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IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,881

KAREN D'AMARIO, individually, and on
behalf of CLIFFORD HARRIS, a minor,
and CLIFFORD HARRIS, individually,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

_______________________________________/

PETITIONERS' BRIEF ON JURISDICTION

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CERTIFICATE OF TYPE STYLE

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I. STATEMENT OF THE CASE AND FACTS

Clifford Harris was a passenger in a 1988 Ford Escort driven by an intoxicated underage driver. The drunk driver lost control of the car and collided with a tree. The car was purportedly designed to interrupt electrical power to the fuel pump in the event of such a collision, and thereby prevent post-collision fuel-fed fires. Notwithstanding the design, an enormous fire followed the collision. Trapped in the fire, Mr. Harris was badly burned and lost three of his limbs. He brought a "crashworthiness" action against Ford Motor Company, alleging that the design of the electrical system was defective and that a problem-plagued relay in the system failed to operate, and that these defects resulted in the fire which caused his devastating injuries. The drunk driver was not a party to the action.

The case was tried to a jury, which returned a verdict for Ford. The trial court thereafter granted Mr. Harris' motion for new trial on two grounds. It concluded that it had erred in admitting evidence of the driver's intoxication in support of Ford's "*Fabre* defense,'' which sought to apportion liability for the product defect with the conduct of the drunk driver in colliding with the tree. And it concluded that two of the jurors had engaged in misconduct by providing false answers to relevant and material questions on their juror questionnaires. The District Court of Appeal, Second District, rejected both of these grounds. It held that, on the facts in the case, Ford was entitled to apportion its liability with the drunk driver. It also concluded that the jurors' answers to the questionnaires did not justify the trial court's determination that a new trial was warranted. It therefore reversed the new trial

order, and ordered entry of a judgment in Ford's favor. The details are contained in the decision sought to be reviewed, to which the Court is referred?

11. ISSUES PRESENTED ON JURISDICTION

The issues presented on jurisdiction are stated in the Table of Contents.

III. SUMMARY OF THE ARGUMENT

Both of the holdings in the district court's decision conflict with other decisions on the same points of law. The district court also failed to apply the appropriate standard of review, and its decision conflicts with other decisions on that point of law. The Court therefore has jurisdiction to review the decision, and we respectfully urge it to do so.

IV, ARGUMENT

A. THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *NASH v. GENERAL MOTORS* CURP., 24 Fla. L. Weekly D1031 (Fla. 3d DCA Apr. 28,1999).

This was a "crashworthiness" case in which a drunk driver caused a collision and a passenger suffered an "enhanced injury" because of a defect in the automobile.

[1/] The district court's opinion contains a highly sanitized version of the facts underlying the juror misconduct issue, as well as a "fact" supplied only in an after-the-fact, unauthenticated, hearsay document that was not even before the trial court at the time it entered the new trial order. Although this was unfair to both Mr. Harris and the trial court, we recognize that, for purposes of demonstrating this Court's jurisdiction at least (and notwithstanding that the ultimate aim of justice is poorly served in the process), we are stuck with the district court's version of the facts. ***See*** *Paddock* **v.** *Chacko,* 553 So.2d 168 (Fla. 1989). **If** we are given an opportunity to brief the case on the merits, we will supply the Court with the actual facts on which the trial court bottomed its new trial order.

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Was an "apportionment defense" available to Ford on those facts? The district court held that it was:

> Clifford Harris was a passenger in a 1988 Ford Escort LX driven by his friend, Stanley Livernois. Livernois was driving without the adult supervision his drivers' license required. He was also speeding and intoxicated when the car collided with a tree. A witness to the crash circled the car twice and noticed a fire in the engine area. Some minutes later, the fire spread and an explosion occurred, engulfing the car in flames. Harris was severely injured, losing three limbs and suffering burns to much of his body. On the facts in this crash-worthiness case, the appellant [Ford] properly raised an apportionment defense. See Kidron. Inc. v. Carmona, 665 So.2d 289 (Fla. 3d DCA 1995).

(Slip opinion, **p.** 2).[2]

The Third District was presented with the identical question in *Nash* **v.** *General Motors Corp.*, ***supra,*** decided one month later. In that case, the driver of an automobile died of head injuries suffered in an accident caused by a drunk driver. Her survivors brought a "crashworthiness" action against General Motors, contending that her death was an "enhanced injury" caused by a design defect in the automobile's seat belt system which permitted her head to strike the door post. Was an "apportionment defense" available to General Motors on those facts? The district court held

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[2] ***Kidron,*** *Inc.* **v.** *Carmona,* ***supra,*** involved a ***sober*** driver who *negligently* drove his automobile into the back of a stalled truck. His widow contended that the truck was "uncrashworthy" because it was not equipped with an "under-ride guard." The district court held that the defendant's "comparative negligence" defense would lie on those facts. There was no issue in the case concerning intoxication or any other type of intentional misconduct.

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that it was not:

> . . . [T]he estate argues that the evidence of the other driver's intoxication was too prejudicial and irrelevant as to General Motor's [sic] negligence in designing a defective seatbelt. That issue is resolved by the supreme court's recent decision in *Stellas v. Alamo Rent-A-Car, Inc.*, 702 So.2d 232 (Fla. 1997) . . . . In *Stellas,* the court held that it was error to permit a nonparty intentional tortfeasor's name to appear on the verdict form so as to permit the jury to apportion fault between the nonparty and the negligent tortfeasor. . . .
>
> . . . [T]he act of causing injury from driving a motor vehicle on the public roadways while intoxicated is an intentional tort. ***See Ingram v.*** *Pettit*, 340 So.2d **922** (Fla. 1976)(holding that driving after voluntarily drinking to the point of intoxication is an intentional act creating known risks to the public thereby warranting punitive damages for injuries resulting from such act). . . . Here, it was error for the drunk driver, an intentional tortfeasor, to appear on the same verdict form as General Motors, the negligent tortfeasor in a products liability action.

24 Fla. L. Weekly at D1032 (footnotes omitted).

Most respectfully, the two decisions cannot be reconciled in any way. In the Second District, evidence of the intoxication of a driver is admissible in a "crashworthiness" case; the drunk driver can be placed on the verdict form; and the defendant is permitted to apportion its liability with the drunk driver. In the Third District, evidence of the intoxication of a driver is inadmissible in a "crashworthiness" case; the drunk driver cannot be placed on the verdict form; and the defendant is not permitted to apportion its liability with the drunk driver. This is precisely the type of decisional conflict for which this Court's discretionary review jurisdiction

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exists, and we respectfully urge it to grant review to resolve the conflict.[3/]

B. THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *De La ROSA v. ZEQUEIRA,* 659 So.2d 239 (Fla. 1995); *WILCOX v. DULCOM*, 690 So.2d 1365 (Fla. 3d DCA 1997); AND SIMILAR DECISIONS,

The district court dismissed Juror Leslie's undeniable misrepresentation concerning her husband's prior lawsuit as "not material to the cause being tried" because it occurred before they were married and was remote in time (slip opinion, p. 4). It dismissed Juror Leslie's failure to disclose that her family business owned a fleet of 25 Ford vehicles as "not material to the issues in the case'' (*id.*, p. 5). It dismissed Juror Warwick's conceded misrepresentation concerning her husband's prior lawsuit as "not material" because he "was a plaintiff in a 1985 lawsuit where he sued for $1,000 over a real estate transaction" (*id.*). And it dismissed Juror Warwick's failure to disclose her husband's prior workers' compensation claims as "not material" because they were "remote in time, small in amounts, and asserted by one seeking monies, to-wit: one customarily favorable to a plaintiff' (*id.*, pp. 5-6).[4/]

[3/] At the time this brief was written, *Nash* was pending on a motion for rehearing and therefore not yet final. To protect against the remote possibility that the *Nash* court might change its mind on rehearing, we assert alternatively that the district court's decision also conflicts with *Stellas* v. *Alamo Rent-A-Car, Inc.*, 702 So.2d 232 (Fla. 1997), for the reasons expressed in the *Nash* court's initial opinion.

[4/] The district court also twice observed that plaintiff's counsel failed to inquire about prior litigation history when other potential jurors acknowledged prior litigation in their questionnaires, suggesting that the plaintiffs' post-trial complaints about the materiality of the misrepresentations were therefore either insincere or waived. No authority was cited for this proposition, and there is none -- and there is real mischief

The district court's conclusions, we respectfully submit, are essentially a reprise of Judge Schwartz's opinion for the majority in *Zequeira v. De La Rosa, 627* So.2d 531 (Fla. 3d **DCA** 1993), *quashed,* 659 So.2d 239 (Fla. 1995), in which he declared a juror's misrepresentations concerning seven prior lawsuits -- six of which were clearly unrelated to the issues in suit; one of which involved a similar personal injury suit in which the juror (who voted against the plaintiff) had been a plaintiff; and some of which were five, seven, 14 and 15 years in the past -- to be immaterial, and therefore insufficient to support a new trial order.

The late Judge Baskin vigorously dissented from this position, however, concluding instead that the juror's misrepresentation of his prior litigation history was material as a matter of law -- whether the prior litigation was related to the present litigation or not; whether the juror was similarly situated to the complaining litigant in the related suit or not; and however remote in time the prior litigation might have

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in the suggestion. The time allotted for jury voir dire is limited, and repetition by counsel is strictly prohibited. Because defense counsel *always* inquire about prior litigation history, plaintiffs' counsel almost always leave that inquiry to defense counsel and spend their limited time on other matters.

If the district court's decision is to be law in this state, then plaintiffs' counsel are no longer free to leave *any* subject to defense counsel in voir dire -- not even those questions that are *always* asked by defense counsel. Neither will defense counsel dare to forego inquiry on any subject previously addressed by plaintiffs' counsel. And the unintended effect of the district court's decision will be that both sides must ask exactly the same questions in their voir dire in order to avoid a waiver of the type the district court has endorsed in this case. **As** a result, and as a matter of necessity, voir dire will become highly extended and unduly repetitive, and we doubt that the trial judges in this state will stand for that. While the district court's observation does not create a conflict supporting this Court's jurisdiction, it should provide ample motivation to accept jurisdiction if conflict otherwise exists.

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been. Judge Baskin's dissent is now undeniably the law in Florida, because this Court said so in *De La Rosa v. Zequeria,* 659 So.2d 239, 242 (Fla. 1995): "Judge Baskin's dissenting opinion contains a complete yet concise analysis of all the issues involved herein. Rather than repeat that analysis, we approve and adopt her opinion as our own." As a result, Judge Schwartz's majority opinion was quashed.

In our judgment, the district court's opinion in the instant case echoes Judge Schwartz's analysis of the issue in numerous respects; it is inconsistent with Judge Baskin's analysis of the issues; and it is therefore in conflict with this Court's ultimate approval of Judge Baskin's dissent. And because the Third District has accepted the lesson of this Court's quashal of its decision in *De La Rosa,* the decision sought to be reviewed here conflicts with at least two of the Third District's post-*De La Rosa* decisions. For example, in *Wilcox v. Dulcom*, 690 So.2d 1365, 1366 (Fla. 3d DCA 1997), the Third District wrote:

> The litigation history of a potential juror is relevant and material to jury service, even if that history involves a different type of case. "A person involved in prior litigation may sympathize with similarly situated litigants who develop a bias against legal proceedings in general." *De La Rosa,* 659 So.2d at 241 (Fla. 1995) (quoting *Zequeira v. De La Rosa, 627* So.2d 531,533 (Fla. 3d **DCA** 1993). (Baskin, J., dissenting). Accordingly, the materiality prong of the test was satisfied in the instant [personal injury] case when the juror failed to reveal the fact that she had been involved in a collections dispute and a party in a domestic action.

In addition, *see American Medical Systems, Inc. v. Hoeffer*, **723** So.2d 852 (Fla. 3d **DCA** 1998) (in a products liability action, juror's failure to disclose her prior

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involvement in a debt-collection action was a material concealment supporting trial court's grant of a new trial). These are the types of decisional conflict for which this Court's discretionary review jurisdiction exists, and we respectfully urge it to grant review to resolve the conflicts.

C. THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH A NUMBER OF DECISIONS HOLDING THAT ORDERS GRANTING NEW TRIALS FOR JUROR MISCONDUCT DURING VOIR DIRE ARE REVIEWABLE ON APPEAL ONLY FOR AN "ABUSE OF DISCRETION."

Although the order before the district court was a new trial order, the word "discretion" appears nowhere in the district court's opinion reversing the order. From all that appears in the opinion, the district court made its own *de novo* determination of whether the facts warranted a new trial. This was inappropriate. The appropriate standard of review of an order granting a new trial for juror misconduct during voir dire is "abuse of discretion," not legal error. See *Zequeira v. De La Rosa,* 627 So.2d 531,533 (Fla. 3d DCA 1993)("I am unable to agree with the majority's conclusion that the trial court abused its broad discretion in granting the motion for new trial"; J. Baskin, dissenting), *quashed,* 659 So.2d 239,242 (Fla. 1995) ("we approve and adopt [Judge Baskin's] opinion as our own"). *See Castenholz v. Bergmann,* 696 So.2d 954,955 (Fla. 4th DCA 1997)("Our review of the record does not disclose the 'clear showing of an abuse of discretion,' . . . necessary to reverse the trial court's

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decision to grant a new trial [forjuror misconduct]"); *Owen v. Bay Memorial Medical Center,* 443 So.2d 128, 130 (Fla. 1st **DCA** 1984) ("We affirm the trial court's granting of a new trial [for juror misconduct] by recognizing the trial judge's discretion to order **a** new trial and the well documented position that the grant of a new trial should not be disturbed on appeal absent a clear showing of abuse of discretion"), *review denied,* 450 So.2d 487 (Fla. 1984).

In the past, this Court has not hesitated to find conflict and grant review where, as here, a district court has reversed a new trial order without acknowledging the appropriate standard of review. *Baptist Memorial Hospital, Inc.* v. *Bell,* 384 So.2d 145, 146 (Fla. 1980), is exemplary:

> , . . In reversing the trial court, the district court did not expressly find that the trial court abused its discretion.
>
> In entering its order granting a new trial, we find that the trial court properly applied the dictates of this Court , . . We further find that the district court failed to properly apply the broad discretion rule granted to trial courts as **expressed** in our decisions . . . ,
>
> . . . .
>
> In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. . . .
>
> For the reasons expressed, we quash the decision of the district court of appeal and direct a reinstatement of the order granting a new trial.

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This Court did the same thing in *Ford Motor* Co. *v. Kikis*, 401 So.2d 1341, 1342-43 (Fla. 1981):

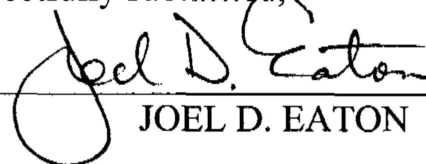
> . . . We have stated and restated the appropriate standard for district courts on review of a trial court's [order] granting a new trial. The test is whether the trial court abused its "broad discretion." If reasonable men could differ as to the propriety of the action taken by the trial court, then there is no abuse of discretion. . . .
>
> The district court's apparent failure to apply this standard requires that we quash the decision. . . .

And this Court has reiterated over and over again in numerous contexts that new tria orders are reviewable on appeal, not for legal error, but only for an "abuse of discretion.'' See, e. g., *Allstate Ins. Co. v. Manasse*, *707* So.2d 1110 (Fla. 1998); *E.R. Squibb & Sons, Inc. v. Farnes,* 697 So.2d 825 (Fla. 1997); *Smith v. Brown*, *525* So.2d 868 (Fla. 1988); *State v. Spaziano,* **692** So.2d 174 (Fla. 1977). The district court plainly failed to apply the appropriate standard of review in the instant case, and we respectfully urge the Court to grant review to resolve this additional conflict.

V. CONCLUSION

The district court's decision is in express and direct conflict with a number of decisions on three different points of law. The Court therefore has jurisdiction to review it, and we respectfully urge it to do so.

Respectfully submitted,

By: 

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Appendix

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

FORD MOTOR COMPANY,)
)
Appellant,)
)
v.) CASE NO. 97-02429 & **97-02540**
) **CONSOLIDATED**
KAREN D'AMARIO, individually,)
and on behalf of CLIFFORD HARRIS,)
a minor, and CLIFFORD HARRIS,)
individually,)
)
Appellees.)
)

Opinion filed March 31, 1999.

Appeal from a final and
nonfinal order of the Circuit
Court for Pinellas County:
Howard P. Rives, (Senior) Judge.

Wendy F. Lumish and Jeffrey A.
Cohen of Carlton, Fields, Ward,
Emmanuel, Smith & Cutler, P.A.,
Miami, and Ronald E. Cabaniss,
of Cabaniss, McDonald, Smith
& Wiggins, P.A., Orlando,
for Appellant.

Joel D. Eaton of Podhurst, Orseck,
Josefsberg, Eaton, Meadow, Olin
& Perwin, P.A., Miami, and Florin,
Roebig, Walker, Huddlestun, Rogers
& Brown, P.A., Clearwater, and
Wagner, Vaughan & McLaughlin,
P.A., Tampa; for Appellees.

WHATLEY, Acting Chief Judge.

Ford Motor Company appeals an order granting Karen D'Amario, individually, and on behalf of Clifford Harris, a minor, and Clifford Harris, individually (appellees), a new trial following a defense verdict. We reverse.

Clifford Harris was a passenger in a 1988 Ford Escort LX driven by his fiend, Stanley Livernois. Livernois was driving without the adult supervision his drivers' license required. He was also speeding and intoxicated when the car collided with a tree. A witness to the crash circled the car twice and noticed a fire in the engine area. Some minutes later, the fire spread and an explosion occurred, engulfing the car in flames. Harris was severely injured, losing three limbs and suffering burns to much of his body. On the facts in this crash-worthiness case, the appellant properly raised an apportionment defense. See Kidron, Inc. v. Carmona, 665 So. 2d 289 (Fla. 3d DCA 1995).

The appellees' theory of liability was that a relay switch failed, thus preventing it from disrupting the flow of power to the fuel pump. The appellees presented experts who testified that gasoline continued to be pumped after the impact and caused the fire. The appellant's experts countered that the relay switch and fuel pump properly worked and that the crash caused an oil pan to burst, which resulted in an oil-based fire. The appellant pointed to the slow spreading nature of the fire in support of its theory.

After the jury rendered a verdict in favor of the appellant, the appellees hired an investigator to do a background check on the jurors solely based on the

adverse verdict.[1] This investigation was limited to a public records search. We would note that our courts have approved this type of post-verdict investigation without requiring a reasonable suspicion of juror misconduct. See De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995). However, an investigation of this type is limited to matters that are not an invasion of a juror's private affairs. Zeaueira v. De La Rosa, 627 So. 2d 531, 534 (Fla. 3d DCA 1993) (Baskin, J., dissenting), overruled, 659 So. 2d 239 (approving and adopting Judge Baskin's dissent). Anything beyond a public records ssarch would appear to be invasive of a juror's private affairs and would invade the sanctity and finality essential to a jury verdict. In State, Department of Transportation v. Reirat, 540 So. 2d 911, 913 (Fla. 2d DCA 1989), this court stated: "There are strong public policies supporting the secrecy and sanctity of the jury's verdict. The jurors' right of privacy should not be lightly disregarded."

In the present case, the appellees asserted that their investigation revealed several alleged instances of juror misconduct. All allegations centered on jurors Glennedda Leslie and Christine Warwick and their alleged failure to disclose information in the juror questionnaires and during voir dire.

In De La Rosa, 659 So. 2d 239, the Florida Supreme Court set forth the factors that must be considered in determining whether to grant a new trial based on the nondisclosure of a juror during voir dire:

> In determining whether a juror's nondisclosure of information during voir dire warrants a new

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[1] The appellees' trial counsel asserted in a post-verdict affidavit that unnamed persons told him they had heard laughter from the room in which the jurors were deliberating. This, without more, is not evidence of juror misconduct.

> trial, courts have generally utilized a three-part test. First, the complaining patty must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

659 So. 2d at 241 (citations omitted).

As to Juror Leslie, the appellees contend that she failed to disclose prior litigation and that she failed to disclose her employer's use of twenty-five Ford vehicles. We conclude that the failure to disclose this information did not meet the test set forth in De La Rosa. As to the prior litigation claim, the applicable question on the juror questionnaire was, "Have you or any member of your immediate family been a party to any lawsuit?" Leslie answered, "No." Her response was truthful. Her husband had been involved in a lawsuit, but it occurred in 1986 before the Leslies were married. Requiring a potential juror to disclose matters in a juror questionnaire relating to family members before they became family would impose an impractical, if not impossible, standard. In addition, the prior lawsuit was dismissed more than a decade before the trial in this cause. Further, the appellees did not ask a single question on this topic when potential jurors acknowledged prior lawsuits in the questionnaire. Therefore, we conclude that, first, Leslie did not conceal this information and, further, it was not material to the cause being tried.

The appellees also alleged that there was misconduct by Juror Leslie because she failed to disclose that the business for which she worked had a fleet of twenty-five Ford vehicles. Leslie was a vice president of this business. However, she

was asked about vehicles she owned and she admitted that she owned a 1993 Ford Bronco, which she liked. Leslie was also asked, "Do you, yourself, get involved in Fords or anything like that?" She said that she did not. We conclude that Leslie did not conceal any information and that her employer's use of Ford vehicles was not material to the issues in this cause.

The allegation against Juror Warwick was that she failed to disclose a prior lawsuit and three workers' compensation claims of her husband. Warwick's reply to the question on the juror questionnaire of "Have you or any member of your immediate family been a party to any lawsuit?" was not answered correctly when Warwick said, "No."[2] However, the prior lawsuit was not material. Mr. Warwick was a plaintiff in a 1985 lawsuit where he sued for $1,000 over a real estate transaction. Further, we would again note that the appellees failed to ask about litigation history when potential jurors acknowledged prior litigation in the questionnaire.

Regarding the three workers' compensation claims, Mr. Warwick is a firefighter and his workers' compensation claims resulted in the following recoveries: **1986 - $2,527;** 1988 - $1,259; and 1991 - $1,083. Juror Warwick was not required to disclose this information. Mr. Warwick filed three workers' compensation claims, but from the record was not a "party to a lawsuit." Further, these matters are not material

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[2] It is not necessary that a juror intended to mislead counsel for an item of nondisclosure to constitute juror misconduct. See Bernal v. Lipp, 580 So. 2d 315 (Fla. 3d DCA 1991). However, it is still required that the three prong test of concealment, materiality, and nondisclosure be met. See De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995); Young v. State, 720 So. 2d 1101 (Fla. 1st DCA 1998).

as they are remote in time, small in amounts, and asserted by one seeking monies, to-wit: one customarily favorable to a plaintiff.

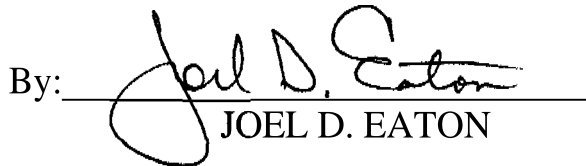
Accordingly, we reverse and remand this cause for entry of an order reinstating the jury verdict. Any matters raised in the appellees' motion for new trial and not specifically addressed in this opinion have been considered and rejected.

Reversed and remanded.

NORTHCUTT and GREEN, JJ., Concur.

VI. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 25th day of June, 1999, to: Wendy F. Lumish, **Esq.,** Carlton, Fields, Ward, Emmanuel, Smith & Cutler, **P.A.,** 4000 NationsBank Tower, 100 **SE** Second **Street,** Miami, FL 33131; and to Ronald E. Cabaniss, **Esq.,** Cabaniss, McDonald, Smith & Wiggins, P.A., One Orlando Centre, Suite 1800, 800 North Magnolia Avenue, P.O. Box 25 13, Orlando, FL 32802-2513.



By:______________________
JOEL D. EATON