IN THE SUPREME COURT OF FLORIDA

CASE NO. 1999-53

SECOND DISTRICT COURT OF APPEAL CASE NO. 97-4845

GEORGE W. GARBUTT,

Petitioner,

vs.

ROSEMARY LaFARNARA,

Respondent.

On Certified Question of Great Public Importance from the Second District Court of Appeal for the State of Florida

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

The District Court of Appeal of Florida, Second District, has certified the following question of great public importance for review in this case:

> **TO PRESERVE ERROR, IS A CONTEMPORANEOUS OBJECTION REQUIRED FOR EACH INSTANCE OF IMPROPER ARGUMENT OR CAN THE ISSUE BE PRESERVED BY A MOTION FOR MISTRIAL BEFORE THE CASE IS SUBMITTED TO THE JURY?**

PRELIMINARY STATEMENT

The Petitioner in this case, George W. Garbutt, was the defendant and appellant below. He will be referred to as "Mr. Garbutt" in this brief. The Respondent, Rosemary LaFarnara, was the plaintiff and appellee below and will be referred to as "Ms. LaFarnara" herein. Citations to the record will be contained in a parenthetical beginning with the letter "R" followed by the volume and page number. Citations to the trial transcript will be referenced by the record volume number, not the transcript volume number, followed by the page number. An appendix, containing certain documents and transcripts referenced in this brief, is filed contemporaneously herewith pursuant to Florida Rule of Appellate Procedure 9.220. References to the appendix will be in a parenthetical containing the word "Appendix" followed by a tab number and a page number. The opinion of the Second District Court of Appeal is contained in Appendix A.

STATEMENT OF JURISDICTION

This Court has discretionary jurisdiction to review certified questions of great public importance pursuant to Article V, §3(b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). The certified question in the instant case concerns the issue of when a party must object to preserve for review improper comments made by opposing counsel during closing argument. The District Courts of Appeal have struggled with this issue for several years, and have developed a split of authority on the issue of when an appellate court may review improper comments without objection. *See, e.g.,* Murphy v. International Robotics Systems, Inc., 710 So.2d 587 (Fla. 4th DCA 1998), rev. granted, 722 So.2d 193 (Fla. 1998); Fravel v. Haughey, 727 So.2d 1033 (Fla. 5th DCA 1999). In fact, the resolution of this conflict is currently pending before this Court in Murphy v. International Robotics Systems, Inc., case no. 92,837. Regardless of how this Court resolves Murphy, the bar of this State will require further guidance as to the proper procedure for preserving error in closing argument. The instant case provides this Court with an opportunity to clarify the issue raised in Murphy by advising practicing attorneys throughout the state as to whether it is necessary to object immediately upon the utterance of an improper comment, or if a party may approach the bench later with a timely motion for mistrial to preserve the error. This case also presents an important policy issue addressed by Judge Blue's concurring opinion

below, namely whether the responsibility for making proper arguments should be placed on the party victimized by improper comments. (Appendix A, p.4). Furthermore, this Court will need to decide whether unscrupulous attorneys should be permitted to engage in unethical conduct without punishment, simply because their opponents moved for a mistrial without making constant objections.

Of course, if this Court accepts jurisdiction on the certified question, it may also review the entire case. Bell v. State, 394 So.2d 979 (Fla. 1981); Lawrence v. Florida East Coast Railway Co., 346 So.2d 1012 (Fla. 1977). Therefore, some of the remaining issues on appeal, which present compelling issues of fundamental fairness, are addressed in this brief as well.[1]

STATEMENT OF THE CASE AND FACTS

This appeal arises from a judgment entered pursuant to a jury verdict in the Circuit Court for Pinellas County, Florida. The judgment was entered against Mr. Garbutt and in favor of Ms. LaFarnara in excess of $1,200,000.00 in compensatory damages plus $500,001.00 in punitive damages. A motion for new trial was filed by Mr. Garbutt, which was denied in a 68-page opinion by Circuit Judge David Demers. (R.46, p.7326, *et seq.*, Appendix B) On appeal to the Second District Court of Appeal, the appellate court affirmed the verdict, but certified a question of great public importance indicating that reversal would be warranted if this Court finds that the issue was preserved for review. In a

[1]Judge Blue characterized the case as "unusual if not bizarre" with "epic" problems. (Appendix A, p.3).

concurring opinion, Judge Blue urges this Court to affirmatively answer the question and reverse the judgment. Upon notice to invoke discretionary jurisdiction, this Court reserved ruling on jurisdiction and directed the parties to file briefs on the merits.

Ms. LaFarnara's claim arises from a two year relationship lasting from March of 1987 through May of 1989, during which she and Mr. Garbutt cohabitated at his home in Treasure Island, Florida. Ms. LaFarnara now claims that Mr. Garbutt physically abused her on numerous occasions during the relationship. She further claims that Mr. Garbutt engaged in a campaign of conduct designed to harass and intimidate her, and as a result she suffered severe emotional distress. Additionally, she claims that Mr. Garbutt uttered defamatory remarks to a number of individuals in the community. Accordingly, her complaint set forth counts for assault and battery, intentional infliction of emotional distress, defamation and a permanent injunction. (R.15, p.2082-88)

There were no third party eyewitnesses to any of the alleged incidents of abuse. The only person who offered any direct evidence was Ms. LaFarnara herself. However, it was established at trial that Ms. LaFarnara had lied under oath on several occasions. She was confronted with deposition transcripts from an auto accident case in 1984 where she admitted to lying, (R.52, p.572-77; R.54, p.765-69, 773-80), and depositions from a 1990 worker's compensation case where she also admitted to lying, (R.54, p.782-85, 792, 813-14, 833-34). She also admitted to failing to tell the truth on the witness stand in this case. (R.50, p.347).

Ultimately, she confessed that "a lot" of her testimony in this trial was not based upon present recollection, but that she was reading from interrogatory answers prepared years earlier. (R.103 p.8260).

The defense presented substantial evidence to rebut Ms. LaFarnara's claims of abuse. For example, witnesses who saw Ms. LaFarnara the day after an allegedly savage attack testified that they noted nothing wrong. (R.70, p.3358-60; R.71, p.3537, 3552-56). Neither did another witness who had dinner with Ms. LaFarnara the evening that Mr. Garbutt allegedly caused her to sustain a concussion. (R.84, p.5310-11).

Ms. LaFarnara claimed that as a result of this alleged abuse, she suffered both physical and psychological injuries. The physical injuries she claimed were a cervical strain and sprain, aggravation of a preexisting degenerative condition in her cervical spine, and post-traumatic-head-injury syndrome, also known as post-concussion syndrome. Her claimed psychological injuries included depression and battered spouse syndrome. (R.15, p.2082-2088).

Despite her claims of severe psychological and physical injury, Ms. LaFarnara admits to having remarried. Her new husband testified that they have gone on lengthy car trips to Ohio and New York, that she puts on ceramic shows, and that she does some of the housework. (R.57, p.1253-56). He also testified that all she does for her pain is take Tylenol and lie down. (R.57, p.1259).

IMPROPER COMMENT ON CLOSING ARGUMENT

Although Mr. Garbutt urged a substantial number points of

error on appeal, the Second District Court has certified a question concerning closing argument. During his argument, Ms. LaFarnara's attorney, Robert Merkle, made numberous improper comments. Mr. Garbutt raised 34 such comments in his Motion for New Trial, fifteen of which were found to be improper by the trial judge. (Appendix B, p.41-50, R.46 p.7367-77). The appellate court found that at least some of the remaining comments were also improper. (Appendix A, p.4-5). Comments by appellee's counsel in closing argument and rebuttal are contained in Appendix D filed contemporaneously herewith.

The first category of objectionable comments were comments which belittled the defense and accused Mr. Garbutt's attorney of lying. Some examples of these comments, all of which are contained in the Appendix, included:

> Now, folks, if a used car salesman tries to sell me a car that doesn't have an engine in it, I am not going to buy a car from that person ever. If I want to go hunting and I buy a hunting dog and that dog won't hunt, I am not going to buy a dog from whoever sold it to me ever. (R.108, p.8977).
>
> Now, so counsel's statement to you that these reports clearly showed degeneration of the upper cervical spine is hogwash. He is selling you a car without an engine. (R.108, p.8979).
>
> So, folks, that dog don't hunt. And let me tell you something. You spent now since one o'clock, almost - it's after six o'clock, the best part of five hours this afternoon listening to Mr. Lewis, and what has he been doing? He wanted to talk about blowing smoke, blowing smoke; he is blowing smoke at you. And if you had the disposition of Mr. Garbutt and there were hamburgers in front of you, you would probably throw them at him. That's what he is doing here in this courtroom. (R.108, p.8981).

At this point, defense counsel objected and brought to the

court's attention that it is improper to belittle the defense with such comments as "blowing smoke." (R.108, p.8984-85). The court did not rule on this objection at this time, and counsel continued:

> But Mr. Lewis is blowing smoke at you, and it is the apotheosis, if you will, the culmination, the fulfillment of what was designed by his client in 1990, his only defense, every single point, every single argument that is made here by Mr. Lewis, takes that seed and causes it to grow into a huge, blossoming weed. And it is the ultimate insult to your intelligence now to suggest, as he has done, that her hospitalization in the middle of this trial is a sham, that Dr. Walker is a liar or Dr. Walker was fooled, that she really didn't have to go into the hospital. (R.108, p.8982).
>
> That represents, seems to me, ladies and gentlemen, another smoking gun to you of the fraudulent nature of the defense in this case. (R.108, p.8983).
>
> Well, ladies and gentlemen, if you believe this cock and bull, pigs fly, pigs fly, and pigs do not fly. They don't. (R.108, p.8984).

At this point, there was an overnight recess in the midst of Ms. LaFarnara's rebuttal argument. The next morning, before counsel had concluded his rebuttal argument, the court sustained the objection to the "blowing smoke" comment. (R.109, p.8894). Immediately thereafter, Mr. Garbutt objected to Ms. LaFarnara's attorney belittling the defense and moved for a mistrial, objecting to ten improper comments. (R.109, p.8997-98).[2] The court denied

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[2]The comments included comparing Mr. Lewis' argument to a used-car salesman attempting to sell a car without an engine; selling a dog that doesn't hunt; to blowing smoke; to insulting the jury's intelligence; to being a fraudulent defense; that the only joke in this case is the defense; there's been a lot of fog thrown at you in this defense; the defense has been carried out to elaborate and expensive extreme; the problem with the defense is that it's so carefully constructed it collapses; it seems the philosophy of the defense is, the greater the imagination, the more likely you're going to buy it. (R.109, p.8998).

the motion for mistrial, but noted that the comments were improper. (R.109, p.9003). Despite this ruling, counsel's argument continued to include comments such as:

> And quite frankly, ladies and gentlemen, if - if defense counsel wants to stand up here, either for his lack of comprehension or his zeal for representing his client - I don't know. I'm not suggesting he's lying, but if he wants to stand up here and tell you, time and time again, that the earth is flat, it doesn't make it flat, and you have a duty to reject that argument. (R.109, p.9031).

Additional comments of this nature, including several made in the punitive damage phase of the trial, are contained in Appendix D due to space limitations.

Appellee's counsel also made numerous comments concerning matters outside the evidence in the case. Those comments are contained in Appendix D, along with comments on Mr. Garbutt's failure to call two witnesses and comments on the veracity of witnesses.

EVIDENCE GENERATED DURING THE TRIAL

A. New Medical Evidence

During a three-day previously scheduled break in the trial, Ms. LaFarnara had new X-rays and MRIs of the cervical spine taken had a brain MRI completed, and consulted with Dr. Afield, a neuropsychologist, for the first time. This evidence was first brought to the attention of the trial court immediately after the break. (R.61, p.1773). As a result, the testimony of two of Ms. LaFarnara's expert witnesses substantially changed. Dr. Wassel, an orthopedist, testified that based upon this new evidence, the

injury to the spine had gotten worse, (R.69, p.3071), and the x-rays showed damage to the upper cervical spine which could only be caused by repeated trauma, (R.69, p.3636-37, 3650-51). Furthermore, he testified that Ms. LaFarnara's future medical costs would be $2,500 per year instead of $500.00 per year as he had originally opined, (R.72, p.3651-52), and that, instead of a permanent impairment of 23% of the body as a whole, she now suffers a permanent impairment of 50% of the body as a whole, (R.72, p.3709, 3662). Additionally, Dr. Witek, a radiologist, testified that the new X-rays indicated that the condition in the neck had gotten worse. (R.69, p.3071).

The court expressed concern about this evidence, and contemplated a mistrial, (R.61, p.1856), but instead ordered that no mention of this evidence could be made until the defense had an opportunity to conduct discovery, (R.62, p.1875). After protestation by Ms. LaFarnara's counsel to mid-trial discovery, however, the court ruled that none of the evidence was admissible. (R.62, p.2011-12). After further protest by Ms. LaFarnara's counsel, the court indicated that it would consider granting a mistrial on its own motion. (R.62, p.2056).

Instead of a mistrial, the court granted the defense a three-day continuance based upon the admission of evidence of certain telephone calls, which will be discussed below. The court directed the parties to attempt to deal with the new medical evidence during that recess as well. (R.63, p.2096, 2100). Instead of using that time to try to remedy the situation, however, Ms. LaFarnara

compounded the problem by submitting to additional testing and produced a whole new battery of brain damage evidence, including "computerized brain mapping." (R.63, p.2113). This evidence was directly contrary to Ms. LaFarnara's own neuropsychological expert, Dr. Sidney Merin, who had testified that there was insufficient evidence to conclude there was any neuropsychological or organic brain injury. (R.76, p.4160). The court then granted Mr. Garbutt's motion in limine to exclude all of this newly-created medical evidence, (R.63, p.2110, 2156).

Despite the court's ruling, counsel for Ms. LaFarnara continued to press the point, arguing that the defense would "open the door" to this evidence by denying that Mr. Garbutt injured Ms. LaFarnara. (R.63, p.2156-69). Once again, the court contemplated a mistrial. (R.63, p.2157). In presenting arguments on this issue, counsel for Mr. Garbutt pointed out that this evidence was voluntarily generated by Ms. LaFarnara during the trial, and was thus distinguishable from that type of evidence which would arise from a sudden medical emergency over which a party has no control. (R.64, p.2245). Counsel for Ms. LaFarnara conceded on numerous occasions that this new evidence was disastrous to the defense position and that no amount of time could cure the prejudicial effect of this evidence. (R.64, p.2192-93, 2199-2204). On the other hand, counsel for Ms. LaFarnara continued to argue strenuously that, even if the defense was prejudiced by the new brain evidence, it could not be prejudiced by the cervical spine films. (R.64, p.2238). Based upon these arguments, the court

ruled that the brain damage evidence and all of Dr. Afield's testimony and test results were inadmissible for any reason, including rebuttal. (R.64, p.2258). However, despite its earlier rulings, the court ruled that it would wait until after the mid-trial deposition of Ms. LaFarnara's orthopedic expert, Dr. Wassel, to determine the admissibility of the cervical spine films. (R.64, p.2258).

After Dr. Wassel's deposition, Mr. Garbutt moved in limine again to exclude the newly-generated spine films and Dr. Wassel's testimony. (R.66, p.2487). Despite the fact that these films were taken during the trial, and that the court had previously excluded them on three occasions, the court denied the motion in limine and allowed the spine films to be used in evidence. (R.66, p.2507).

B. Ms. LaFarnara's Mid-Trial Hospitalization

The day after the Court ruled that Dr. Afield could not testify for any purpose, (R.64, p.2258), and defense counsel argued that going to Dr. Afield was distinct from an emergency hospitalization, (R.64, p.2245), Ms. LaFarnara was excused from court due to alleged illness. (R.67, p.2673). That weekend, it was disclosed that Ms. LaFarnara was hospitalized in a psychiatric ward on an emergency basis. (R.68, p.2476). The court again considered a mistrial but instead granted a three-day continuance in order to evaluate Ms. LaFarnara's condition. (R.68, p.2912, 2920). The defense objected to the continuance, and pointed out to the court that this hospitalization would generate a plethora of surprise evidence which Mr. Garbutt could not possibly meet in the

middle of the trial. (R.68, p.2923-25). At that point, on four separate occasions, the trial court considered whether a mistrial was the only solution. (R.68, p.2923, 2925, 2933, 2938).

On the last day of the three-day recess, the court denied the defendant's motion in limine to exclude all evidence of the hospitalization. (R.69, p.3004). In so ruling, the court applied the "newly discovered evidence" standard which is ordinarily applied when considering motions for new trial after new evidence arises. (R.69, p.3007-10). The court also ruled that the defense was entitled to a psychiatric IME, to be conducted later in the week. (R.69, p.3028). In making further rulings on the hospitalization, the court pointed out that "at this particular point it's pretty much a big mess anyway." (R.70, p.3207).

After deposing Ms. LaFarnara's treating psychiatrist, Dr. Walker, the defense again filed a motion in limine to exclude his testimony. (R.74, p.3801). In arguing that motion, the defense pointed out that after being excused by the court for illness, Ms. LaFarnara in fact went to see Dr. Afield, whose testimony had previously been excluded. (R.74, p.3801). Instead of treating Ms. LaFarnara himself, Dr. Afield asked Dr. Walker, who had never treated or examined Ms. LaFarnara, to admit her to St. Joseph's Hospital under Dr. Walker's name. (R.74, p.3801-02). Dr. Afield then dictated the admission documents and admitted Ms. LaFarnara to the hospital the next day, after which Dr. Walker saw her the following day. (R.74, p.3802). Dr. Walker testified that Ms. LaFarnara was not suicidal or out of touch with reality when he

first saw her, and admitted that if she had presented herself to him, he would not have hospitalized her. (R.74, p.3807-3812).

Despite these facts, the court ruled that Dr. Walker would be allowed to testify, based upon the doctor's testimony that he did feel that the hospitalization was medically necessary. (R.74, p. 3818). After that ruling, counsel for Mr. Garbutt moved for a mistrial contingent upon the court reserving ruling until after the verdict. (R.74, p.3827). The court, however, would not reserve ruling but indicated that it would rule on the motion when made. (R.74, p.3830-32). Therefore, Mr. Garbutt withdrew the motion.[3] (R.74, p.3833). The court agreed that the motion was probably premature at that point because the evidence had not yet actually come before the jury. (R.74, p.3833).

During cross-examination of Dr. Walker, the court ruled that if the defense asked any questions about Dr. Afield, then Ms. LaFarnara could ask questions on re-direct examination going to the issue of brain damage. (R.75, p.4034-47, Appendix E). Under those circumstances, the defense withdrew the questions and was thereby precluded from cross-examining the doctor as to the circumstances surrounding Ms. LaFarnara's referral from Dr. Afield. (R.75, p.4045, 4048).

Ms. LaFarnara was later recalled to the stand to testify as to

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[3]Mr. Garbutt attempted to avoid a mistrial at this time because his insurance company, which had been providing his defense, had obtained a summary judgment in a companion case finding no coverage in the middle of this trial. Therefore, if a mistrial were granted, he would be unable to afford to defend himself on a retrial. (R.68, p.2890, 2994).

new issues which had arisen during the trial, including the hospitalization. (R.102, p.8037). The defense proffered a series of questions pertaining to the hospitalization, going directly to the issue of medical necessity. (R.102, p.8041-53; Appendix F). In response, Ms. LaFarnara testified on the proffer that she did go to Dr. Afield the afternoon of February 28, 1997, and at the time she did not feel that she needed hospitalization, and that the suggestion that she did was a "complete surprise" to her. (R.102, p.8041-42). She further testified that she did not feel suicidal. (R.102, p.8042-43). She also testified that she was reluctant to go into the hospital, and that she did not know she would be admitted under Dr. Walker's name. (R.102, p.8043). In addition, she testified that she heard in court that Dr. Afield had indicated she had brain damage, and that hearing her attorney discuss that the X-rays showed brain damage contributed to her condition. (R.102, p.8045-48). On cross-examination by her own attorney, however, Ms. LaFarnara testified that Dr. Afield had told her directly that his tests indicated brain damage, which caused her great distress and led to the hospitalization. (R.102, p.8053-56).

The court ruled that there was no way to do this proffered examination without allowing Ms. LaFarnara to testify as to her knowledge concerning Dr. Afield's opinion as to brain damage. (R. 102, p.8060). Even if the questions were limited, the court warned counsel that Ms. LaFarnara could give any testimony she wanted in response to those questions, including what Dr. Afield told her about brain damage. (R.102, p.8065-66). Based on that warning,

the defense declined to ask the questions, and moved for a mistrial, or for a continuance in the alternative, both of which were summarily denied. (R.102, p.8066).

C. Evidence of Telephone Calls

In addition to the medical testimony discussed above, the defense was also surprised by the admission of evidence of harassing telephone calls allegedly made by Mr. Garbutt. The recordings of the phone calls played to the jury consisted of identical pre-recorded "canned" laughter, with no identifiable voice or spoken words. (R.63, p.2068). Ms. LaFarnara also claimed that several hang-ups recorded on her answering machine were harassing phone calls made by Mr. Garbutt. (R.63, p.2068).

Originally, the court excluded this evidence, finding that it was "woefully weak in establishing the identity of the caller." (R.21, p.3272-74). Ten days into the trial, Ms. LaFarnara filed a "Notice of Filing Supplemental Information" which revealed, for the first time, that Ms. LaFarnara claimed to know all along the source phone number of nearly every call as well as the location of those phones. (R.25, p.3877-86). This evidence was not revealed in discovery, (R.29, p.4611-43), nor to the court during the initial hearing on the Motion in Limine, (R.63, p.2076-77). Regardless of that fact, the court determined that the defense had not requested this information in discovery and, based upon the new evidence, found that there was sufficient circumstantial proof for the issue to go to the jury as to whether Mr. Garbutt was making the calls. (R.63, p.2077). The court has since recognized that the defendant

did request the information and that there was, in fact, a discovery violation. (R.46, p.7350). Upon the court's reversal of its order in limine, the defendant moved for, and was granted, a three-day continuance to conduct discovery. (R.63, p.2100). This was the same continuance referenced above with regard to the medical testimony. After the continuance, Mr. Garbutt moved again to exclude the evidence, because much of the evidence as to the phone calls had been destroyed by the phone company due to the passage of time, and had the information been revealed in discovery, substantially more phone records would have existed. (R.63, p.2117-20). That motion was denied, and the evidence was admitted. (R.63, p.2155).

In addition to having to defend against this surprise evidence as to the location of the calls, Mr. Garbutt was forced to defend against evidence of calls made *during the trial.* (R.101, p.7830-58). Despite strenuous objection, Ms. LaFarnara was allowed to introduce evidence of these additional phone calls. (R.94, p.6925-27; R.100, p.7718-20; R.101, p.7785-90). Ms. LaFarnara was also allowed to testify over the strenuous objection of the defense that she believed Mr. Garbutt was stalking her in the courthouse, during the trial. (R.103, p.8190).

CHARACTER EVIDENCE

The court's order in limine also excluded certain specific items of character evidence. (R.21 p.3257-76).[4] Despite this

[4]A supplementary Order on Defendant's Motions in Limine was entered on February 10, 1997. That order appears to have been

ruling, however, Ms. LaFarnara continued to attempt to introduce evidence of bad character, and in large part was successful in convincing the court to overrule most of its order in limine.

The supplementary order in limine excluded, in part, a hearsay statement allegedly made by Mr. Garbutt's daughter, Joan, to Ms. LaFarnara to the effect that "he beats all his women, what he did to my mother was inhumane". (Appendix C, p.3). Joan Garbutt denied ever making such a statement. (R.79, p.4491-92). At the outset of the trial, the court reversed its exclusionary ruling on Ms. LaFarnara's representation that the statement was not being offered for the truth of the matter asserted, but instead was being offered to explain Ms. LaFarnara's subsequent conduct in calling a spouse-abuse shelter. (R.48, p.27-40). Despite this ruling and this representation, counsel for Ms. LaFarnara used the statement continually throughout the trial to prove the truth of the matter asserted, beginning as early as voir dire. (R.48, p.101-02). The statement was continually referred to for the truth of its contents in the direct examination of Ms. LaFarnara, (R.51, p.490-01), in the direct examination of Ms. LaFarnara's psychological expert, Dr. Merin, (R.74, p.3866, 4305, 5019), during the cross examination of Mr. Garbutt's daughter, Joan, (R.79, p.4531; R.96, p.7119-20), during the cross examination of Mr. Garbutt's son, George, Jr., (R.83, p.5258-59), during the cross-examination of Mr. Garbutt's psychological expert, Dr. Filskov, (R.94, p.6878, 6884), during the

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omitted from the record by accident. Therefore, Mr. Garbutt has filed it herewith as Appendix C.

cross-examination of Mr. Garbutt, (R.106, p.8539), and in closing argument, (R.107, p.8770-71, 8783). In fact, during the direct examination of Dr. Merin, Mr. Garbutt's counsel objected and protested vehemently to the misuse of this evidence, requesting that the court put a stop to it. (R.77, p.4306, 4331-34). The court sustained the objection. (R.77, p.4339).

A similar hearsay statement, that Mr. Garbutt beat his dog, Rusty, with a two-by-four, was also continually used by Ms. LaFarnara to prove that Mr. Garbutt beat his dog. (R.51, p.414-18, R.74, p.3850; R.107, p.8770). Joan Garbutt also denied having made this statement. (R.79, p.4491-92). At one point, the court voiced concern over losing sight as to why certain evidence was admitted in the trial. (R.79, p.4562). The court further expressed concern that the jury was being presented with "this whole history of how bad this guy is." (R.81, p.4830).

Ms. LaFarnara's counsel continually attacked Mr. Garbutt's character, beginning as early as opening statement, with the following comment:

> The evidence is going to show, in this case, that George Garbutt is an alcoholic. He is a bully. Getting drunk, for George Garbutt, was a way of life. He would drink five to 15 drinks, at a time, of alcohol. And when he got drunk, the evidence is going to show, he beat up women. Unprovoked, savage attacks.

(R.50, p.244). Ms. LaFarnara also attempted to show that Mr. Garbutt was engaged in social security fraud. (R.52, p.530; R. 106, p.8547). Her attorney asked numerous witnesses about Mr. Garbutt's reputation for truth and veracity in the community. (R.57, p.1194,

1202; R.67, p.2711). Ms. LaFarnara also characterized Mr. Garbutt as "loud, obnoxious and mean." (R.74, p.3871). Continual attempts were made to demonstrate that Mr. Garbutt treated his deceased wife poorly. (R.38, p.4976; R.97, p.7210, 7234; R.100, p.7722, 7724-28; R.103, p.8132; R.105, p.8454; R.106, p.8510). Questions were also improperly asked concerning whether Mr. Garbutt was hiding assets, (R.100, p.7648), whether he carried a blackjack to collect rents in south St. Petersburg, (R.101, p.7760), and whether he made his second wife pay for half of the marriage license, (R.100, p.7698). He was further asked whether he crushed people's cigarettes, (R.101, p.7763), when counsel knew there were three smokers on the jury. (R.51, p.417).

Ms. LaFarnara also asked questions concerning Mr. Garbutt's history of DUI arrests, despite a court ruling to exclude them. (R.70, p.3365). The court sustained an objection to that question. (R.71, p.3346). Despite that ruling, counsel asked the questions again. (R.99, p.7592)

Further questions were asked as to whether one of Mr. Garbutt's former girlfriends on one occasion was crying with black eyes, even though no evidence was ever introduced to prove it. (R.86, p.5771, 5783). Counsel also asked Mr. Garbutt's son whether Mr. Garbutt had ever told him he could be "replaced by a nigger," despite the fact that counsel knew that he had answered "no" to the question on deposition and that there was an African-American member of the jury. (R.46, p.7367; R.90, p.6206)

THE VERDICTS, POST-TRIAL MOTIONS AND APPEAL

The jury returned a verdict for Ms. LaFarnara on all four counts, awarding compensatory damages in the total amount of $1,254,359.65, consisting of $16,359.65 past medical expenses, $60,000.00 present value of future medical expenses, $1,168,000.00 past and future pain and suffering, and $10,000.00 injury to reputation. (R.27, p.4305). Four days later, after the punitive damage phase of the trial, the jury awarded an additional $500,001.00 in punitive damages. (R.27, p.4306).

A timely Motion for New Trial was filed by Mr. Garbutt alleging over 100 points of error. (R.35, p 5429-45; amended R.37 p.5785-5804). At the same time, Mr. Garbutt also filed a Motion for Judgment Notwithstanding the Verdict, (R.35, p.5446-47), Motion for Remittitur (R.35, p.5448-51) and Motion for Leave to Interview Jurors (R.35, p.5452-54; amended R.37 p.5715-44). Judgment was entered on May 5, 1997. (R.37, p.5756-57). A lengthy memorandum of law (R.39 p.6110-6543) and supplemental memorandum of law (R.45, p.7135-7310) were filed in support of the Motion for New Trial.

The Motion for Leave to Interview Jurors was granted by the trial court. (R.41, p.6544-49). The discovery conducted in connection with that motion revealed that alternate juror Thomas Workman was a long-time friend of an individual by the name of Debbie Hawks. (R.46, p.7314). Ms. Hawks admitted that she hated Mr. Garbutt, and that she had told Mr. Workman during the trial that she thought Mr. Garbutt was an "asshole." (R.46, p.7313-14). It was further established that Ms. Hawks had driven Mr. Workman to

court on numerous occasions during the trial, and that she socialized with him during the trial. (R.46, p.7315-16).

Ultimately, on October 24, 1997, the trial court denied the Amended Motion for New Trial and Motion for Judgment Notwithstanding the Verdict, but granted the Motion for Remittitur as to the $10,000.00 awarded for injury to reputation, as there was no evidence to support that award, and reduced it to $1.00 nominal damages. (R.46, p.7326-93).

On appeal to the Second District Court of Appeal, the appellate court affirmed the judgment, but certified a question to this Court concerning whether Mr. Garbutt preserved for appeal the issue of improper comment on closing argument. (Appendix A, p.2). If that error was preserved, the appellate court indicated that a new trial would be appropriate. (Appendix A, p.2). Judge Blue's concurring opinion urges this Court to find that the issue was preserved, and reverse for a new trial. (Appendix A, p.3-5).

SUMMARY OF ARGUMENT

There are four primary issues which deprived Mr. Garbutt of a fair trial in this case. First, Ms. LaFarnara's counsel, Robert Merkle, made numerous improper comments on closing argument. Essentially, counsel for Ms. LaFarnara repeatedly accused Mr. Garbutt and his attorneys of lying and orchestrating a fraud upon the Court and the jury in creating a defense to the case. Such arguments are clearly prohibited by law, and constitute sufficient grounds for a new trial. Additional comments by counsel were made which were also improper for different reasons, and those will be

set forth in more detail later in this Brief.

The certified question before this court concerns whether Mr. Garbutt preserved this issue for review by making a cumulative objection and motion for mistrial during a recess in Ms. LaFarnara's closing argument. Both the trial court and the appellate court found that the objections should have been made immediately upon the utterance of the improper comments. Despite this finding, this Court should find that the objections were preserved because the law supports preservation by motion for mistrial and public policy would disfavor allowing the plaintiff to benefit from this unethical conduct without consequence.

Secondly, Ms. LaFarnara was allowed to essentially change the entire nature of the case during the trial by creating additional medical evidence. This evidence not only substantially enhanced the level of Ms. LaFarnara's arguable damages, but also lent additional credence to and bolstered her version of the events which occurred in this case. The Court should keep in mind that there were no third party eye witnesses to the alleged assaults by Mr. Garbutt in this case, and therefore, the medical testimony was used extensively to corroborate Ms. LaFarnara's story. In fact, Ms. LaFarnara went so far as to argue on closing argument that "the first witness in the case is Rosemary's own cervical spine." (R. 107, p. 8745). In addition to the creation of the medical evidence, Mr. Garbutt was faced with the daunting task of having to defend against allegations which continued to arise during the trial, consisting of continuing harassing phone calls which were

being received by Ms. LaFarnara from an unidentified caller. Therefore, by careful maneuvering and creation of evidence during the trial, Ms. LaFarnara was able to put Mr. Garbutt in a situation where he could not possibly defend himself.

The third issue which deprived Mr. Garbutt of a fair trial concerns the amount and extent of bad character evidence which was introduced during the trial. In each case, Ms. LaFarnara argued that the evidence was not being introduced to prove bad character or propensity, but had some probative value towards an issue in the case. By doing so, Ms. LaFarnara was permitted to paint a picture of Mr. Garbutt as a mean, obnoxious, hateful person. Despite any limiting instruction given by the Court as to the use of such evidence in this case, the end result was a trial in which, at every turn, Mr. Garbutt must not only defend against the allegations of what he may have done to Ms. LaFarnara, but must also defend against constant general assaults on his character. Ultimately, the jury was left with the impression that Mr. Garbutt is a hateful person, not deserving of any fair consideration of the facts. This resulted in a clearly excessive verdict, not supported by the evidence.

The fourth problem which arose in this trial concerns misconduct of the jury. It is clear that one juror had direct contact with an outside individual who knew and hated Mr. Garbutt. Florida case law is replete with opinions holding that such misconduct is, in and of itself, grounds for a new trial.

Ultimately, any one of these errors would be sufficient

grounds for a new trial, however, when taken as a whole, one can arrive at no conclusion other than that Mr. Garbutt did not receive a fair trial. In fact, there were numerous other errors which will not be discussed in this Brief due to page limitations. Suffice it to say that the Amended Motion for New Trial filed by Mr. Garbutt asserted over 100 points of error. (R.37, p.5785-5804). The initial brief on appeal, 62 pages in length, raised 13 issues. Based on these errors, Mr. Garbutt is entitled to a new trial.

ARGUMENT

I. THE CLOSING ARGUMENT MADE BY MS. LAFARNARA'S COUNSEL CONTAINED NUMEROUS IMPROPER COMMENTS BELITTLING THE DEFENSE AND ACCUSING DEFENSE COUNSEL OF LYING, COMMENTING ON MATTERS OUTSIDE THE EVIDENCE, AND COMMENTING ON MR. GARBUTT'S FAILURE TO CALL CERTAIN WITNESSES, ALL OF WHICH WERE PRESERVED BY A CUMULATIVE OBJECTION AND MOTION FOR MISTRIAL, AND WHICH ENTITLE MR. GARBUTT TO A NEW TRIAL.

A. The comments made by Ms. LaFarara's counsel were improper.

Both the trial and the appellate courts found Ms. LaFarnara's closing argument to be improper, though to varying degrees. (Appendix B, p. 41-50; Appendix A, p.4-5). These findings are eminently correct, as the closing argument made by Ms. LaFarnara's attorney violated several well-established rules. The most pervasive type of comment made by Plaintiff's counsel concerned the manner in which the case was defended coupled with allegations of fraud or trickery on the part of Mr. Garbutt and defense counsel. The case law is replete with authority holding that a new trial must be granted where counsel argues that a party or his attorneys are liars, or where counsel ridicules the defense presented. Riley

v. State, 560 So.2d 279 (Fla. 3d DCA 1990); Maercks v. Birchansky, 549 So.2d 199 (Fla. 3d DCA 1989); Kendall Skating Centers v. Martin, 448 So.2d 1137 (Fla. 3d DCA 1984). It has also been specifically held that it is improper to accuse opposing counsel of fraud in a closing argument. Venning v. Roe, 616 So.2d 604 (Fla. 2d DCA 1993). In the case at bar, comments by Plaintiff's counsel in closing argument did just that. (Appendix D1 and p.5-7, *supra*).

Similar comments have been held to be grounds for a new trial in Carnival Cruise Lines v. Rosania, 546 So.2d 736 (Fla. 3d DCA 1989). In that case, plaintiff's counsel argued

> This is a perfect example of what Carnival Cruise Lines had been doing for the last three years. They want to hide the truth. . . . I think the evidence shows that they have taken the position that they're going to put roadblock after roadblock and say she wasn't fit to make this trip. In putting up roadblocks such as we've seen here through this entire trial, keep in mind when you make a verdict, when you render a verdict, your verdict has to be unanimous. And think about how Carnival Cruise Lines defended this particular case.

Id. at 737 n. 1. Surely, if accusations in Carnival that a defendant wants to "hide the truth" and "puts up roadblocks" is sufficient to require a new trial, then comments in the instant case that the defense is "fraudulent", "cock and bull", "blowing smoke" or "a huge, blossoming weed" are more than sufficient to warrant a new trial.

In addition to belittling the defense, Ms. LaFarnara's counsel made several suggestions concerning the failure of Mr. Garbutt to call witnesses. (Appendix D2). It is not proper to draw a negative inference from the failure to call a witness, particularly where that witness is available to be called by either party.

Lowder v. Economic Opportunity Family Health Center, Inc., 680 So.2d 1133 (Fla. 3d DCA 1996). Counsel suggested that Mr. Garbutt should have called Dr. DeSousa and Kathy Ritter as witnesses. Obviously, Ms. LaFarnara could have called either of these witnesses, and failed to do so. Thus, it is improper for Plaintiff's counsel to comment on Mr. Garbutt's failure to call these witnesses. The comment as to Dr. DeSousa is particularly egregious, because it invites the jury to speculate that Dr. DeSousa would have testified favorably to Ms. LaFarnara.

Counsel for Ms. LaFarnara also made several comments in his closing argument and rebuttal which were not supported by any record evidence. (Appendix D3). Florida Rule of Professional Conduct 4-3.4(e) prohibits attorneys from alluding to matters that are not supported by admissible evidence. Impermissible comments in this area included comments that someone other than George Garbutt made the harassing calls for him, that tinnitus was incurable, that Ms. LaFarnara broke down in the hallway and was excused by the judge, that the court was advised of Ms. LaFarnara's medical condition outside the presence of the jury, and that people in the jury pool who had been abused did not have defective characters. The trial court agreed that these comments were outside the evidence. (R.46, p.7374-5). Counsel also made reference to a document which was not shown to a witness in a prior proceeding, to which the trial court sustained a contemporaneous objection as being outside the evidence. (R.109, p.9045).

Ms. LaFarnara's counsel also asked the jury to award pain and

suffering damages on a per diem amount comparable to "one and a half tickets to Disney World." It is improper to ask the jury to place a monetary value on Ms. LaFarnara's damages just as a monetary value is placed on inanimate commodities. Public Health Trust of Dade County v. Geter, 613 So.2d 126 (Fla. 3d DCA 1993). Thus, this comment was improper, particularly when there was no evidence as to the value of a ticket to Disney World.

Counsel also commented on the veracity of witnesses. (Appendix D4). On numerous occasions, he implied that defense witnesses were lying by arguing, for example, that Dr. Filskov's allegiance to the defense was so strong she was blind, (R.107, p.8741); that for many witnesses the oath was a mere bump in the road, (R.107, p.8762); that Dr. Greenberg was being paid $500 an hour and his allegiance was to the defense to the point where he was blind, (R.107, p.8764); and that the jury "can't or should not believe anything Mr. Garbutt tells you in this case." (R.109, p.9017). Similarly, counsel commented on the truthfulness of his own witnesses. He argued that "these people are telling you the truth," (R.107, p.8767); that Ms. LaFarnara was not acting and was "one sick woman," (R.107, p.8795); that if she was acting, she deserved an Oscar, (R.107, p.8805); and that what the jury saw on the stand was "the real McCoy," (R.107, p.8805). In Airport Rent-A-Car v. Lewis, 701 So.2d 893, 896 (Fla. 4th DCA 1997), it was held impermissible to comment that:

> "that's the kind of defense and evidence and forthrightness that you get from this side of the room", "the last thing that the defense wants in this case is for you to be fair and

> reasonable. That is why they come in here with this bogus counterclaim to try and make it look like they have something to argue about" and "but [appellee] is not going to lie to you. That's my client. She is not... She's not going to tell you something."

Clearly, if those comments were improper, so were the ones in the case at bar.

B. The issue of improper comment on closing argument was preserved for appellate review.

Both the trial and appellate courts below have ruled that this issue was not preserved for appeal because Mr. Garbutt did not object timely to the improper arguments at trial. This is not a case, however, where Mr. Garbutt failed to object at all. To the contrary, ten improper comments were objected to at a recess in the arguments, and a timely motion for mistrial was made before the arguments were completed. Thus, as Judge Blue points out in his concurrence, the issue should be preserved for review and the case reversed. (Appendix A, p.3). An analysis of the timing of the objections is therefore important to deciding this issue.

The sequence of events leading up to the motion for mistrial are rather unusual. The majority of the most egregious comments came during Ms. LaFarnara's rebuttal argument, which her attorney specifically asked to begin late in the evening after defense counsel had concluded his closing argument. (R.108, p.8975-76). After listening to Ms. LaFarnara's attorney continually refer to him as a liar, Mr. Garbutt's counsel made two objections, which were ruled upon as follows:

> MR. LEWIS: The "sending a message" argument, I believe, has been specifically held to be improper, and

also the comments about me blowing smoke, I think, are improper.

THE COURT: I'm going to sustain the objection.

MR. MERKLE: For what? Blowing smoke --

THE COURT: Excuse me. I am going to sustain the objection to the comments about "In this day and age." This is particularly inappropriate. I'm going to sustain the objection because it's tantamount to telling the jury to send a message, so I sustain the objection. Thank you.

(R.108, p.8984). The court then recessed shortly thereafter. (R.108, p.8989). Immediately following the recess, the court issued this additional ruling:

THE COURT: Before Mr. Merkle continues with his rebuttal, based on research that I did last night, I'm going to -- the objection made to the statement that the defense was blowing smoke will be sustained.

(R.109, p.8994). Immediately after this objection was sustained, counsel for the defense moved for a mistrial, objecting to ten comments which, like the "blowing smoke" comment, accused the defense of lying to the jury. (R.109, p.8997-98). At this point, the court denied the motion, but recognized that the comments were improper. (R.109, p.9003).

The purpose of reviewing these facts is that this is not a case where the defense sat idly by while improper comments were made, received an adverse verdict, and then complained that the comments were improper. To the contrary, this is a case where the defense, during opposing counsel's argument, objected to ten comments and moved for a mistrial based upon those comments before the argument was completed, before the jury was charged, and before

the verdict was reached. Indeed, the only thing that Mr. Garbutt waited for was a recess to present this issue to the court.

The Second District (and the trial court) declined to reverse based upon the interpretation that Hagan v. Sun Bank of Mid-Florida, 666 So.2d 580 (Fla. 2d DCA 1996), required the objections to be made immediately upon the improper comments having been uttered. Whether or not this is a correct interpretation of Hagan, Judge Blue in his concurring opinion below urges that this requirement be re-examined, and that the standard for preservation of error be a timely motion for mistrial without constant objections. (Appendix A, p.4). As will be discussed below, there is also support in existing law to find that the objections need not be immediate.

First of all, there should be no question in this case that the motion for mistrial was timely. The law is clear that in order for the motion for mistrial to be timely, it must merely be made before the jury retires to deliberate. Hagan, 666 So.2d at 585. There is no dispute that the motion for mistrial in this case was made before the jury retired, and therefore there is no dispute that it was timely. Thus, the remaining issue is whether the objections to the comments, made during the recess, were timely.

An objection is timely if it allows the court, if it sustains the objection, to instruct the jury or consider a motion for mistrial. Jackson v. State, 451 So.2d 458, 461 (Fla. 1984). However, it is not necessary to ask for a curative instruction when an improper comment is made during closing argument, because to do

so only re-emphasizes the prejudicial remarks to the jury. James v. State, 695 So.2d 1229, 1234 (Fla. 1997). Therefore, the objection is timely if it is made in such a manner as to allow the court to consider a motion for mistrial. As pointed out above, a timely motion for mistrial was made by the defense in this case with a cumulative objection. The court could have sustained the objection and granted the mistrial at that point in time. There was no other remedy which the defense was obligated to, or reasonably could have, requested from the court. Under these circumstances, it cannot reasonably be said that Mr. Garbutt waived his objections to these comments. They were brought to the attention of the court at a recess, with a motion for mistrial. That is sufficient to preserve the error for appellate review.

Of course, there are compelling policy reasons for holding that a timely motion for mistrial preserves this error. As Judge Blue points out in his concurrence, requiring a party to object 34 times (as in this case) during an opponent's closing argument has the effect of shifting the responsibility for making a proper argument from the attorney making the argument to the party being victimized by it. (Appendix A, p.4). Much of the debate over the issue of appellate review of improper arguments absent objection centers around whether the courts will emphasize accountability for attorney misconduct or predictability in appellate decisions. *See,* Fravel v. Haughey, 727 So.2d 1033, 1038 (Fla. 5th DCA 1999) (Cobb, J., concurring).

Certainly, if the context is changed to a situation like the

case at bar where a party *did* object and *did* move for a mistrial, the policy concern over appellate predictability wanes considerably; a party can be sure that his motion for mistrial will preserve the issue for appeal. In contrast, the policy concern over keeping attorneys accountable for unethical conduct remains strong. A court should not allow an unscrupulous attorney to make improper and unethical arguments without consequence, simply because his adversary waited until a recess to object and move for a mistrial. As Judge Blue argues, the law should not put the onus of keeping arguments proper on the opponent. To the contrary, the law should be that a timely motion for mistrial based upon cumulative improper comment, made out of the presence of the jury at the option of counsel, preserves this error. To rule otherwise allows attorneys who try cases on personal attacks and improper comment to reap the benefits of their unethical conduct, both in the form of high attorney's fees from the large verdicts their inflammatory arguments garner and in the form of inflated reputation for winning such verdicts despite their questionable ethics. The public should be discouraged from seeking out the "sharks" and "mad dogs" in our profession, and there is no better way to do that than to reverse unfair verdicts rendered as a result of their unethical and improper trial tactics. This honorable Court should not hesitate, then, to find in this case that the objections and motion for mistrial preserved this issue for review, and to reverse this case for a new trial.

C. Even if contemporaneous objections were not made, the closing argument warrants a new trial as it constitutes fundamental error.

Even had the objections not been made, however, these comments amount to fundamental error in this case. In other words, they are "so extreme that it could not be corrected by an instruction if an objection had been lodged." Hagan, 666 So.2d at 586. Therefore, they warrant a new trial even without contemporaneous objection. Id. In this case, any instruction by the court would have been completely ineffective; basically the court would have to instruct the jury to disregard counsel's comments that the defense lawyer was a liar and that the defense case was a fraud, that the defense was "cock and bull", "blowing smoke" or "a huge, blossoming weed." This would cure nothing and would only serve to re-emphasize the prejudicial remarks to the jury. It is not necessary to ask for a curative instruction to preserve this error, for this very reason. James v. State, 695 So.2d 1229, 1234 (Fla. 1997).

It is true that the Hagan court pointed out that the fundamental error standard is almost a Catch-22 because the fact that the trial attorney did not object itself demonstrates that the comments could not have been that bad. Id. However, that standard simply does not apply to this case in light of the fact that the defense objected to these comments and moved for a mistrial in the middle of Ms. LaFarnara's argument.

Furthermore, less stringent standards have been adopted by several District Courts in Florida, including the Third District in

Borden, Inc. v. Young, 479 So.2d 850 (Fla. 3d DCA 1985), in which the court reversed a judgment for improper comment absent objection or motion for mistrial. Under that standard, the instant case would be reversible without any discussion as to preservation of error, and of course Mr. Garbutt would urge this Court to adopt that standard.[5]

Ms. LaFarnara's attorney's closing argument, taken as a whole, violates several fundamental rules established for such arguments. The litany of inflammatory, improper comments by counsel listed above and contained in Appendix D confirms that Mr. Garbutt did not receive a fair trial, and under all available case law a new trial is essentially mandatory in this circumstance. Regardless of all of the other error asserted by Mr. Garbutt, these comments made by counsel alone warrant a new trial in this case as a matter of law.

II. THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE CERTAIN MEDICAL EVIDENCE CREATED DURING TRIAL, EVIDENCE OF A MID-TRIAL HOSPITALIZATION, PREVIOUSLY UNDISCLOSED EVIDENCE OF HARASSING PHONE CALLS, AND EVIDENCE OF WRONGFUL ACTS WHICH ALLEGEDLY OCCURRED DURING THE TRIAL, ALL OF WHICH WAS PROCEDURALLY PREJUDICIAL TO MR. GARBUTT AND DEPRIVED HIM OF HIS RIGHT TO A FAIR TRIAL.

A. The court erred in allowing into evidence x-rays and MRI films of the appellee's cervical spine, all of which were taken during the trial.

In order to discern the full impact of the surprise evidence in this case, the Court must be able to appreciate the posture of the medical evidence as it existed before trial, as compared to the

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[5]Whether this Court adopts the standard announced in Borden or Hagan will be decided in Murphy, currently pending before this Court.

medical evidence which ultimately went to the jury. As of the pretrial conference, Ms. LaFarnara was complaining of neck pain, headaches, tinnitus and depression. She had been diagnosed as suffering from a soft-tissue injury to her neck, battered spouse syndrome, dysthymia (mild chronic depression), and post-concussion syndrome. Her symptoms did not indicate any neuropsychological injury. Additionally, she had received no professional treatment for any psychological condition since 1989. The objective evidence consisted of x-ray reports from 1985, an MRI report of the cervical spine from 1985 and a cinefluoroscopy video tape from 1989. The defense was thus in a position to argue that the medical testimony was based purely on subjective findings, and that the objective tests were unreliable due to the dubious nature of cinefluoroscopy and the inability to compare the video tape with an x-ray or MRI report of four years earlier.

During the trial, the medical evidence changed entirely. Suddenly, Mr. Garbutt was faced with new x-ray and MRI films of the cervical spine which Ms. LaFarnara's doctors (now Dr. Wassel *and* Dr. Witek) testified illustrated severe changes which could only have resulted from multiple trauma. Thus, Mr. Garbutt was stripped of his argument concerning the lack of any conclusive objective evidence, and his trial strategy similarly impaired. Additionally, Dr. Wassel was allowed to testify that he believed the x-rays demonstrated sufficient injury to indicate brain damage, and increased his permanent impairment rating from 23% to 50% of the body as a whole. In that instance, Mr. Garbutt was suddenly faced

with an opinion doubling the potential damages in the case, with no real way to defend against it.

This creation of evidence began with a referral to Dr. Afield, whose testimony the trial court wisely excluded under the authority of Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981). In excluding Dr. Afield's opinions and testimony, the court applied the Binger analysis and found that the defense was in fact surprised by this testimony and that (i) the defense could not cure the prejudice because the entire defense strategy was undermined by the new evidence; (ii) there was no evidence of bad faith and (iii) the orderly trial of the case would be substantially disrupted. (R. 61, p. 1835 - R. 62, p. 1875); *See,* Binger, 401 So.2d at 1314. The court appropriately focused its analysis on the prejudice to the defense, relying upon Office Depot v. Miller, 584 So.2d 587 (Fla. 4th DCA 1991), Grau v. Branham, 626 So.2d 1059 (Fla. 4th DCA 1993), and Colonnell v. Mitchels, 317 So.2d 799 (Fla. 2d DCA 1975). Although the court was eminently correct in excluding Dr. Afield's testimony under this authority, the court effectively undermined its own ruling by admitting the newly-generated x-ray and MRI of the cervical spine.

As pointed out above, admitting the x-ray and MRI films into evidence destroyed Mr. Garbutt's argument with regard to the objective medical evidence in this case. The evidence forced the defense to change course midstream, and, as Ms. LaFarnara's counsel stated, the evidence "just blows the pins right out from under their case." (R.62, p.2023). Furthermore, Mr. Garbutt was forced

to scramble to find Dr. Katz, a hospital radiologist, who had testified only 10-15 times in the past 25 years. (R.115, p.7783). Surely, had these films existed before the trial, a different radiologist would have been employed. The films undermined Mr. Garbutt's case and filled a vacuum in Ms. LaFarnara's case which substantially changed the positions of the parties. As Plaintiff's counsel argued, "the first witness in this case is Rosemary's own cervical spine." (R.107, p.8745). That "witness" was transformed, through these new films, from speculative to concrete. This evidence clearly should have been excluded under Binger as well.

B. The court erred in allowing into evidence Ms. LaFarnara's mid-trial hospitalization, including the testimony of Dr. Walker, which error was compounded because Mr. Garbutt could not effectively cross-examine Dr. Walker or Ms. LaFarnara without opening the door to highly prejudicial and inadmissible surprise evidence of brain damage.

In admitting evidence of Ms. LaFarnara's mid-trial hospitalization, the Court did not apply the Binger analysis for surprise evidence, but instead applied the "newly discovered evidence" standard used when evaluating motions for new trial. This is erroneous for several reasons.

The "newly discovered evidence" test is clearly designed to be used after a trial is over, not in the midst of the proceeding. The test has been stated as follows:

> The requirements for the granting of a new trial on the ground of newly discovered evidence are (1) that it must appear that the evidence is such as will probably change the result if the new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue(s); and (5) that is not merely

cumulative or impeaching.

City of Winter Haven v. Tuttle/White Constructors, Inc., 370 So.2d 829 (Fla. 2d DCA 1979). First of all, it should be apparent from the first three elements that the test on its face is designed to be applied after a trial and not during one. But most importantly, the test lacks one important element which was emphasized in the Binger analysis: prejudice to the objecting party. This is particularly important in light of the first element of the newly discovered evidence test, which requires a finding that the evidence would probably change the result on a new trial. This is tantamount to a finding that the evidence will, in fact, prejudice the opposing party. Thus, in applying this test, the Court essentially ruled that the hospitalization evidence was admissible because it could not have been discovered before the trial and that it was, in fact, prejudicial to the defense. This flies in the face of the entire concept of procedural prejudice which was the underlying concern in the Supreme Court's opinion in Binger. Although Binger did involve a violation of the pretrial disclosure order, and this evidence at least arguably does not, the distinction is meaningless without an analysis of the prejudice to the defense.

Although there appears to be no Florida law directly on point, there are ample cases discussing surprise expert testimony, all of which sanction exclusion of the evidence.[6] In addition to Binger,

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[6]As the court stated in Semmer v. Johnson, 634 So.2d 1123, 1124 (Fla. 2d DCA 1994), "our courts have shown little tolerance

Grau, Office Depot, and Colonnell discussed above, the Third District recently pointed out that allowing the prejudiced party's witnesses to evaluate the new evidence prior to testimony does not necessarily cure the prejudice. Garcia v. Emerson Electric Company, 677 So.2d 20, 21 (Fla. 3d DCA 1996). In Garcia, the defendant's expert conducted additional testing which could not be reviewed by the plaintiff's expert until the day of trial. Id. at 20. In reversing the trial court, the Third District, relying on Grau, held that the plaintiff was prejudiced by having their expert "forced to scurry during the trial" to rebut the evidence, and further that the new evidence "was made a feature of the trial." Id. at 21. This is precisely what happened in the instant case. Dr. Foreman's IME of Ms. LaFarnara, hastily conducted one Friday afternoon a week after her hospitalization, was virtually useless to the defense. Furthermore, the fact of her hospitalization (and, for that matter, the new spine films) was made a feature of the case. In fact, Ms. LaFarnara's closing argument is replete with references to the hospitalization, used to bolster the credibility of her case. (R. 107, p. 8744, 8766, 8793-8795, 8824, 8827).

The prejudice to the defense is also apparent from the cross-examination of Dr. Walker, a new witness created by the

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for a party's mid-trial disclosure of substantial changes in the nature and severity of a litigant's medical condition." See also, Auto Owners Insurance Co. v. Clark, 676 So.2d 3 (Fla. 4th DCA 1996); Dept. Of Heath and Rehabilitative Services v. J.B., 675 So.2d 241 (Fla. 4th DCA 1996). Furthermore, the decision in Colonnell v. Mitchels, 317 So.2d 799 (Fla. 2d DCA 1975) involved the exclusion of the testimony of a treating physician, not a hired expert, who changed his testimony mid-trial.

hospitalization, who testified that Ms. LaFarnara now suffered from major depression, recurrent, as well as acute anxiety disorder. (R. 75, p. 4021; Appendix E). Ultimately, the Court ruled that if Mr. Garbutt's proffered cross-examination were conducted, then Dr. Afield would be allowed to testify despite the Court's prior ruling excluding his testimony based upon severe prejudice to the defense. (R. 75, p. 4047). This illustrates the impossible position that Mr. Garbutt was placed in with regard to this evidence. If Mr. Garbutt chose to pursue this line of cross-examination, the jury would hear essentially unrebutted evidence of brain damage which would destroy Mr. Garbutt's position in the case. On the other hand, if Mr. Garbutt did not pursue this line of cross-examination, then the jury was left with the impression that the hospitalization was legitimate. Thus, Mr. Garbutt was effectively denied the right to present evidence to rebut Dr. Walker's testimony. Mr. Garbutt's choice of the lesser of two evils here does not cure the prejudice; litigants should not be forced to chose between evils.

The problem is even more clear when the Court considers the cross-examination of Ms. LaFarnara on this issue. (Appendix F; Statement of the Case and Facts, p. 12-13, *supra*). Mr. Garbutt even offered to limit his proffered questioning, but the court allowed that only with a caveat: the questions would be asked at the peril of Ms. LaFarnara volunteering information about Dr. Afield and his brain damage evidence. (R. 102, p. 8065-66). Once again, then, Mr. Garbutt was placed in an impossible position. He could cross-examine Ms. LaFarnara with regard to the

hospitalization and risk her volunteering that Dr. Afield told her she had brain damage, or he could forego the cross examination. Realizing that impossible dilemma, Mr. Garbutt made a motion for mistrial and continuance which was denied. (R. 102, p. 8066).

Attempts by the trial court to alleviate the prejudice did not cure the problem. The continuance and examination by Dr. Foreman could not "unring the bell" with regard to the defense strategy in the case. Had Mr. Garbutt known that evidence of this sort, including the hospitalization and Dr. Walker's testimony, would come before the jury, then Mr. Garbutt would not have adopted his trial strategy of focusing on Ms. LaFarnara's lack of treatment and objective evidence. Mr. Garbutt might have hired different experts, asked for different examinations, and made different statements to the jury.[7] No amount of mid-trial discovery could cure this problem, in addition to the sheer distraction of having to deal with the new evidence. As the Grau court stated, "once the trial starts the parties' attorneys should be allowed to concentrate on the presentation of the evidence at hand. Neither side should be required to engage in frantic discovery to avoid being prejudiced." 626 So.2d at 1061. Therefore, the prejudice to the defense in this case was truly incurable.

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[7]In fact, the St. Joseph's hospital records indicate that Ms. LaFarnara saw a neurologist, a neurosurgeon, a cardiologist and an internist, among others, during her stay. (R. 74, p. 3810). Mr. Garbutt had no discovery whatsoever with regard to these doctors, and has no idea whether they would have helped his case or not.

C. The court erred in allowing into evidence testimony and tape recordings of canned-laughter telephone calls, because the caller could not be identified and none of the circumstantial evidence of identity was disclosed to Mr. Garbutt in discovery.

As pointed out in the Statement of the Case and Facts, p. 14-15, *supra,* Ms. LaFarnara withheld discovery of pertinent information with regard to the alleged harassing telephone calls. At the time the defense objected to this evidence, the court ruled that the defense had not asked for this information. (R.63, p.2077). Since the trial, however, the court has acknowledged that a discovery violation did, in fact, occur. (R.46, p.7326). Thus, there is no question that the defense was procedurally prejudiced.

By introducing this surprise evidence as to the location of the phone calls, Mr. Garbutt was prejudiced by his inability to conduct further discovery and determine whether or not there was any exculpatory evidence or whether he could establish alibis for the dates the calls were allegedly made. While Mr. Garbutt was able to establish alibis for some of the recent calls, this was simply not enough to combat the obviously prejudicial nature of this phone call evidence.[8] In fact, the record clearly demonstrates that Mr. Garbutt was, in fact, prejudiced. The representative of GTE, the phone company, testified that pay phone

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[8]At closing, Ms. LaFarnara's attorney played the phone call tapes and argued "That is the signature of Mr. Garbutt, laughing. He is laughing at Ms. LaFarnara. He is laughing ultimately, if his defense prevails, at you." (R.107, p.8735). And again on rebuttal, "If the strong prevail in this courtroom today, the sound in the Garbutt household will be the laughter that you've heard on the tape recorder." (R.109, p.9065).

records are recycled every 90 days and, therefore, no evidence of the phone calls older than that existed. (R.63, p.2117-18; R.85, p.5559-61). Furthermore, had the interrogatories been answered fully when they were asked, nearly all of the calls could have been traced. (R.63, p.2118; R.85, p.5567-68). Therefore, this additional evidence should have been excluded under Binger, and the jury never should have heard those tape recordings.[9]

D. The court erred in allowing into evidence testimony and tape recordings of phone calls made during the trial and of alleged actionable conduct of Mr. Garbutt which occurred during the trial.

Bringing in additional circumstantial evidence was not the sole extent of the prejudice, however. In addition to having to defend against this surprise evidence as to the location of the calls, Mr. Garbutt was forced to defend against evidence of calls made *during the trial.* Despite strenuous objection, Ms. LaFarnara was allowed to essentially amend her complaint by introducing new causes of action in the form of additional phone calls.[10] Mr.

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[9]Even if there were no discovery violation, the circumstantial evidence proved at trial was still "woefully short" of identifying Mr. Garbutt as the caller. All that was proved was that all the calls were the same type of recording (or hangups), that they were all made from pay phones within Pinellas and Hillsborough Counties, and that Mr. Garbutt at one time owned 30 pay phones out of thousands in Pinellas County. This requires the jury to make impermissible inferences upon inferences. Voelker v. Combined Ins. Co. Of America, 73 So.2d 403, 407 (Fla. 1954).

[10]Ms. LaFarnara was also allowed to testify as to allegations of stalking in the courthouse, during the trial, which was also outside the pleadings. Interestingly, she never moved for contempt for violation of a stipulated restraining order which had been entered years earlier.

Garbutt never had any opportunity to plead defenses or raise legal challenges to these causes of action, to conduct discovery or to plan a defense. Instead, Mr. Garbutt had to defend himself on a trial by ambush basis where he did not know on any given day whether he would be accused of having made a call.[11] There is simply no precedent for a party to have to defend himself under these circumstances. To the contrary, it is well established that matters not plead cannot be proved, and that the right to recover must be based upon facts that exist at the time suit was instituted. City Council of North Miami Beach v. Trebor Construction Corp., 277 So.2d 852 (Fla. 3d DCA 1973); City of Coral Gables v. Sakolsky, 215 So.2d 329 (Fla. 3d DCA 1958). And, as stated above, lawyers and their clients have the right to expect that trials will consist of the evidence revealed as of the discovery cut off date, and should not be required to engage in frantic discovery during trial to cure the prejudice of surprise evidence. *See*, Grau, 626 So.2d at 1061.

III. THE TRIAL COURT ERRED IN ADMITTING CHARACTER EVIDENCE CONCERNING MR. GARBUTT, WHICH ERROR WAS COMPOUNDED BY MS. LAFARNARA'S COUNSEL'S IMPROPER QUESTIONING OF A NUMBER OF WITNESSES CONCERNING MR. GARBUTT'S CHARACTER.

Mr. Garbutt's difficulties at trial were not limited to the constantly changing evidence or inflammatory arguments. One of the themes developed by Ms. LaFarnara in this case was an effort to present the jury with any evidence of any negative thing ever done

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[11]In fact, some of the alleged calls were made while Mr. Garbutt was present in the courtroom. (R.101, p.7874).

by or said about Mr. Garbutt. The strategy was sound; paint Mr. Garbutt as a vile, hateful person and the jury will have no problem concluding that Ms. LaFarnara's allegations of abuse are true, despite the lack of any objective corroborating evidence. Our legal system, however, does not allow trials to progress in this manner. Instead, juries are supposed to decide cases on the facts of the case, not on character assassination.

Under Florida Evidence Code §90.404, character evidence is not admissible to prove a person acted in conformity therewith, unless such evidence goes to prove some issue of material fact in the trial. Ms. LaFarnara argued repeatedly that each and every piece of bad character evidence was introduced to prove some material fact in issue under § 90.404(b). Thus, much of this evidence came before the jury over strenuous objections by Mr. Garbutt.[12] Ms. LaFarnara did not, however, use this evidence to prove any of the facts in issue to which she claimed the evidence was relevant. Instead, from opening statement through examination of witnesses to closing argument, Ms. LaFarnara used this evidence to paint Mr. Garbutt as a despicable person. This is what led United States

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[12]Mr. Garbutt realizes that a substantial amount of this evidence was ruled relevant to impeach Mr. Garbutt's own statements that he "never hit a woman," "never hit anybody else," and "was a gentle man." While these statements may have made some of the character evidence logically relevant, it did not make it legally relevant. In other words, the Court should have still excluded all of this testimony under §90.403, because its use at trial was exceedingly prejudicial and its probative value was minimal at best. Furthermore, any appropriate impeachment evidence would have consisted of direct testimony that he hit other people. Instead, much of this evidence concentrated on other character traits, or was pure hearsay.

Magistrate Judge Thomas Wilson to grant a motion for new trial in Ammirati v. Bonati, Case No. 92-1052-CIV-T-17(B), (M.D. Fla., May 27, 1997).

The plan was clear from the start. In the very beginning phrases of Ms. LaFarnara's opening statement, instead of discussing how the evidence would show Mr. Garbutt beat Ms. LaFarnara, counsel stated:

> The evidence is going to show, in this case, that George Garbutt is an alcoholic. He is a bully. Getting drunk, for George Garbutt, was a way of life. He would drink five to fifteen drinks, at a time, of alcohol. And when he got drunk, the evidence is going to show, he beat up women. Unprovoked, savage attacks. (R. 50, p. 244).

This tactic continued throughout the trial. As pointed out in the statement of the case, questions were asked to insinuate that Mr. Garbutt had committed social security fraud, that he treated his wife poorly, that he was hiding assets, that he was "loud, obnoxious and mean," that he carried a blackjack to collect rent, that he made his second wife pay for half of her marriage license, that he crushed people's cigarettes, that he had a history of DUI arrests, that he gave a former girlfriend a black eye, and that he beat his dog.

One of the most egregious examples of this tactic concerns counsel's question to the Defendant's son, Robert Garbutt, as to whether the Defendant told him "he could hire a Nigger to do the work you did." (R.90, p.6206). This question was asked despite the fact that counsel knew that Robert Garbutt had previously denied this on deposition. (R.46, p.7367). No evidence was ever

presented that this statement was actually made. Of course, the defense could not possibly object to the question, as to do so would imply that the answer was "yes." The defense thus had no choice but to allow the witness to deny it.

The same tactics were employed with regard to the hearsay statement "He beats all his women. What he did to my mother was inhumane," which Joan Garbutt denied ever having said. (R.79, p.4491-92). This is significant because this statement was used extensively by Ms. LaFarnara, as early as voir dire (R.48, p.101-2) all the way through closing argument (R.107, p.8770-1, 8783). Although this statement was excluded as hearsay by the Court in its Order in Limine (Appendix C, p.3), the Court reversed that ruling based on Ms. LaFarnara's argument that it was necessary not to prove the truth of the matter asserted, but to explain why Ms. LaFarnara contacted CASA, a spouse-abuse shelter. (R.48, p.27) Of course, the statement was continually used to prove the truth of the matter asserted, (Statement of the Case and Facts, p.16-17, *supra*), despite the fact that the declarant denied ever making it. In fact, Plaintiffs counsel plainly asked Joan Garbutt whether she was referring to beatings when making the "inhuman" statement, again going to the truth of the matters asserted. (R.79, p.4531).

Furthermore, when a hearsay statement is used to demonstrate a person's state of mind, the relevant inquiry is the state of mind of the declarant, not that of the witness repeating the statement. Fla. Stat. 90.803(3)(a). In other words, the rule does not contemplate proving the state of mind of the person hearing the

statement. *See,* Hodges v. State, 595 So.2d 929 (Fla. 1992), vacated on other grounds, 113 S.Ct. 33 (1992).

Finally, in closing argument, Ms. LaFarnara's counsel repeatedly pointed to physical abuse of other women. (R.107). Despite continually denying he was trying to assassinate Mr. Garbutt's character, counsel stated "George Garbutt, the evidence will (sic) show, has set himself up as the judge, jury and dispenser of punishment to women that he collects, who are no use to him, or who don't go along with his primary concerns." (R.107, p.8737). This is clearly an argument that concerns Mr. Garbutt's character and his propensity to act in conformity with it towards Ms. LaFarnara. Plaintiff's counsel found it necessary to call Mr. Garbutt a "cocky, confident, brazen, control-all-people, control-all-situations guy" who would refuse orders from a police officer and grab his arm. (R.107, p.8760). There is no apparent reason for these statements other than to destroy Mr. Garbutt's character. Mr. Garbutt is accused of "beating all his women," and beating "Rusty the dog with a two x four." (R.107, p.8770). He is accused of being "a man that is so in charge he will take cigarettes out of people's hands, whole packs of cigarettes, and crush them because it offends him." (R.107, p.8782). This has no relevance to whether he abused Ms. LaFarnara, but is a convenient piece of evidence in light of the fact that three of the jurors in this case were smokers.

Of course, the importance of this analysis goes to whether Mr. Garbutt received a fair trial. In order to discern the effect of

this tactic of character assassination, one need look no further than the verdict in this case. A compensatory damage verdict of 1.25 million dollars is so grossly excessive in relation to the damage evidence in this case that only one conclusion can be reached.[13] This jury did not decide this case based upon an objective view of the facts. This jury decided that George Garbutt was a mean, obnoxious drunk, who beat his wife, his girlfriends and his dog, who cheated on his taxes and lied to the Social Security Administration, who was a racist and hated smokers and, therefore, hated the members of this jury, who returned that feeling with its verdict. This does not remotely resemble what American jurisprudence defines as a fair trial.

While it is true that a court should ordinarily not substitute its judgment for that of the jury, "when an award 'is so excessive as to indicate that the jury was influenced by passion, prejudice, corruption, or other improper motive,' a court may substitute its judgment for that of a jury's." Synergy Gas Corp. v. Johnson, 627 So.2d 539 (Fla. 3d DCA 1993), *citing* Upton v. Hutchinson, 46 So.2d

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[13]Before trial began in this case, Ms. LaFarnara's evidence of injury consisted of an opinion by Dr. Wassel that she suffered from aggravation of a pre-existing degenerative condition of her cervical spine impairing her body as a whole by 23%; an opinion by Dr. Merin that she suffered from dysthymia (minor chronic depression) and battered spouse syndrome; and an opinion by Dr. Musella that she suffered from post-concussion syndrome. She had sought no significant treatment for any of these injuries in the eight years which had elapsed since the case was filed in 1989. Her husband testified that all she does for her pain is take Tylenol and lie down. (R.57, p.1259). This kind of injury simply cannot justify a 1.25 million dollar compensatory damage verdict.

20 (Fla. 1950). It has been held that the cumulative effect of such prejudicial issues resulting in an excessive verdict justifies a new trial. Nash v. Winn Dixie Montgomery, Inc., 552 So.2d 944 (Fla. 1st DCA 1989). In this case, the cumulative effect of the prejudicial attacks on the defense clearly resulted in this excessive verdict, which should not be allowed to stand.[14]

IV. MR. GARBUTT WAS PREJUDICED BY JURY MISCONDUCT IN THIS CASE, BECAUSE ONE JUROR KNEW AN INDIVIDUAL WHO HATED MR. GARBUTT AND ADMITTEDLY MADE NEGATIVE COMMENTS TO THE JUROR CONCERNING MR. GARBUTT DURING THE TRIAL.

It has been held that a jury may not take into account considerations outside the record. Snook v. Firestone Tire & Rubber Co., 485 So.2d 496, 499 (Fla. 5th DCA 1986). A juror is not permitted to become a witness in the jury room by imparting his knowledge to other jurors. Id. citing Houchins v. Florida East Coast Railway, 388 So.2d 1287 (Fla. 3d DCA 1980). In reaching a verdict, jurors must not act on special or independent facts which were not received in evidence. Id., citing Edelstein v. Roskin, 356 So.2d 38 (Fla. 3d DCA 1978). The record in this case establishes that, during the trial, Juror Thomas Workman had direct and prejudicial contact with an individual who knows Mr. Garbutt.

Juror Workman had a longstanding relationship with an individual known as Debbie Hawks, who he had contact with

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[14]The trial court did agree that there was no evidence in the record to support the jury's award of $10,000.00 damages for injury to reputation, and granted a remittitur of $9,999.00. If the $10,000.00 reputation damages are excessive and unsupported by the evidence, then it reasonably follows that the other damages awarded are excessive as well. This evidence of prejudice in the jury's verdict warrants a new trial.

repeatedly throughout the trial. (R. 46, p. 7314). Ms. Hawks was an employee of the American Legion post where Mr. Garbutt was a member and commander. (R. 46, p. 7312). Upon learning that Juror Workman was impaneled as an alternate juror in this case, Ms. Hawks advised Juror Workman that she thought Mr. Garbutt was an "asshole." (R. 46, p. 7313). In addition, Juror Workman testified that Debbie Hawks told him that Mr. Garbutt had called her a "ballbuster." (R. 46, p. 7289). Thus, Juror Workman was exposed to a prejudicial outside influence regarding Mr. Garbutt.

CONCLUSION

The certified question in this case presents this Court with an opportunity to clarify the procedure for preserving error in closing arguments, and the Court should answer that question by holding that a motion for mistrial is sufficient and reversing this case for a new trial. The Court should also consider the other errors or irregularities discussed in this Brief which, when taken as a whole, clearly demonstrate that Mr. Garbutt did not receive a fair trial.[15] The case should therefore be reversed and remanded for a new trial.

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[15]This Court should also consider the remaining issues raised at the appellate level which have been excluded from this brief due to space restrictions, by examining the Appellant's Initial Brief, p.55 (error in jury instruction on intentional infliction of emotional distress); p.56 (error in allowing cross-examination on invocation of fifth amendment privilege); p.59 (overbreadth of the permanent injunction; and p.60 (improper use of battered spouse syndrome). Mr. Garbutt would incorporate those arguments by reference. The appellate brief also contains a more detailed statement of the case an facts (p.1).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Initial Brief on the Merits was mailed this 7th day of January, 2000, to ROBERT MERKLE, ESQUIRE, 5510 West LaSalle Street, Tampa, Florida 33607.

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