defendant, Baptist Hospital of Miami, Inc.[?]

In the event any juror answered "yes" to one of these questions, the court announced that appropriate follow-up questions would be posed.

The Malers then filed a petition for writ of certiorari in the Third District Court of Appeal. The Third District quashed the trial court's order after ruling that the questions dealt with matters that inhered in the verdict itself, thus rendering them impermissible under Florida law. *Maler ex rel. Maler v. Baptist Hosp. of Miami, Inc.*, 559 So.2d 1157 (Fla. 3d DCA 1989).

We recently set forth the test for gauging claims of juror misconduct in the case of *State v. Hamilton*, 574 So.2d 124 (Fla. 1991). There we said that, in considering whether to authorize inquiry into alleged jurors misconduct, the trial court must determine exactly what type of information will be elicited from the jurors, because

> Florida's Evidence Code, like that of many other jurisdictions, absolutely forbids any judicial inquiry into emotions, mental processes, or mistaken beliefs of jurors. § 90.607(2)(b), Fla.Stat.Ann. (1987) (Law Revision Council 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.2d 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. 2d DCA 1968). The rule also rests on a policy "of preventing litigants or the public from invading the privacy of the jury room." *Velsor v. Allstate Ins. Co.*, 329 So.2d 391, 393 (Fla. 2d 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." § 90.607(2)(b), Fla. Stat.Ann. (1987) (Law Revision Council Note—1976) (emphasis added). *See Maler ex rel. Maler v. Baptist Hosp.*, 559 So.2d 1157, 1162 (Fla. 3d DCA 1989) (discussing application of this principle).

Hamilton, 574 So.2d at 128 (emphasis in original; footnote omitted). These conclusions rested in part on the following relevant portion of Florida's Evidence Code:

> 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.

§ 90.607(2)(b), Fla.Stat. (1987). The published notes accompanying this provision reveal that it codified the relevant holding of *McAllister Hotel, Inc. v. Porte*, 123 So.2d 339, 344 (Fla.1959), which stated in pertinent part:

> [T]he law does not permit a juror to avoid his verdict for any reason which essentially inheres in 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 his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."

Id. (quoting *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866)).

[1] The distinction drawn by the cases quoted above is between overt prejudicial acts, and subjective impressions or opinions of jurors. To the extent an inquiry will elicit information about overt prejudicial acts, it is permissible; to the extent an inquiry will elicit information about subjective impressions and opinions of jurors, it may not be allowed.

[2] In the present case, Baptist Hospital alleges that the affidavits disclose 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 nonrecord evidence that Baptist Hospital had insurance covering the present liability.

The affidavits, quoted in pertinent part above, do not support these conclusory statements. The factual matters in the affidavits allege nothing more than 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 a particular verdict clearly are subjective impressions or opinions that are not subject to judicial inquiry.

Nor do these affidavits establish that jurors received nonrecord evidence. Indeed, the record strongly supports the conclusion that jurors inferred the existence of applicable insurance based on the testimony of Baptist Hospital's own risk manager, who told the jury one of his responsibilities was to "make sure we have insurance" for matters that may result in liability. This was a door that Baptist Hospital opened, and Baptist Hospital now must live with whatever assumptions or inferences jurors chose to draw from this evidence. One such reasonable assumption is that Baptist Hospital held insurance policies covering the present liability. We thus are bound by the district court's conclusion that "no facts were brought before the jury which were not introduced in evidence." *Maler*, 559 So.2d at 1162.

Accordingly, as a matter of Florida law, the affidavits failed to state a legally sufficient reason to interview jurors. *Hamilton*. In reaching this conclusion we are mindful that some of the language in our recent opinion in *Hamilton* may be read to support a contrary conclusion. In *Hamilton*, we held that a trial court did not err in conducting an inquiry even though the alleged misconduct was of a type highly unlikely to indicate any prejudice whatsoever: a juror had taken two automobile magazines into the jury room. *Hamilton*, 574 So.2d at 130–31. The *Hamilton* opinion stated that an inquiry is permissible whenever the court entertains "serious doubt" as to the existence of juror misconduct, provided the inquiry is limited to permissible questions. Obviously, the misconduct alleged in *Hamilton* was less serious than that alleged in the present case. *Id.*

The *Hamilton* opinion, however, made clear that it would have reached the same result whether or not the trial court had conducted an inquiry of jurors. Thus, *Hamilton* did not turn on the question of when an inquiry is permissible, unlike the present case.

[3] 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 party has made sworn factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in *Hamilton*.[1]

[4] Finally, our opinion in no sense should be construed as condoning any process by which jurors actually enter into an agreement to disregard the law applicable to a case. Any actual, express agreement between two or more jurors to disregard their oaths and instructions constitutes neither subjective impression nor opinion, but an overt act. It thus is subject to judicial inquiry even though that inquiry may not be expanded to ask what impressions or opinions motivated jurors to enter into the agreement in the first instance. *Hamilton*. This is true, as the court below noted, *Maler*, 559 So.2d at 1162, whether the agreement is 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. *Russ v. State*, 95 So.2d 594, 600 (Fla.1957); *Marks v. State Road Dep't*, 69 So.2d 771, 775 (Fla.1954).

[5] Similarly, any receipt by jurors of prejudicial nonrecord information constitutes an overt act. Accordingly, it is sub-

1. Under this standard, the moving party first must establish actual juror misconduct in the juror interview. Once this is done, the party making the motion is entitled to a new trial *unless* the opposing party can demonstrate that there is no reasonable possibility that the juror misconduct affected the verdict. *Hamilton*, 574 So.2d at 129 (quoting *Paz v. United States*, 462 F.2d 740, 745 (5th Cir.1972)).

ject to judicial inquiry even though that inquiry may not be expanded to ask jurors whether they actually relied upon the nonrecord information in reaching their verdict. *Hamilton.* As Judge Hubbart correctly suggested in the opinion under review, the case law on this topic allows inquiry only into objective acts committed by or in the presence of the jury or a juror that might have compromised the integrity of the fact-finding process. *Maler,* 559 So.2d at 1162 (citing *Russ, Marks*); *accord Hamilton.*

In the present case, however, the sworn affidavits upon which the motion was based do not allege this type of impropriety. We agree with Judge Hubbart's observation that

> no other inquiries of the jury could be properly framed [based on the present record] because the affidavits are solely concerned with matters which essentially inhere within the jury verdict.

Maler, 559 So.2d at 1162. Accordingly, the trial court abused its discretion in authorizing any inquiry of the jurors. For the reasons above, the order quashing the trial court's determination of this matter is approved.[2]

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT and GRIMES, JJ., concur.

KOGAN, J., concurs in part and dissents in part with an opinion, in which HARDING, J., concurs.

KOGAN, Justice, concurring in part, dissenting in part.

I concur in the majority's continued adherence to the standard of review for jury interviews set forth in *State v. Hamilton,* 574 So.2d 124 (Fla.1991). However, I dissent from the majority's decision—so soon after *Hamilton* was released—to effectively overrule *Hamilton*'s threshold standard for determining when a jury interview is permissible in the first instance. As the majority notes, we approved the interview in *Hamilton* even though the facts of that case were less serious than those at hand. Accordingly, we should allow an interview here.

In reaching this conclusion, I do not disagree with the majority's distinction between overt acts (which can be the subject of an interview) and subjective thought processes (which cannot). Clearly, *Hamilton* and all the case law upon which it relied have adhered to this distinction.

However, I am not so convinced that these two categories always come in distinct packages. It is a human tendency to express in subjective terms matters that actually are based on objective fact. This may well have happened in the present case when the jurors spoke with Baptist Hospital's attorney. Certainly, I agree with the majority that sympathy for a child and the *reasons* why jurors reached a particular verdict clearly are subjective impressions or opinions that are not subject to judicial inquiry. However, to my mind, that is not an end of the matter.

The possible juror misconduct alleged by Baptist Hospital also involves separate elements that clearly are not within the realm of subjective impressions or opinions. While the affidavits do not expressly allege the existence of an improper agreement among jurors, they at least are entirely consistent with the conclusion that such an agreement existed among several of the jurors. Moreover, these same affidavits are at least consistent with the conclusion that jurors may have received nonrecord information about Baptist Hospital's level of insurance. Accordingly, I would quash the opinion of the district court and permit a *very limited* interview of the jurors to ascertain whether these two specific improprieties occurred.

2. We approve the result reached by the conflict case, *Preast v. Amica Mutual Insurance Co.,* 483 So.2d 83 (Fla. 2d DCA 1986), solely to the extent that it found the award of damages illegal because jurors had decided the amount by lot. The opinion in *Preast* otherwise is disapproved, because the Second District's reasoning suggests that a new-trial order may be based on the thoughts, feelings, opinions, and subjective impressions of jurors.

In so doing, I would require that jurors only be asked whether an overt agreement existed to disregard their oaths and instructions, and whether any nonrecord evidence about insurance was received. Follow-up questions would be limited exclusively to these two categories in the same way testimony on cross-examination is limited to subjects raised during direct examination. Throughout this process, jurors could be questioned *only* about objective acts occurring in the presence of the jury or any juror, not subjective opinions or the reasons why particular decisions were made.

I do not share the majority's view that this very limited type of interview will undermine the sanctity of the jury process by condoning harassment of jurors or second-guessing of verdicts. The limited scope of inquiry I would authorize would not permit these evils to occur, and I am fully confident in the ability of this trial court to properly control the way these litigants interact with the jurors. Moreover, the slight inconvenience that would be caused here is outweighed by the need to guarantee the integrity of the fact-finding process—a goal the majority itself lauds.

Finally, I agree with the majority's conclusion that the questions framed by the trial court are improper. Their phrasing clearly elicits information about subjective matters. However, I believe the questions can be rephrased to eliminate the impropriety, in the manner I have stated above.

In all other respects, I concur in the majority opinion.

HARDING, J., concurs.

Charles SKITKA, et al., Petitioners,

v.

STATE of Florida, Respondent.

No. 77413.

Supreme Court of Florida.

May 2, 1991.

Motion of public defender to withdraw from representation of 29 indigent defendants was denied by the Second District Court of Appeal, and application was filed for review. The Supreme Court, Grimes, J., held that public defender presented sufficient grounds to be permitted to withdraw from representation of 29 appeals, based on case backlog.

Order quashed with direction.

1. **Criminal Law** ⇐641.11, 1077.3

Courts should not involve themselves in management of public defender offices, but courts are not obligated to permit withdrawal of public defender from representation of a number of appeals automatically upon filing of a certificate by the public defender reflecting backlog in the prosecution of appeals.

2. **Criminal Law** ⇐641.11, 1077.3

Public defender presented sufficient grounds, based on case backlog, to be permitted to withdraw from representation of 29 appeals, despite increased staff such that court was hopeful that problem would soon be alleviated.

James Marion Moorman, Public Defender, Tenth Judicial Circuit, Bartow, for petitioners.

Robert A. Butterworth, Atty. Gen., Tallahassee, for respondent.

GRIMES, Justice.

We review an order of the Second District Court of Appeal denying the motion of the Public Defender of the Tenth Judicial Circuit to withdraw from the representation of twenty-nine indigent defendants. We have jurisdiction because this case affects a class of constitutional officers, pub-

It is high time, in my opinion, for our courts to recognize the weakness of the arguments for the maintenance of the interspousal immunity doctrine and to step in line with the great majority of other states. After all, it has been done in other intrafamilial immunity cases. *See, e.g., Ard v. Ard,* 414 So.2d 1066 (Fla.1982).

The two principal bases upon which the argument is made to maintain this inability to be compensated for injury are 1) the disruption of family, or marital, harmony and, 2) the possibility of collusion between the parties or fraud by them. The first has been largely discounted recently and in this case is hardly a factor because the marriage occurred after the injury and the attorney for appellee has, in no uncertain terms, admitted that he is the attorney for an insurance company and not really seeking the interests of Douglas Gulick. He said at oral argument that he has never consulted Mr. Gulick about his interests. Further, what is more disruptive than to require appellant to get a divorce in order to receive the compensation she is due for her injuries?

As far as collusion or fraud is concerned, this is the only place in the law where the possibility of a defense is a bar to suit. Is that fair? Or is it more fair for the suit to be allowed and the defense to be raised, if warranted, and the trier of the fact to decide? The answer must be obvious.

In *Raisen,* our supreme court held that it was the province of the legislature, not the court, to decide whether to "abrogate any part of the common law." The court found little hesitancy, however, in changing from contributory negligence to comparative negligence, *Hoffman,* even though it scolded the district court for its impertinence and presumptiveness (or courage and foresight, if viewed from another perspective). Lately, our supreme court saw fit to "construe" (the court's word) a criminal statute in someone's favor for reasons, *inter alia,* of "... public policy, reason and common sense...." *Johnson v. State,* 602 So.2d 1288 (Fla.1992). That done in the face of statutory language. Here we have no statute, only tired old common law, so the fruit is ripe for the picking.

All are commended to the thoughtful and scholarly dissent of Judge Gersten in *Waite v. Waite,* 593 So.2d 222 (Fla. 3d DCA 1991).

RABUN AND PARTNERS, INC., Petitioner,

v.

ASHOKA ENTERPRISES, INC., Respondent.

No. 92-1373.

District Court of Appeal of Florida, Fifth District.

Sept. 11, 1992.

Architectural firm sought certiorari review of Circuit Court order obtained by corporation, granting corporation's motion to interview juror following trial of architectural firm's action for collection of fees. The District Court of Appeal, Peterson, J., held that inquiry based upon corporation president's allegation that jury decided to rule against corporation because its president was rich doctor and did not need money was prohibited as inquiry into emotions and mental processes of jurors.

Certiorari granted; order quashed.

Jury ⇐76

In action brought by architectural firm against corporation for payment of fees, corporation was not entitled to postverdict interview with juror, even though juror had allegedly stated that jury decided to rule against corporation because its president was rich doctor who "did not need the money" where jury asked questions regarding evidence during deliberations, answered four pages of questions included in

verdict form, made finding that architectural firm had delayed project, and calculated amount of award perceived by corporation for that delay; inquiry into emotions and mental processes of jurors is prohibited absent allegation that jury expressly agreed to ignore evidence, law, or instructions.

Denise G. Morris and Eric R. Martuza of Fisher, Rushmer, Werrenrath, Keiner, Wack & Dickson, P.A., Orlando, for petitioner.

Vincent G. Torpy, Jr., Melbourne, for respondent.

PETERSON, Judge.

Rabun and Partners, Inc. (Rabun), seeks certiorari review and quashal of a circuit court order obtained by Ashoka Enterprises, Inc. (Ashoka), granting a motion to interview juror Tamim Hamid. We grant the petition and quash the order.

Rabun initiated an action to collect fees for architectural services provided to Ashoka for the design of the Melbourne Beach Hilton Hotel. Ashoka counterclaimed for damages for construction defects and delays allegedly caused by Rabun's errors and omissions. The case was tried before a jury between October 29, 1991, and November 4, 1991. After deliberating for nearly seven hours, the jury returned a verdict for Rabun in the amount of $87,949 and for Ashoka on the counterclaim in the amount of $19,950 representing interest on the latter's construction loan for Rabun's delays. During their deliberation, the jury posed the following questions to the court:

1. The jury requests the use of a calculator. Thank you for this consideration.

2. Does the last paragraph of this document make the contents legally binding between Dr. Patel and L.W. Thompson wherein Dr. Patel states ... "if anything went wrong with the mechanical system, the Owner would look to L.W. Thompson for correction."

3. Please describe exact location of crack in marble entry and please include proximity to tower. How far from wall joining the low and high rises?

On January 30, 1992, Ashoka filed a motion in the circuit court to interview juror Hamid. The motion was supported by an affidavit of Ashoka Patel, Ashoka's corporate president. Patel averred that he had spoken with juror Hamid on the phone on four or five occasions and that the juror had stated that he was dissatisfied with the verdict, that the other jurors had refused to look at the documentary evidence, claiming that it was irrelevant, that the other jurors were not interested in Ashoka's arguments, and that the other jurors were prepared to rule against Ashoka because its president was a rich doctor and did not need the money. The motion was granted with the proviso that an evidentiary hearing would be scheduled and that either party could subpoena the jurors.

Rule 1.431(h), Florida Rules of Civil Procedure, provides, "If a party believes that grounds for legal challenge to a verdict exists, he may move for an order permitting an interview of a juror or jurors...." However, in *Baptist Hospital of Miami, Inc. v. Maler*, 579 So.2d 97 (Fla.1991), the supreme court acknowledged the existence of strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial. *See also Schmitz v. S.A.B.T.C. Townhouse Ass'n, Inc.*, 537 So.2d 130 (Fla. 5th DCA 1988). In *Baptist Hospital of Miami*, two jurors indicated to the defendant hospital's lawyers that, although the defendant hospital should have won, a verdict was rendered against the hospital as a result of sympathy for the child plaintiff in the medical malpractice action and an assumption that the child was injured. The district court's quashal of the trial court's allowance of a juror interview was affirmed. The supreme court held, "To the extent an inquiry will elicit information about overt prejudicial acts, it is permissible; to the extent an inquiry will elicit information about subjective impressions and opinions of jurors, it

may not be allowed." 579 So.2d at 99. However, any process by which the jurors agree to disregard the law applicable to the case was disapproved.

> Any actual, express agreement between two or more jurors to disregard their oaths and instructions constitutes neither subjective impression nor opinion, but an overt act. It thus is subject to judicial inquiry even though that inquiry may not be expanded to ask what impressions or opinions motivated jurors to enter into the agreement in the first instance.

579 So.2d at 100.

In *Orange County v. Piper*, 585 So.2d 1182 (Fla. 5th DCA 1991), a juror stated that the verdict was a compromise and that the deliberations involved discussions of matters not introduced into evidence, such as insurance. The record revealed no allegation that an actual, express agreement was reached by the jurors to disregard their oaths and ignore the law or instructions. This court found that, even if true, the facts alleged failed to warrant a post-verdict interview because the juror's statements were nothing more than that juror's opinion about the reasons the jury arrived at its verdict.

An overt act justifying juror interview was present in *Snook v. Firestone Tire & Rubber Company*, 485 So.2d 496 (Fla. 5th DCA 1986), when it was alleged that a 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. In *Preast v. Amica Mutual Insurance Company*, 483 So.2d 83 (Fla. 2d DCA), *review denied*, 492 So.2d 1334 (Fla.1986), 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 held: "Such deliberate, 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." *Preast*, 483 So.2d at 86.

In the instant case, Patel's allegation that the jury decided to rule against Ashoka because he was a rich doctor and did not need the money clearly fits within the category of prohibited inquiry into the emotions and mental processes of the jurors, matters which essentially inhere within the jury verdict. These matters are similar to those in *Baptist Hospital of Miami* involving jury sympathy for an injured child where the supreme court determined that interviews were not permissible. Further, Patel's affidavit falls far short of alleging that the jury expressly agreed to ignore the evidence in the case and refused to look at documentary evidence. Also, the record is not consistent with these allegations. During the seven hours of deliberation, the jury asked questions regarding the evidence and answered the four pages of questions included in the verdict form, including making a finding that Rabun delayed the project and the number of days the project was delayed, and calculating the dollars awarded to Ashoka for the delay.

We grant the petition for a writ of certiorari and quash the circuit court's Order Granting Motion to Interview Juror.

Certiorari GRANTED; order QUASHED.

W. SHARP and GRIFFIN, JJ., concur.

FIRST FLORIDA BANK, N.A., Appellant,

v.

Larry R. HOWARD and Larry U. Howard, Appellees.

No. 92-189.

District Court of Appeal of Florida, Fifth District.

Sept. 11, 1992.

Following repossession and sale of vehicle which was collateral for promissory

appellant's arguments as to each point, we need only address the first point raised which we believe is dispositive of the remaining issues. In Florida, the state is under a special duty to protect incompetent persons and their property as a class incapable of protecting themselves. *Allen v. City of St. Augustine*, 500 So.2d 206, 209 (Fla. 1st DCA 1986), *review denied*, 504 So.2d 766 (Fla.1987). The guardian in the instant case was found to have violated his fiduciary duty as guardian. His claim to compensation cannot be entertained by the court in view of its finding that he had breached his fiduciary duty. *See Carroll v. Carroll*, 127 Fla. 226, 172 So. 916, 918 (1937); *American Surety Co. of New York v. Hayden*, 112 Fla. 17, 150 So. 114, 121 (1933). The court's acceptance of the Visitor's initial report finding that appellee breached his fiduciary duties as appellant's guardian is supported by competent substantial evidence and, thus, the trial court abused its discretion by entertaining the issue of his compensation. On remand, we direct that the trial court order the guardian, or alternatively the surety, to repay the funds mismanaged by the guardian, with interest. *See* section 744.377, Florida Statutes (1987); *In re Nusbaum's Guardianship*, 154 Fla. 49, 16 So.2d 519 (1944).

REVERSED and REMANDED with directions.

ZEHMER and ALLEN, JJ., concur.

Mercedes SANCHEZ, Appellant,

v.

INTERNATIONAL PARK CONDOMINIUM ASSOCIATION, INC., et al., Appellees.

No. 89-50.

District Court of Appeal of Florida, Third District.

June 26, 1990.

Action was brought for personal injuries suffered as result of slip and fall on wet tile floor in condominium building lobby. The Circuit Court, Dade County, Robert P. Kaye, J., returned verdict for plaintiff, but attributed 96% contributory negligence to her, and plaintiff appealed. The District Court of Appeal, Cope, J., held that derogatory comments about Cubans that were allegedly made by one juror entitled plaintiff of Cuban extraction to new trial.

Reversed and remanded.

New Trial ⇐44(2)

Juror's alleged derogatory remarks about Cubans entitled personal injury plaintiff who was of Cuban extraction to new trial in action in which verdict was returned in her favor, but 96% contributory negligence was attributed to her, although three of six jurors denied that any remarks were made and jurors testified that they were not influenced by ethnic bias.

Perez-Abreu, Zamora & de la Fe and Ernesto J. de la Fe and Enrigue Zamora, Coral Gables, for appellant.

West & Lindley and Harold West, North Miami Beach, Kubicki, Draper, Gallagher and McGrane, Betsy E. Gallagher, Miami, Buschbom & Panter, Miami, for appellees.

Before BASKIN, FERGUSON and COPE, JJ.

COPE, Judge.

Appellant Mercedes Sanchez was plaintiff below in an action 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 Sanchez' favor, but attributed to her ninety-six percent contributory negligence and two percent negligence for each of the defendants, appellee International Park Condominium Association, Inc., and appellee Miami Domestic Services, Inc.

Ms. Sanchez is of Cuban extraction, and testified at trial through an interpreter.

After the trial, one of the jurors volunteered the comment that another juror had made a derogatory comment about Cubans. The trial court conducted interviews of each of the six jurors. Each juror was interviewed separately by the court, on the record and in the presence of counsel. The court also allowed a limited amount of inquiry by counsel. For present purposes the jurors will be identified in the order in which they were interviewed.

Juror number one testified:

> ... I was surprised ... [that juror number six] was selected for the jury, and I mentioned that he seemed to be a very opinionated person, and he made some remark in the jury room that I had a problem with.
>
> The Court: What was that remark?
>
> [Juror Number One]: That remark was, 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.
>
> . . . . .
>
> I personally had a problem with the statement that man made. I don't feel it affected me or anybody for that matter in the outcome....
>
> . . . . .
>
> The Court: It was never brought up again?
>
> [Juror Number One]: No. Well, there was another reference, and I don't know what the conversation was. He said something about being ambulance chasers, but I can't even recall.
>
> The Court: Did that statement in any way affect your decision?
>
> [Juror Number One]: I didn't appreciate the statement, but it didn't affect my decision at all.

The testimony of jurors two and four was substantially identical. Jurors three and five testified that they did not recall any derogatory remarks. Juror number six, who was identified by jurors one, two and four as having made the remarks, denied having made them, and stated that he heard no such remarks. He indicated that someone, whom he could not identify, had made a remark about ambulance chasing, but that it was not associated with any particular ethnic group.[1]

The trial court did not make any specific factual findings. The court concentrated on trying to determine whether the jurors had been influenced by any comments reflecting ethnic bias. The jurors testified that they were not influenced. The trial court denied the motion for new trial.

For purposes of the appeal the parties have proceeded on the assumption that the derogatory remarks were in fact made by juror six. The high degree of similarity in the accounts given by jurors one, two and four supports that conclusion. The appellees argue, however, that the remarks are not such as would warrant a new trial. We disagree.

We find persuasive the decision in *United States v. Heller*, 785 F.2d 1524 (11th Cir.1986), a case in which a juror made antisemitic remarks to other jurors during a criminal trial. The court there said:

> 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.

Id. at 1527.[2] *See also People v. Jones*, 105 Ill.2d 342, 86 Ill.Dec. 453, 457–58, 475 N.E.2d 832, 836–37 (1985). The views set

1. Counsel inquired on voir dire whether the jurors would be impartial given the fact that the plaintiff was Spanish speaking, and the jurors responded affirmatively.

2. As this is a civil case, the sixth amendment portion of the court's analysis is not applicable here.

forth in *Heller* draw support by analogy from the considerations underpinning *State v. Neil*, 457 So.2d 481 (Fla.1984), *City of Miami v. Cornett*, 463 So.2d 399 (Fla. 3d DCA), *cause dismissed*, 469 So.2d 748 (Fla. 1985) (applying *Neil* to civil cases), and *Moriyon v. State*, 543 So.2d 379, 380 (Fla. 3d DCA), *review dismissed*, 549 So.2d 1014 (Fla.1989).

Jury service is a collegial process. It may be that the other jurors were not affected by the remarks made by juror six. Juror six was, however, an active participant in the deliberative process, and the verdict included his input. The jury's verdict included not only a determination of liability, but also the amount of damages and percentages of comparative fault. The plaintiff was entitled to have her case heard by an impartial jury.[3] We therefore reverse the final judgment and remand for a new trial.

Fidel Eladio DIAZ, Appellant,

v.

The STATE of Florida, Appellee.

Nos. 89–305, 89–1408.

District Court of Appeal of Florida, Third District.

June 26, 1990.

Defendant was convicted in the Circuit Court, Dade County, Robert P. Kaye, J., of first-degree murder, attempted first-degree murder, and attempted robbery, and he appealed. The District Court of Appeal, 492 So.2d 1144, reversed and remanded. On remand, defendant was again convicted of first-degree murder and related crimes by the Circuit Court, Richard V. Margolius, J., and he appealed. The District Court of Appeal, Schwartz, C.J., held that trial judge could retain jurisdiction to "veto" defendant's parole for one third of sentence only if judge provided written reasons for so doing.

Affirmed in part, reversed in part.

1. Criminal Law ⇐979(1), 986(3)

Trial judge could retain jurisdiction to veto parole for one third of defendant's sentence, pursuant to statute which was in effect at time offenses were committed, only upon providing written reasons. F.S. 1985, § 947.16(4)(d).

2. Criminal Law ⇐1181(2), 1184(4)

Case would not be remanded to allow trial judge to provide written reasons supporting decision to retain jurisdiction to "veto" defendant's parole, but rather that portion of sentence would be stricken, in light of age of proceeding, nature of underlying sentence, and subsequent repeal of statute upon which trial judge had relied. F.S.1985, § 947.16(4)(d).

Maria Brea Lipinski and John H. Lipinski, Miami, for appellant.

Robert A. Butterworth, Asst. Atty. Gen. and Julie S. Thornton and Roberta G. Mandel, Asst. Attys. Gen., for appellee.

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

SCHWARTZ, Chief Judge.

Rejecting the appellant's sole claim of error in his conviction of first degree murder and related crimes, we conclude that

3. Appellees rely in part on *Evans v. Roth*, 168 So.2d 546 (Fla. 3d DCA 1964), *cert. denied*, 174 So.2d 32 (Fla.1965). *Evans* involved, in part, a racially prejudicial statement made by a member of the venire who was excused for cause. That statement was held not to constitute a basis for granting a new trial. *Evans* also referred to "remarks made in the jury room," *id.* at 546, but the remarks are not set forth in the opinion. We do not read *Evans* to hold that remarks made by a juror can never be a basis for granting a new trial, but only that on the basis of the record there presented, the trial court did not abuse its discretion in denying relief.