ORIGINAL

IN THE SUPREME COURT OF FLORIDA

LUCILLE ROBERTS, personally and as personal representative of the Estate of FREDERICK ROBERTS, Deceased,

Petitioner.

v.

FRANCISCO TEJADA, M.D., FRANCISCO TEJADA, M.D., F.A.C.P.,P.A., and FRANCISCO TEJADA, M.D., F.A.C.P., P.A., d/b/a AMERICAN ONCOLOGY CENTERS, INC.,

Respondents.

_____/

CASE NO. SC00-xxx SC00-1080
THIRD DISTRICT CASE NO.99-01432

FILED
THOMAS D. HALL
MAY 30 2000
CLERK, SUPREME COURT
BY _____

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON JURISDICTION

Shelley H. Leinicke, Esq.
WICKER, SMITH, TUTAN, O'HARA, McCOY, GRAHAM, & FORD, P.A.
Attorney for Respondents
One East Broward Boulevard
SouthTrust Towers, Suite 500
Fort Lauderdale, FL 33302
Phone: (954) 467-6405
Fax: (954) 760-9353

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (CONTINUED)

PAGE

CERTIFICATE OF TYPE SIZE AND STYLE

Respondents, Francisco Tejada, M.D., Francisco Tejada, M.D., F.A.C.P., P.A. and Francisco Tejada, M.D., F.A.C.P., P.A., d/b/a American Oncology Centers, Inc., are utilizing fourteen (14) point Times New Roman font in this brief.

TABLE OF CITATIONS

PAGE

CASES

STATEMENT OF CASE AND FACTS[1]

This action stems from a claim of medical malpractice in the treatment of advanced liver cancer in a terminally ill patient. Roberts alleges that a less aggressive chemotherapy regime would have extended the decedent's life by a matter of months. Without chemotherapy, the decedent had no more than two to three months' life expectancy, with chemotherapy, there was a possibility of six months life expectancy, assuming no physical complications. The treatment recommended by Dr. Tejada included surgical insertion of a "port" for delivery of the chemotherapy with close outpatient monitoring rather than hospitalizing Roberts one week out of every three to four weeks at the end of his life. A jury verdict found there was no malpractice by Dr. Tejada. Roberts requested a new trial on the basis that two jurors[2] failed to disclose involvement in prior litigation.

Roberts did not challenge any juror during voir dire on the basis of familiarity with cancer or the medical profession, with the result that five jurors either had seen close family members develop cancer or had relatives who were doctors. One juror's uncle was dying of Hodgkin's disease and undergoing chemotherapy at the time of trial. The jurors all denied withholding any relevant

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[1] The symbol "A" refers to the Appendix attached hereto.

[2] There was a significant question as to whether either of these jurors were the same individuals referenced in earlier court records because of a multiplicity of persons with same names.

information that was not addressed by specific questioning. No juror mentioned any litigation experience.

After losing at trial, Roberts checked old records in the courthouse and learned that one juror (Guerrero) had not mentioned a petition for domestic violence that she had once filed but voluntarily dismissed nine days later. Roberts also alleged that another juror (Fornell) had been joined with her spouse in a short-lived auto negligence case and in a separate small claims action brought by Biscayne Title Company, both of which settled more than 20 years earlier. These records had been available in the clerk's office throughout the lengthy trial, but were consulted only at the time of an amendment to Roberts' Motion for New Trial.

The trial court granted a new trial to Roberts because of the mere existence of the jurors' prior litigation experience despite the absence of any indication of meeting all prongs in the three part test of *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995) (materiality, concealment, diligent inquiry by counsel). In a well reasoned opinion, the Third District Court of Appeal reversed and remanded the case with directions to reinstate the jury verdict and enter final judgment for Dr. Tejada. Following a clarification of the District Court's opinion, Roberts now seeks discretionary review by this Court.

ISSUES

I

WHETHER THIS COURT LACKS JURISDICTION TO REVIEW THIS PETITION BECAUSE THE DISTRICT COURT'S DECISION IS IN HARMONY WITH *DE LA ROSA V. ZEQUEIRA, 659 SO.2D 239 (FLA. 1995).*

II

WHETHER THIS COURT LACKS JURISDICTION BECAUSE THE DISTRICT COURT'S OPINION DOES NOT CREATE AN *EX POST FACTO* LAW.

III

WHETHER THE DISTRICT COURT'S OPINION DOES NOT AFFECT THE DUTIES AND RESPONSIBILITIES OF CIRCUIT JUDGES AND CLERKS.

ARGUMENT SUMMARY

This Honorable Court lacks jurisdiction to review this case because the District Court's decision does not conflict with any decision of this Court and fully harmonizes with the settled law. Not only does the District Court's decision follow the settled law, it relies upon the very decision that Roberts cites as controlling.

Review of the instant case is not available on the alternative grounds raised by Roberts. This case does not create any *ex post facto* law; it merely identifies potential procedures to streamline the litigation process and to foster judicial economy.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO REVIEW THIS PETITION BECAUSE THE DISTRICT COURT'S DECISION IS IN HARMONY WITH *DE LA ROSA V. ZEQUEIRA, 659 SO.2D 239 (FLA. 1995).*

In an attempt to create a conflict, Roberts overlooks the fact that the Third District's decision not only acknowledges the *De La Rosa* decision of this Court, but also identifies it as "the beginning point for analysis." (A.4) The opinion in issue repeatedly refers to *De La Rosa* as the touchstone for its analysis.

The *De La Rosa* case does *not* hold that a new trial is automatically mandated whenever there is an allegation that a juror has not disclosed information. Rather, *De La Rosa* holds that courts must analyze such assertions to determine whether the information is relevant and material to jury service in that case, second, that the juror concealed the information, and third, that there was due diligence in the questioning of the venire. A new trial is warranted only if *all* three elements are present.

Under the facts of the instant case, Roberts failed to meet all three of these requirements with Guerrero and at least two of the three requirements with Fornell (Roberts was clearly given the benefit of the doubt by the District Court's dual assumptions that Fornell had familiarity with the litigation process because she was a "banker" and also that she was ever aware of two short-lived legal matters occurring during the Nixon era where she may have been a nominal party – so that "concealment" could be assumed).

The District Court was clearly guided by the *De La Rosa* decision when considering whether either juror failed to disclose information which could be material to their jury service. The District Court's opinion recited the fact that, unlike the instant case, the *De La Rosa* juror had concealed his status as a defendant in six prior lawsuits, including a final judgment entered only two months earlier and a recent deposition in aid of execution. The Third District noted that such facts were "so clear cut and the non-disclosure so clear on its face, that the case was disposed of as a matter of law." (A.10) The instant case presented a stark contrast where the "past experience is simply too remote in time to have a material bearing on the present jury selection," and was therefore "too far removed to be material under *De La Rosa.*" (A.11)

Conflict certiorari is available only where there is a *direct* conflict between two decisions. *Ford Motor Co. v. Kikis,* 401 So.2d 1341 (Fla. 1981). Review is

limited to those situations because of the concern for uniformity in decisions as precedent rather than the adjudication of the rights of particular litigants. *Mystan Marine Inc. v. Harrington*, 339 So.2d 200 (Fla. 1976). Because the case claimed to be in conflict is easily distinguishable on its facts, and in fact forms the basis for the instant decision in issue, certiorari review on the grounds of conflict is not available. *Wilson v. Southern Bell Telephone & Telegraph Co.*, 327 So.2d 220 (Fla. 1976); *Department of Revenue v. Johnston*, 442 So.2d 930 (Fla. 1983).

II

THIS COURT LACKS JURISDICTION BECAUSE THE DISTRICT COURT'S OPINION DOES NOT CREATE AN *EX POST FACTO* LAW.

Roberts takes the wholly unfounded position that any change in courtroom procedures constitutes an *ex post facto* law. This is clearly incorrect. Courts frequently apply procedural modifications to pending cases. As this Court stated in *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978), changes to procedure do not fall within a constitutional prohibition against retroactive litigation and may be immediately applicable to pending cases. *See e.g., Insurance Co. of North America v. Pasakarnis*, 451 So.2d 447 (Fla. 1984) (new seatbelt defense applicable in pending case); *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996) (modification of affirmative defense relating to non-party or third party liability). Roberts misplaces reliance on the case of *State v.*

Hootman, 709 So.2d 1357 (Fla. 1998) because that factually distinguishable case involved a statute that affected the scope of evidence in a first degree murder action.

III

THE DISTRICT COURT'S OPINION DOES NOT AFFECT THE DUTIES AND RESPONSIBILITIES OF CIRCUIT JUDGES AND CLERKS.

In a footnote to its opinion, the Third District suggested a possible procedure which might enhance the efficiency of courtroom proceedings. This suggestion to utilize computers that many, if not most, judges already have sitting on the bench, cannot be considered by any stretch of the imagination as a mandate to revamp the court system or to buy expensive equipment that will "bring the trial court system to its knees, and require huge delays" as suggested by Roberts (Roberts' Jurisdictional Brief, pages 9-10). Roberts' hysterical exaggeration in this assertion is a case of actions speaking louder than words as to the so-called merits of Roberts' entire argument.

Roberts also presumes, without any citation to case law or the record, that the instant case has caused "state officers [to be] unsure what is, or is not, required of them to comply with the intra-trial investigation requirements of the District Court's opinion," with the result that "uncertainty and injustice abounds.

(Roberts' Jurisdictional Brief p. 10). Robert's assumption is simply not supported by the case law of this state, the opinion in issue, or the record in the instant case.

CONCLUSION

For the reasons set forth herein, no direct conflict exists between the decision of the District Court of Appeal and the decisions of this Court and therefore there is no jurisdiction to review this matter.

Respectfully submitted,

WICKER, SMITH, TUTAN,
O'HARA, McCOY, GRAHAM &
FORD, P.A.
Attorney for Respondents
1 East Broward Blvd.
South Trust Tower, Suite 500
P.O. Box 14460
Ft. Lauderdale, FL 33302
Phone: (954) 467-6405
Fax: (954) 760-9353

By: _____
Shelley H. Leinicke
Florida Bar No. 230170

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing and attached was mailed this 25th day of May, 2000, to David Kleinberg, Esq., Gaebe, Murphy, Mullen & Antonelli, 420 South Dixie Highway, Third Floor, Coral Gables, Florida 33146.

WICKER, SMITH, TUTAN,
O'HARA, McCOY, GRAHAM &
FORD, P.A.
Attorney for Respondents
1 East Broward Blvd.
South Trust Tower, Suite 500
P.O. Box 14460
Ft. Lauderdale, FL 33302
Phone: (954) 467-6405
Fax: (954) 760-9353

By: _____
Shelley H. Leinicke
Florida Bar No. 230170

IN THE SUPREME COURT OF FLORIDA

LUCILLE ROBERTS, personally and as personal representative of the Estate of FREDERICK ROBERTS, Deceased,

Petitioner.

v.

FRANCISCO TEJADA, M.D., FRANCISCO TEJADA, M.D., F.A.C.P.,P.A., and FRANCISCO TEJADA, M.D., F.A.C.P., P.A., d/b/a AMERICAN ONCOLOGY CENTERS, INC.,

Respondents.
_____/

CASE NO. SC00-xxx
THIRD DISTRICT CASE NO.99-01432

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

RESPONDENTS' APPENDIX TO BRIEF ON JURISDICTION

Shelley H. Leinicke, Esq.
WICKER, SMITH, TUTAN, O'HARA, McCOY, GRAHAM, & FORD, P.A.
Attorney for Respondents
One East Broward Boulevard
SouthTrust Towers, Suite 500
Fort Lauderdale, FL 33302
Phone: (954) 467-6405
Fax: (954) 760-9353

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2000

FRANCISCO TEJADA, M.D., **
FRANCISCO TEJADA, M.D.,
F.A.C.P., P.A., and **
FRANCISCO TEJADA, M.D.,
F.A.C.P., P.A., d/b/a **
AMERICAN ONCOLOGY CENTERS,
INC., **

Appellants, **

vs. ** CASE NO. 3D99-1432

LUCILLE ROBERTS, personally **
and as personal representative LOWER
of the Estate of FREDERICK ** TRIBUNAL NO. 96-12563
ROBERTS, Deceased,
**

Appellee.
**

Opinion filed February 23, 2000.

An appeal from the Circuit Court for Dade County, Steve Levine, Judge.

Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., and Shelley H. Leinicke, for appellants.

Gaebe, Murphy, Mullen & Antonelli and David Kleinberg, for appellee.

Before JORGENSON, COPE and LEVY, JJ.

COPE, J.

After an adverse judgment in a medical malpractice case, plaintiff-appellee Lucille Roberts moved for a new trial on the ground that two jurors had failed to disclose prior litigation history. The trial court interpreted the case law as requiring a new trial when there has been a nondisclosure, even if there has been no showing of prejudice to the moving party. The court granted the new trial but invited the parties to seek clarification of the applicable legal standards in this court. We conclude that a new trial is not called for, and reverse the order under review.

I.

The plaintiff is the widow and personal representative of Frederick Roberts, who suffered from terminal liver cancer. Plaintiff alleged that defendants-appellants[1] were negligent in their treatment of the cancer, resulting in Mr. Roberts' death sooner than otherwise would have been the case.

During voir dire, the court and plaintiff's counsel asked the prospective jurors individually if they had been parties to any lawsuit. Jurors Paula C. Guerrero and Thelma Fornell answered no. Both served on the jury. The jury returned a defense verdict.

Thereafter plaintiff searched the index to the public records for Miami-Dade County, which appeared to show that in 1996 Ms.

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[1] Francisco Tejada, M.D., Francisco Tejada, M.D., F.A.C.P., P.A., and Francisco Tejada, M.D., F.A.C.P., P.A., d/b/a American Oncology Centers, Inc.

Guerrero had filed a domestic violence petition, and voluntarily dismissed it nine days later. The public record appeared to show that Ms. Fornell had been party to two civil lawsuits over twenty years ago, one as defendant in a small claims case filed in 1973 and the other as plaintiff in an auto negligence case filed in 1975. The trial court concluded that the case law required the ordering of a new trial, so long as it was shown that there was a nondisclosure of litigation history, and that the moving party need not show any prejudice from the nondisclosure. The court ordered a new trial, and defendants have appealed.

II.

It appears to this court that in the wake of De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995), and this court's subsequent cases, particularly Wilcox v. Dulcom, 690 So. 2d 1365 (Fla. 3d DCA 1997), there is a widespread misimpression that a losing litigant can obtain an automatic new trial if he or she can show that one of the jurors failed to disclose prior litigation history, regardless of the circumstances. The practice appears to be developing that when there is a loss in a large case, be it by plaintiff or defendant, the losing litigant scours the public record to try to find evidence of a litigation nondisclosure. This court at present has three such cases pending, all of which involve substantial jury

trials.[2]

We think the existing case law has been misinterpreted. When there is a post-trial claim of juror misconduct--nondisclosure of an important fact in voir dire--the interest which is being vindicated is the moving party's right to a fair trial. See McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555 (1984). A new trial is called for if there is evidence that the moving party "was not accorded a fair and impartial jury or that his substantial rights were prejudiced . . . ." State v. Rodgers, 347 So. 2d 610, 613 (Fla. 1977); see also Lowrey v.State, 705 So. 2d 1369-70 (Fla. 1998). Unless the moving party has been adversely affected in a material way, however, the jury's verdict should not be disturbed. See Florida Power Corp. v. Smith, 202 So. 2d 872, 878 (Fla. 2d DCA 1967).

III.

The beginning point for analysis is the Supreme Court's decision in De La Rosa, which states:

> In determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. . . . First, the complaining party 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. We agree with this general framework for analysis . . . .

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[2] The other pending cases are Leavitt v. Krogen, No. 98-3233, and Birch v. Albert, No. 98-416.

659 So. 2d at 241 (citation omitted). This is, as the court said, a "general framework for analysis," id., and judgment is called for in the application of the factors. We consider each of these elements in turn.

We start with the second element of the De La Rosa test, namely, "that the juror concealed the information during questioning." 659 So. 2d at 241.[3] With regard to juror Guerrero, we do not believe that any concealment has been demonstrated. Juror Guerrero had filed a petition for a domestic violence injunction in 1996, which she voluntarily dismissed nine days later.

Florida courts agree that to show concealment, the moving party must demonstrate (among other things) that the voir dire question was straightforward and not reasonably susceptible to misinterpretation. See Coleman v. State, 718 So. 2d 827, 830 (Fla. 4th DCA 1998); Blaylock v. State, 537 So. 2d 1103, 1106 (Fla. 3d DCA 1988); Mitchell v. State, 458 So. 2d 819, 921 (Fla. 1st DCA 1984).

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[3] As a threshold matter, the plaintiff's investigation showed that there was more than one "Thelma Fornell" and more than one "Paula Guerrero" in the index to civil cases. Where there is any doubt about whether the person identified in the litigation index is the same person that served on the jury, then a juror interview should be conducted before a new trial is ordered. The court in this case concluded that the documents brought forward by the plaintiff sufficiently established identity. Defendants did not press this point below, so we assume for present purposes that the two jurors have been correctly matched to the prior litigation.

When the subject of prior litigation was raised by the trial court in voir dire, the court said:

> I'll ask you . . . have you been a party to a lawsuit.
>
> What I mean by that is, have you brought a court action against somebody else **seeking money from them** or if someone brought an action against you, **seeking money from you.** And it could be because of an auto accident, breach of contract, many other things, divorces and whatnot.
>
> But let me know if you have been a party, a plaintiff or defendant, in a case yourself or maybe a close family member has been involved in a lawsuit. Let me know that as well.

(Emphasis added).

When plaintiff's counsel questioned the jurors, he said:

> He [the judge] asked you if you had ever been a party to a lawsuit. And again, the reason isn't to embarrass you, because you know when you were in the lawsuit, you may have won and you thought it was great or you lost, thought it stunk. Or you may have been a defendant and think all the plaintiffs are **out to get their money** or you may have been a plaintiff and thought otherwise.
>
> It's really important what you bring to the stand on

this issue. So I'm going to ask you, each one of you by name whether or not you have ever been a party to a lawsuit. And I mean, any kind of lawsuit, a divorce, a collection of a debt, a breach of contract, an assault and battery, an auto accident, a defective product, a medical negligence case, such as this case, a divorce, anything at all.

(Emphasis added).

The trial court and counsel framed the inquiry in terms of an action **for damages**. A petition for a domestic violence injunction is not an action for damages. We do not think that a reasonable juror would conclude that a petition for domestic violence amounts to a "lawsuit" for purposes of the voir dire questions that were asked. Indeed, it may not be clear to the average juror that a petition for domestic violence injunction is actually a civil, as opposed to criminal, matter. There was no concealment.

We also suggest that the court and counsel tread on thin ice when they assume that a juror knows exactly what a "lawsuit" is. Law students have drummed into them the fact that under the Rules of Civil Procedure, a civil action commences with the filing of a complaint. See Fla. R. Civ. P. 1.050. Thus, under a civil procedure definition, a demand letter or prelitigation settlement is not disclosable, but the filing of a lawsuit is.

Lay jurors are not law students and do not have the benefit of

a course in civil procedure. Experience suggests that jurors do not have a clear understanding of when a lawsuit technically begins. We suspect jurors believe that a lawsuit occurs when the parties proceed to a jury trial in open court, and that all preliminary steps are not a "lawsuit." See Jay M. Zitter, Effect of Juror's False or Erroneous Answer on Voir Dire Regarding Previous Claims or Actions Against Himself or His Family, 66 A.L.R. 4th 509 § 6 (1988). "Called as they are from all walks of life, many [jurors] may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 555. We need not explore this point further as to Juror Guerrero (who voluntarily dismissed her petition without a trial) because in any event, the voir dire questions did not call for disclosure of a domestic violence petition.

We reach a different conclusion as to juror Fornell, who gave her occupation as "banker," evidently meaning bank officer. Since some bank officers through their work experience become quite familiar with the litigation process, plaintiff's showing was sufficient to call for an interview of juror Fornell on the issue of concealment.[4] See De La Rosa, 659 So. 2d at 241 (three-part

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[4] The question is whether in light of her work experience juror Fornell should have understood the voir dire questions to extend to lawsuits that do not proceed to trial. Juror Fornell's two prior cases were resolved prior to trial.

test is used for deciding whether to grant jury interview or new trial). No interview will be needed in this case, however, because as explained later in this opinion, other elements of the De La Rosa test are not satisfied.

IV.

We next address the requirement that "the complaining party must establish that the information is relevant and material to jury service in the case." Id. This is the part of the De La Rosa test which is proving most troublesome, but we think the test is straightforward. The question is whether, if the correct information had been given by the juror, the movant would have had a ground for a challenge for cause, see McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 556, or the movant would have exercised a peremptory challenge. See James v. State, 25 Fla. L. Weekly D301, D302 (Fla. 5th DCA Jan. 28, 2000); Blaylock v. State, 537 So. 2d at 1106.

In De La Rosa, the Florida Supreme Court cited Mitchell v. State, 458 So. 2d 819 (Fla. 1st DCA 1984), and Mitchell puts it this way:

> [R]elief will be afforded where (1) the question propounded is straightforward and not reasonably susceptible to misinterpretation; (2) the juror gives an untruthful answer; (3) the inquiry concerns material and relevant matter to which counsel may reasonably be expected to give substantial weight in the exercise of his peremptory challenges; (4) there were peremptory challenges remaining which counsel would have exercised at the time the question was asked; and (5) counsel represents that he would have peremptorily excused the

juror had the juror truthfully responded.

Id. at 821 (footnote omitted).[5]

In De La Rosa the materiality test was clearly met. In that case the jury foreperson failed to disclose that he was a defendant in six prior lawsuits. 659 So. 2d at 240 n.1. He had been subject to a final judgment in garnishment only two months prior to jury selection, and had appeared at a deposition in aid of execution only six months before jury selection. Id. Plainly such a juror would be ill-disposed to rule for a plaintiff, and would likely have been stricken for cause. The facts were so clear-cut, and the nondisclosure so clear on its face, that the case was disposed of as a matter of law without a juror interview.[6]

Turning to Ms. Fornell, we conclude that the nondisclosures were immaterial. She was allegedly named in two lawsuits over twenty years prior to jury selection in this case. One was a 1973

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[5] Whether to believe the representation that counsel would have exercised a peremptory challenge is for the court. Cf. Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996) (whether stated reason for peremptory challenge is pretext is for the court).

[6] Whether a jury interview is necessary in a particular case depends on the circumstances. The De La Rosa court noted that where the three-part test was met, "our appellate courts have reversed **for jury interviews or new trials**, where jurors allegedly failed to disclose a prior litigation history or whether other information relevant to jury service was not disclosed." 659 So. 2d at 241 (citations omitted; emphasis added). In other words, if the motion for new trial can be disposed of as a matter of law without a jury interview, the trial court is free to do so. However, if a juror interview is necessary in order to obtain the facts necessary to make an informed decision, then there should be an interview.

small claims matter in which she was a defendant, and the other a 1975 automobile negligence case in which she was a plaintiff. Both were resolved without trial. The point of asking about litigation history is to determine if the juror bears some animus about the litigation process, or about similarly situated litigants, which would adversely impact on the prospective juror's ability to consider the case fairly. See De La Rosa, 659 So. 2d at 241.

In this case the plaintiff has not given any particularized argument why Ms. Fornell's experience over twenty years ago as an auto negligence plaintiff, or small claims defendant, could plausibly form the basis for a challenge for cause or a peremptory challenge. At some point, past experience is simply too remote in time to have a material bearing on present jury selection. Whether Ms. Fornell's 1970's experiences in those cases were good, bad, or indifferent, twenty years is too far removed to be material under De La Rosa.[7]

V.

The last consideration mentioned in De La Rosa is "that the failure to disclose the information was not attributable to the complaining party's lack of diligence." 659 So. 2d at 241. Although not raised by the appellant, we conclude that the diligence requirement was not satisfied in this case.

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[7] Because there was no concealment by juror Guerrero, we need not reach the issue of materiality in her case.

The motion for new trial in this case is, at bottom, based on a review of the civil lawsuit index maintained by the clerk of the circuit and county court. It is a public record which was freely available before, during, and after this trial.

This court's concern is that the checking of the clerk's lawsuit index was not done until after the trial was over, when it could have been done sooner. This court has become aware that in at least two circuit courtrooms, the trial judge at the conclusion of jury selection will grant a recess if either of the parties wishes to check the litigation index before the trial proceeds. If it appears that any of the juror's names has turned up, then an inquiry can be conducted on the spot and the juror can be excused if need be. Plaintiff's counsel candidly disclosed that he had followed such a procedure in a recent trial in Key West. In our view, that is the better solution to the problem.

We therefore hold that the time to check the jurors' names against the clerk's lawsuit index is at the conclusion of jury selection. If a party does not request the opportunity to make the record search, then that litigant will not be heard to complain later about nondisclosure of information which could have been disclosed by reference to the clerk's index.[8]

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[8] The court would suggest that the chief judges of the Eleventh and Sixteenth Judicial Circuits look into this problem and determine if this information may feasibly be made available at an earlier stage, such as on line in the courtroom or attached to juror questionnaires, if the litigants request it.

VI.

For the reasons stated, we reverse the order granting new trial and remand with directions to reinstate the jury verdict.

Reversed and remanded.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2000

FRANCISCO TEJADA, M.D., FRANCISCO TEJADA, M.D., F.A.C.P., P.A., and FRANCISCO TEJADA, M.D., F.A.C.P., P.A., d/b/a AMERICAN ONCOLOGY CENTERS, INC.,

Appellants,

vs.

LUCILLE ROBERTS, personally and as personal representative of the Estate of FREDERICK ROBERTS, Deceased,

Appellee.

CASE NO. 3D99-1432

LOWER TRIBUNAL NO. 96-12563

Opinion filed May 3, 2000.

An appeal from the Circuit Court for Dade County, Steve Levine, Judge.

Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., and Shelley H. Leinicke, for appellants.

Gaebe, Murphy, Mullen & Antonelli and David Kleinberg, for appellee.

Before JORGENSON, COPE and LEVY, JJ.

On Motion for Rehearing, Clarification and Certification

COPE, J.

We deny rehearing and certification but grant clarification.

Plaintiff argues that it is impractical to request a brief recess at the conclusion of jury selection in order to check the jurors' names against the litigation index. Plaintiff explains that after this case was lost, plaintiff used a computer tracking system, Autotrack, to conduct computer research regarding the jurors and their past places of residence, and only upon conclusion of that research was the clerk's lawsuit index consulted. Plaintiff argues that in order to conduct this type of research, it will be necessary for the litigant to request a two-week recess at the close of jury selection and that this court's opinion is mandating a procedure which is totally impractical.

Respectfully, we have done no such thing. While it is true that the plaintiff commissioned Autotrack computer studies, see R. 641-719, those reports are not important in this case. The pivotal documents are instead two pages from the clerk's civil lawsuit index in which the names Paula Guerrero and Thelma Fornell appear. See R. 627 and 631. This alphabetical index is a public record, which could have been consulted at any time. Had the index been reviewed during jury selection, counsel could have questioned jurors Guerrero and Fornell about those entries.

Our point is that in **this** case a quick trip to the clerk's office would have revealed the possibility of an undisclosed litigation history, and the matter could have been cleared up by

questioning the jurors immediately. It is unsound to allow parties to overturn a trial which has lasted days, weeks, or even months, on the basis of information which readily could have been obtained from the clerk's record in the very same courthouse where the case is being tried.

Plaintiff poses a hypothetical question about litigation history which is contained in the records of some foreign jurisdiction, and is not ascertainable in the clerk's record where the case is being tried. We express no opinion on such a case, because that is not the situation now before us. Here, the relevant records were readily available.

Plaintiff argues that consultation of the clerk's lawsuit index is not always as simple as it might seem. Counsel states that in his Key West experience, which we have alluded to in our opinion, certain follow-up inquiries were necessary after the trial had already begun and that, based on information which came to light, the trial court struck one of the jurors and seated an alternate. Although the record of counsel's Key West experience is not now before us, we accept his description of events. If difficulties arise in obtaining access to the clerk's record, then that is a matter which should be addressed to the trial court in the first instance, and the resolution lies within the court's discretion. We do not say that civil trials must be held up for lengthy periods in jury selection, but we do say that the time to

consult readily available public records is before, not after, the fact.

We have carefully considered the other contentions in the motion for rehearing, clarification, and certification, but are not persuaded thereby.

Clarification granted; rehearing and certification denied.