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IN THE SUPREME COURT OF FLORIDA

DERRICK A. POWELL AND
EUGENIA POWELL,

Petitioners,

vs.

ALLSTATE INSURANCE
COMPANY, A FOREIGN CORP.,

Respondent.

_____/

CASE NO.: 83,625

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

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

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

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PRELIMINARY STATEMENT

DERRICK A. POWELL and EUGENIA POWELL, Plaintiffs at the trial level and Appellants at the District Court, shall be referred herein as "Petitioners."

ALLSTATE INSURANCE COMPANY, Defendant at the trial level and Appellee at the District Court, shall be referred herein as "Respondent."

References to the Record on Appeal shall be abbreviated by the Letter "R" and followed by the applicable page number. The numbering system used by the Fifth District Court of Appeal is readopted here. Any reference to documents generated on or after August 11, 1992, shall be referenced by the letter "I" and followed by the page number indicated on the "INDEX" as filed in this Supreme Court of the State of Florida.

STATEMENT OF THE CASE AND FACTS

Petitioners restate and reallege the Statement of the Case and Facts as outlined in pages 1 through 3 in Petitioners' Initial Brief.

SUMMARY OF ARGUMENT

Petitioners restate and reallege their previous Summary of Argument as outlined in pages 4 through 6 in Petitioners' Initial Brief.

ARGUMENT

I

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

Petitioners herein seek a new trial based on "jury misconduct." Misconduct of a jury has long been recognized as sufficient grounds for the granting of a new trial. As stated in Maler v. Baptist Hospital of Miami, Inc., 559 So.2d 1157 (Fla. 3rd DCA 1989) (hereinafter referred to as Maler I) and affirmed by this Honorable Court:

> "In order to constitute juror misconduct and, therefore, a matter extrinsic to the verdict sufficient to set aside the verdict or for a post trial jury inquiry, Florida and other courts have consistently held that some objective act must have been committed by or in the presence of the jury or a juror 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, ... or where: (a) a juror claims personal knowledge of the case tried and conveys this knowledge to the jury, ... (b) a juror lies about a material matter during jury selection, ...; **(c) a juror makes vile racial, religious, or ethnic slurs against a party or witness during trial or jury deliberations**, ...; or (d) a juror, inter alia, goes to scene of the property involved in the case and

> reports his observations to the other jurors." (emphasis added)

This court in Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97 (Fla. 1991) (hereinafter referred to as Maler II) adopts as persuasive the opinions expressed by Judge Hubbart of the Third District Court of Appeal in Maler I. Respondent in their Answer Brief has wholly and completely failed to distinguish the above-cited language from Maler I. Since "ethnic slurs" were not the precise subject of concern in Maler II, this court did not readdress that portion of Maler I which so specifically addresses the matter of, "vile racial, religious or ethnic slurs against a party or witness." However, Maler I specifically cites to United States v. Heller, 785 F.2d 1524 (11th Cir. 1986) as authoritative and Respondent has failed to distinguish Heller as well.

Petitioners herein are simply requesting that this court follow the tenets of Maler I as specifically discussed by Judge Hubbart in the original opinion and later reaffirmed by this Honorable Court's opinion in Maler II.

As so eloquently stated by Amicus for the American Civil Liberties Union Foundation of Florida, Inc. at page 2 of their Initial Brief,

> "The Fifth District Majority is wholly mistaken in its understanding of Florida law. The Fifth District apparently overlooked the language of the Third District Court of Appeal's Opinion in Maler v. Baptist Hospital, 559 So.2d at 1162, which twice expressly holds that if a juror makes vile racial, religious, or ethnic slurs against a party or witness during trial or jury deliberations, he has engaged in precisely the type of

objective act which compromised the integrity of the fact finding process thereby necessitating a new trial."

Respondent fails, as did the Fifth District below, to carefully analyze Maler I as written by the Third District Court of Appeal and affirmed in its entirety by this Honorable Supreme Court. Respondent has wholly failed to distinguish Maler I language which so expressly and poignantly addresses what constitutes a sufficient "overt act" allowing for a new trial and/or jury interview.

Respondent would suggest with their Answer Brief that a Motion For New Trial is directed to the sound, broad discretion of the trial judge and his ruling thereon should not be disturbed absent a clear showing of abuse. Respondent cites for authority Keith v. Russell T. Bundy and Associates, Inc., 495 So.2d 1223 (Fla. 5th DCA 1986). Keith stands for the proposition that it is the duty of the trial court to grant a Motion For New Trial when the jury has been influenced by considerations outside the record. Petitioners agree. Respondent fails to recognize in their Answer Brief that the broad discretion vested in the trial courts in ruling upon motions for a new trial is not an unlimited discretion. Holland v. Watson, 215 So.2d 498 (Fla. 2nd DCA 1968). Where a clear abuse of discretion is demonstrated, an appellate court has the power to reverse and grant the requested new trial. Giller v. McIntosh, 309 So.2d 218 (Fla. 3rd DCA 1975).

Respondent erroneously asserts that the trial judge in this case should be excused for failure to grant a new trial based on

the "harmless error doctrine." Respondent cites to the case of State v. Hamilton, 574 So.2d 124 (Fla. 1991) for the proposition that no new trial should be granted Petitioners even if jury misconduct did occur because said misconduct did not "affect" the verdict. Respondent therefore appears unwilling to consider the statements of Juror Dowding (the only juror Petitioners were allowed to interview) who on multiple occasions indicated that one or more of the remaining jurors were prejudiced and biased and that as a consequence of that prejudice and bias reduced Petitioners' damages on the issue of "comparative negligence" and that in general the overall verdict was influenced by race. (R. 817-818; 847).

In Hamilton, cited favorably by Respondent for the proposition that the "harmless error doctrine" should apply herein, the conclusion of the court was that the unauthorized reading material in the jury room would not likely have influenced the jury, particularly in light of the fact that the reading material had nothing to do with the case being considered. Petitioners respectfully suggest to this court that this is a far cry from the effect of the jury misconduct exhibited in this case and that indeed, we have absolute record evidence that the jury misconduct herein did adversely affect the Petitioners' verdict and by definition therefore could not be considered "harmless error."

ARGUMENT

II

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

Petitioners seek, in the alternative, a jury interview. Maler II very simply stands for the proposition that jury discussions representative of subjective matters which inhere in the verdict will not be the subject of interrogation. Conversely, Maler II makes it clear that extrinsic "overt acts" committed by the jury that were improper shall serve as an appropriate area of inquiry. Petitioners herein have been denied their right to inquire in contradiction to Maler II. This court need not determine whether "actual prejudice" has occurred but instead need only determine that the objective overt acts "actually occurred." Snook v. Firestone Tire and Rubber Company, 485 So.2d 496 (Fla. 5th DCA 1986). Maler I has specifically identified vile racial slurs of the type occurring herein as sufficient "overt acts" to justify a jury interview and ultimately a new trial.

Respondent erroneously states in their Answer Brief that if this court were to affirm Sanchez v. International Park Condominium Association, Inc., 563 So.2d 197 (Fla. 3rd DCA 1990) and overrule Powell v. Allstate Insurance Company, 19 FLW D735 (5th DCA 4/8/94), "jurors would be harassed by the defeated party in an effort to

secure from them evidence of fact which might establish misconduct sufficient to set aside a verdict." First of all, Respondent fails to recognize that it was not the defeated "party" herein that initially complained of jury misconduct. Instead, it is an aggrieved jury participant who initially brought to light the egregious activities of fellow jurors and informed all concerned of the prejudicial effects of their deliberations. Respondent's concerns that future jurors may be subject to harassment is ill-placed particularly in light of the fact that attorneys and the parties they represent would not normally know of such activity unless brought to their attention by an aggrieved juror. As stated in Trawick's, Florida Practice and Procedure (1993 Edition), "The danger caused by insulating jurors from responsibility for their acts is more serious to a Republic than the avoidance of embarrassment to them or the possible influence on future jury service." As stated by Amicus, American Civil Liberties Union Foundation of Florida, Inc. at page 3 of their Initial Brief,

> "The public policy supporting Evidence Code restrictions on inquiries which can be made of jurors cannot override the basic constitutional due process and equal protection rights to a court system free of racial discrimination. ... No one wants jury finality at the price of prejudice and the abandonment of due process and equal protection."

Respondent states in their Answer Brief that there is, "No corresponding constitutional right to trial by jury in a civil case" and thereby attempts to distinguish United States v. Heller, 785 F.2d 1524 (11th Cir. 1986) (a criminal case) and Sanchez.

Unfortunately, what Respondent fails to recognize is that while there may not be a constitutional right to trial by jury in a civil case, there is a constitutional right in the United States and in Florida to a "fair, unbiased and impartial jury." Article I, Section 22 of the Florida Constitution states, "The right of trial by jury shall be secure to all and remain inviolate." "Inviolate" means, "free from substantial impairment." Black's Law Dictionary (5th Ed).

In Loftin v. Conner, 45 So.2d 756 (Fla. 1950), the Supreme Court of Florida stated:

> "It is quite true that when a juror conducts himself in the trial of a cause in such a manner as to create a doubt as to his fairness or impartiality, any verdict in which he may participate will have hanging over it a cloud of suspicion and its integrity may otherwise be called into question. The law in fairminded men and those engaged in the administration of justice frown on the misconduct of jurors who for one reason or another fail to discharge as honorable men the solemn duties and responsibilities by law cast upon jurors. The writer fully agrees with counsel for appellants to the effect that they were entitled to a jury of six men without the slightest taint of corruption."

This court in State v. Hamilton, 574 So.2d 124 (Fla. 1991) reminds us that jurors are entitled to a "fair trial" guaranteed by the State and Federal Constitutions. U.S. Constitution Amendment 6; Article I, Section 16, Florida Constitution.

Petitioners herein urge this court to consider the fact that what Petitioners are simply seeking is a "fair" trial conducted by

six jurors unincumbered with prejudice and corruption of the sort displayed in the trial below.

Respondent erroneously states that the trial court's ruling in the case at bar is consistent with the law in the State of Florida which prohibits jury interviews if there is no reasonable basis to believe there were grounds for a legal challenge to the verdict. For this proposition at pages 20 and 21 of their Answer Brief, Respondent cites to several cases: Schofield v. Carnival Cruise Lines, Inc., 461 So.2d 152 (1984); Albertsons, Inc. v. Johnson, 442 So.2d 371 (Fla. 2nd DCA 1983); Cummings v. Sine, 404 So.2d 142 (Fla. 2nd DCA 1981); Sentinel Star Company v. Edwards, 387 So.2d 367 (Fla. 5th DCA 1980).

Petitioners respectfully suggest that these cases are misplaced. In Schofield, it was determined that no jury interview or new trial should be granted when it was determined that a juror did conceal a material fact during voir dire examination. The information not disclosed concerned the juror's professional relationship with one of the witnesses called to testify. Petitioners herein respectfully suggest to this court that Schofield, and the circumstances surrounding that court's denial of the requested new trial, have little or nothing to do with the facts and circumstances surrounding Petitioners' request for a new trial and/or jury interview herein.

Albertsons v. Johnson, 442 So.2d 371 (Fla. 2nd DCA 1983) cited favorably by Respondent represents a case in which a jury interview was actually allowed by the Second District Court of Appeal and it

was determined by that court that the lower tribunal erred in denying petitioner's requested jury interview. In Albertsons, the court in fact displayed a very liberal interpretation of the case law in granting the requested jury interview and confessed that, "The information alleged by defendants, while not conclusively establishing a quotient verdict, did at least raise a basis for an inquiry. Therefore, the court erred in denying the motion." In Albertsons, it would appear that the evidence need not even be "conclusive" before a jury interview will be allowed.

ARGUMENT

III

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

Respondent on several occasions state their concern that an affirmance of Sanchez and a reversal of Powell would result in jurors constantly being harassed and questioned by unhappy litigants. Respondent suggests that to allow for a jury interview in the circumstances as presented by Powell would further be in derogation of Federal Rule of Evidence 606(b) and Section 90.607 (2) (b), Florida Statutes. Respondent fails to cite to a single case out of the Third District Court of Appeal where Sanchez and Maler I were decided which would illustrate this concern. Where is the avalanche of cases suggesting abuse by the aggrieved litigants who feel they were unfairly treated in trial by bigoted jurors?

Petitioners respectfully urge this court to once again consider that in Powell, it as an aggrieved "juror" who complained initially and not Petitioners. As a practical matter, even if we assume such horrific deliberations occur with regularity as we see in the case below, unfortunately, it is quite unlikely that many jurors will have the courage exhibited by Juror Dowding to come forward with such information. Regrettably, litigants like the Petitioners herein, must blindly assume that the jurors who have decided their case have done so fairly and without influence by racism. On those extremely rare occasions when a juror has the

confidence and courage to come forward and complain, Sanchez would command a new trial, as would Maler I and II.

Even Federal Rule of Evidence 606(b) as cited favorably by the Respondent declares that, "A juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon the juror." (emphasis added) Putting aside the obvious concerns that Petitioners have about "nigger jokes" and comparisons to "chimpanzees," at a minimum we know in the case below that "extraneous prejudicial information" was brought to bear on the jury's deliberations when one of the jurors began making statistical comparisons between "blacks" and "whites" without any evidentiary basis whatsoever and concluded that blacks do not work as well as whites. (R. 811-812). How can any court conclude that this evidence is not overt and extrinsic when perhaps the most substantial claim advanced by Petitioners was that of a "lost wage and/or lost wage earning capacity" claim?

CONCLUSION

Respondent has failed to sufficiently distinguish Maler I and II, Sanchez and Heller. The Fifth District Court of Appeal in Powell has failed to recognize that Maler I has specifically carved out evidence of "vile racial slurs" as an example of overt extrinsic acts justifying a new trial.

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

Respectfully submitted,

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ROBERT C. GRAY

CERTIFICATE OF SERVICE

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

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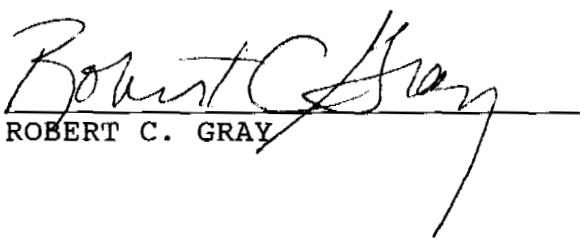

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