OA 5-1-01 47

In the Supreme Court of Florida

Case No. SC00-1080

Lucille Roberts, personally and as Personal Representative
of the Estate of Frederick Roberts,
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.

PETITIONER'S REPLY BRIEF ON THE MERITS

On Petition for Discretionary Review of A Decision
of The Third District Court of Appeal

Respectfully submitted,
January 5, 2001, by
David Kleinberg
Attorney for Petitioner
Gaebe Murphy Mullen & Antonelli
420 South Dixie Highway
Third Floor
Coral Gables, Fl. 33146

CERTIFICATE OF TYPE SIZE AND STYLE

Petitioner, Lucille Roberts, is utilizing fourteen (14) point font in this brief.

TABLE OF CONTENTS

Page

Certificate of Type Size and Style.....i

Table of Authorities.....iii

Introduction.....1

Statement of the Case and Facts.....1

Argument.....5

Prior Litigation is Material in this Specific Case.....5

Prior Litigation *Should* be found material 6

There was Concealment.....9

Diligence of Petitioner on *Voir Dire*.....11

Ex-Post Facto Application.....12

Rhetoric and Policy Positions.....13

Conclusion.....15

TABLE OF AUTHORITIES

Page

AMS v. Hoeffer,
723 So.2d 852 (Fla. 3rd DCA 1998).....14

Beyel Brothers, Inc. v. Lemenze,
720 So.2d 556 (Fla. 4th DCA 1998).....10, 11

Birch v. Albert,
761 So.2d 360 (Fla. 3rd DCA 2000).....11

Canty v. State,
597 So.2d 927 (Fla. 3rd DCA 1992).....7

de la Rosa v. Zequeira,
659 So.2d 239 (Fla. 1995).....1, 4, 5, 6, 9, 13, 15

Drew v. Couch,
519 So.2d 1023 (1st DCA 1983).....6

El Portal v. Miami Shores,
362 So.2d 275 (Fla. 1978).....12

Gavin v. State,
259 So.2d 544 (Fla. 3rd DCA 1972).....6, 7

Gore v. Bush,
- - So.2d - - (Fla. 2000).....5

Hagerman v. State,
613 So.2d 552 (Fla. 4th DCA 1993).....7, 8

Henry v. State,
586 So.2d 1335 (Fla. 3rd DCA 1991).....7, 8

Loftin v. Wilson,
67 So.2d 185 (Fla. 1953).....5, 10, 13

TABLE OF AUTHORITIES (Cont'd)

Lowrey v. State,
720 So.2d 1367 (Fla. 1998).....7, 8, 13

Lusk v. State,
446 So.2d 1038 (Fla. 1984).....7

Mills v. State,
462 So.2d 1075 (Fla. 1985).....7

Mobil v. Hawkins,
440 So.2d 378 (Fla. 1st DCA 1983).....7, 8

Moore v. State,
299 So.2d 119 (Fla.3rd DCA 1974).....6

Murphy v. Florida,
421 U.S. 794 (1975).....6

Nash v. Wells Fargo,
678 So.2d 1262 (Fla. 1996).....12, 13

ICNA v. Pasakarnis,
451 So.2d 447 (Fla. 1988).....12

Rouede v. First National,
177 So.2d 375 (Fla. 2d DCA 1965).....11

Skiles v. Ryder,
267 So.2d 379 (Fla. 2nd DCA 1972).....7, 8 9

State v. Rodgers,
347 So.2d 610 (Fla. 1977).....8, 9, 13

Tejada v. Roberts,
760 So.2d 960 (Fla. 3d DCA 2000).....11

Young v. State,
720 So.2d 1101 (Fla. 1st DCA 1998).....7, 8, 9

INTRODUCTION

The basic position of Respondents' answer brief is that they did not find the jurors litigation history to be relevant, and that there is an "alarming trend" of "sore losers" clogging up the court system.

The Trial Court has the authority to make the determination of relevancy. It did. Neither the Third District nor Respondents claim it abused its discretion.

There is no alarming trend of 'sore losers'. Of tens of thousands of trials in the last 6 years, there were a dozen cases that required the application *de la Rosa*. Our fundamental concept is that a trial must be fair, and jurors honest. One is not a 'loser' (sore or otherwise) when a case is decided outside of that framework.

I. STATEMENT OF THE CASE AND FACTS

Respondents provide a 4½ page 'version' of liability and causation 'facts' designed to improperly convince that they should have won. Such 'facts' are wholly irrelevant to the singular issue on appeal. Petitioner could follow suit, with her version of how Respondents, in just weeks: poisoned the decedent; failed to monitor him; poisoned him again; caused his death by diarrhea; and shortened his life by eighteen months. She won't, saying more than needed in the prior sentence.

When Respondents eventually discuss the *voir dire* issues they only discuss cancer and doctors, points that **they** deem relevant. Yet, Petitioner thought that

litigation history was important, and spent much effort on the issue. She considered issues of doctors and cancer and litigation, *inter alia*, in selecting jurors. But the non-disclosed litigation was obviously not weighed.

Of course, the Trial Court also found that the juror's litigation was relevant. To avoid that finding, Respondents mis-cite the Judge, (p.12) incomplete and out of context. The entire passage (bold was omitted by Respondents) reads:

> **THE COURT: Under the analysis of the cases that are out there, I have to agree with the Plaintiff. I don't think I have any choice.**
>
> **I think that I can find from this record that Thelma Fornell is personally named in at least two cases, and even though they may be remote, 20 years remote, it doesn't seem to matter, because it could have led to legitimate inquiry by Plaintiff's counsel during voir dire that could have led to relevant information about the juror, and I think I can find from this record that Paula Guerrero was the petitioner in the domestic violence case. A named petitioner.**
>
> **She sought relief in a court of law, even though in a few days it was dismissed, and I think I can find from this record that both Fornell and Guerrero failed to disclose that. I'm not finding they were untruthful, I'm simply finding that that information was not revealed during voir dire and that the Plaintiff made legitimate and, I think, adequate inquiry that should have elicited a response revealing that information.**
>
> I disagree with the Third District's rationale in this entire line of cases, that whether there is prejudice is basically irrelevant, and that whether there was ample evidence to support a verdict is essentially irrelevant.
>
> They have pretty much stated – and I have to follow a rule that if there was – that juror information on prior litigation history is relevant and if there is an adequate inquiry and the information is not revealed, regardless of why, whether it is lack of knowledge, lack of truthfulness, just inaccuracy or forgetfulness, those reasons are irrelevant. The failure to reveal it is automatically grounds for a new trial.

MR. MCCOY: Are you making a finding with respect to the relevance of this information; first with respect to Paula Guerrero and the petition for injunction in domestic violence court?
THE COURT: I personally wouldn't find that to be of such moment, that in and of itself, that it would fall under the litigation history gathered. **However, the question by the Plaintiff during voir dire was broad enough that it should have elicited that response.**

Certainly it should have at least elicited that she had been involved in a court case involving her boyfriend or whoever it was, a domestic violence situation, because whether you are looking at the petition she sought and initiated or you're looking at another criminal case where she was a victim, assuming she was, then all of those facts should have been elicited.

They were fair game for either attorney to go into, if they affected her opinions on being a juror in the case, and I think that the questions asked by Plaintiff's lawyer were adequate to have required a response, a disclosure by the juror. I can't find any particular fault by either juror. I'm not attributing any bad motives to them, but the fact is that[1] is irrelevant."

Admittedly, the Trial Court was properly concerned with the issue of remoteness (P.14-15, 17) and relevance (45) and carefully considered them:

MR. MCCOY: Judge you're making a finding that there is relevancy to domestic violence and the petition for injunction and domestic violence court as to – you're making a finding that is relevant to service as a juror in a medical malpractice action in civil court?
THE COURT: No, **it's relevant**. Any litigation history is relevant, whether it is domestic violence, whether it is anything. It would be nice if the Third District said no, it has to have some bearing on the case you're trying, **but the fact is, and there's probably some good rationale behind it, it doesn't matter what their case is about."** (P.45)

There is also another incomplete, out of context quote on p.13 of the brief:

[1] The "that" which is "irrelevant" is the motive of the juror, not the litigation history they did not reveal.

> "The trial court specifically declined to find that there was any concealment of information by the jurors because 'concealment implies a conscious action by the juror, ... and I'm not finding it to be a conscious action'".

Respondents imply that the Judge did not make the requisite *de la Rosa* finding. The entire passage (bold was omitted by Respondents) clearly shows that he **did:**

> **"Okay. Basically the factual matters are accurate. I've changed some of the language, so instead of saying the jurors concealed the information, I said the juror failed to reveal the information. Concealment, I don't think is the applicable standard, and I'm not making a finding that they concealed it.** Concealment implies a conscious action by the juror, ***and*** **I don't think under the law it has to be a conscious action,** and I'm not finding it to be a conscious action.
> **The fact is, there is enough record evidence that they were involved in litigation, they did not reveal it after an appropriate question by the lawyer. That is all I really want to say.**
> **MR. KLEINBERG: The word "Concealment", actually, is in the de la Rosa test.**
> **THE COURT: But they use it interchangeably with "Failure to disclose."**
> **MR. KLEINBERG: So that we're clear, concealment implies some intent or plan ---**
> **THE COURT: Although the Supreme Court has used the word "Concealment", they also used, in the same context, "Failure to disclose." Then I believe the subsequent cases interpreting de la Rosa might have made their decisions without regard to the ---** [intent]."

Worse, Respondents twist the Judge's comments in their last sentence (P. 13). He was not reluctant to grant a new trial, but talking about an interview to determine

intent. The record (bold was omitted by Respondents) shows this:

> **"MR. KLEINBERG: And again, so that the record is clear, should there be any dispute about it, and I don't think there will be, I am not waiving my right nor my request for the interview.**
> THE COURT: I hope that the Third District sends it back **saying that scienter is important and we ought to interview the jurors. I don't think that's going to happen, that's why I'm not ordering the interviews now."**

II. ARGUMENT

The Trial Court found all three prongs of *de la Rosa's* test to be factually supported. Respondents do not argue that the Trial Court abused its discretion.

Respondents do engage in fear mongering about 'alarming trends' and "gotcha". They call Petitioner "unwilling to concede she lost a fair fight", pulled a "rabbit out of the hat", a "playground do-over". But she did not get a "fair fight":

> "A juror who falsely represents his interest or situation or conceals a material fact relevant to the controversy is guilty of misconduct, and ***such misconduct is prejudicial to the party, for it impairs his right to challenge***." *de la Rosa* at 241, citing *Loftin* at 192.

Florida has been the focus of the world's attention over these last few weeks because righteous and fair-minded people (and Justices) believed that fair means fair, as opposed to expedient or convenient. (*Gore v. Bush*, -- So.2d -- (Fla. 2000)).

PRIOR LITIGATION IS MATERIAL IN THIS SPECIFIC CASE

The Trial Court found the litigation to be relevant and material. There was no abuse of discretion. Neither the Third District nor Respondents have addressed this.

The silence is deafening. In fact, Respondents' reliance on *Drew* shows that they do not understand the concept, or simply ignore it. In *Drew*, the trial court specifically found that the non-disclosure (not prior litigation) was not material. The First District, affirmed, refusing to substitute its judgment for that of the trial court:

> "The trial court could have found, without abusing its discretion, that the questions propounded to the juror were reasonably susceptible of misinterpretation, that the undisclosed information was not material, or that [it] did not affect her ability to render a fair and impartial verdict, **[the] decision to *grant or deny* a motion for new trial is a matter of broad discretion, not to be disturbed on appeal absent an abuse**".

PRIOR LITIGATION *SHOULD* BE FOUND MATERIAL

Respondents posit that only "issues of alleged malpractice", cancer or family doctors is material. There is no legal, factual or intellectual basis for that statement. To the contrary, look at the order expressly affirmed in *de la Rosa*:

> "Defendants argue that this concealment is not material. **It is hard for this court to see what could be more relevant than a potential jury [sic] hiding his involvement in litigation."** *de la Rosa*, at 240 n.1.

Lawsuits and their results stir strong emotions as we have recently seen.

Respondents cite three cases[2] for the proposition that a juror has no bias from litigation. In each, there are three factors fatal to their position. First, each is a "change of venue" case from pre-trial publicity. The "bias" does not relate to juror litigation. Second, each juror actually disclosed the information, and the parties

[2] *Gavin v. State*, 259 So.2d 544 (Fla. 3rd D.C.A. 1972); *Moore v. State*, 299 So.2d 119 (Fla.3rd D.C.A. 1974); and

evaluated the juror for challenge. They have no application to this case, save one. That is - in each, the appeals court refused to substitute its judgment for the trial court's, holding:

> "The law focuses upon the impartiality of the jury and vests in the judicial discretion of the trial court the initial determination... Therefore, a reviewing court will not upset the trial judge unless his abuse of discretion is manifest." *Gavin*, 259 So.2d 544 at 547.

Respondents cite *Lusk* and *Mills* as saying prior litigation is not material. The position is untenable. In *Lusk*, and *Mills* the jurors actually disclosed the objected to information, and were challenged peremptorily. Fornell and Geurrero did not. In *Mills*, counsel was afforded an opportunity to follow up with more questions. Counsel for Petitioner herein was not. However, *Mills* states:

> "The competency of a juror challenged for cause presents a mixed question of law and fact **to be determined by the trial court. Manifest error must be shown to overturn**..." *Mills*, at 1079.

Respondents cite seven cases[3] they claim are factually worse than this case. Each has its own facts, and some facts are egregious. Yet none suggest that this case's non-disclosures are unworthy.

In two, *Canty* and *Hagerman*, the bias facts were disclosed, a challenge for cause denied, a peremptory challenge used, and the juror did not sit. The court held:

Murphy v. Florida, 421 U.S. 794 (1975).

[3] *Canty v. State*, 597 So.2d 927 (Fla. 3rd D.C.A. 1992); *Hagerman v. State*, 613 So.2d 552 (Fla. 4th D.C.A. 1993); *Henry v. State*, 586 So.2d 1335 (Fla. 3rd D.C.A. 1991); *Mobil v. Hawkins*, 440 So.2d 378 (Fla. 1st D.C.A. 1983); *Skiles v. Ryder*, 267 So.2d 379 (Fla. 2nd D.C.A. 1972); *Lowrey v. State*, 720 So.2d 1367 (Fla. 1998); and *Young v.*

> "Since a "denial or impairment of the right [to peremptory challenges] is reversible error without a showing of prejudice,"" *Hagerman*, at 554.

It is that "impairment of the right", about which Petitioner complains.

In the third case, *Henry*, the bias fact was disclosed. A challenge for cause was denied, a peremptory no longer available, and a request for more denied. The juror sat. The defendant was entitled to a new trial, because the trial court "permitted an objectionable juror to serve on the jury." Non-disclosure allowed Fornell and Guerrero, the "objectionable juror[s] to serve on the jury." And, *Henry* holds that prejudice is presumed and need not be proven[4]:

> "[Defendant] *need not demonstrate* that a biased juror was seated; it is sufficient that he attempted to use a peremptory challenge to excuse an objectionable juror who served on the jury" *Henry*, at 1337.

In the remaining four cases, *Mobil*, *Skiles*, *Lowrey*, and *Young*, the bias facts were not disclosed. Just like this case. In each, the party received a new trial. Just like this case. It does not matter that the non-disclosure in those four was different, worse or not, than this case. This is a 'distinction without a difference'. Look at the analytical framework in these four cases:

> "Her failure to disclose material information bearing on her ***possible*** bias and her qualifications to serve as a juror **deprived Mobil of its right to intelligently participate in selection of the jury, and gives rise to an unacceptably strong inference that Mobil did not receive the fair trial to which it was entitled**. *Mobil*, 440 So.2d 378, at 381.

State, 720 So.2d 1101 (Fla. 1st D.C.A. 1998).

[4] See also *Lowrey* and *Rodgers* cited and discussed at p. 22-24 of Petitioner's Merits Brief.

"The harm lies in the falsity of the information, **regardless of the knowledge of its falsity**... while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; . . . **the right to a new trial follows as a matter of law.**" *Skiles*, 267 So.2d 379, at 382.

"**We reject** the State's contention that our decision in *Rodgers* dictates that the only remedy for a statutorily disqualified juror's serving on a jury is a posttrial evidentiary hearing at which **the defendant must prove actual bias or prejudice.**" *Lowrey*, at 1370.

"**Inherent prejudice** to the party is **presumed.**" *Young*, at 1103.

Within that analytical framework, look at the actual findings of the Trial Court:

"Because it could have led to legitimate inquiry by Plaintiff's counsel during voir dire that could have led to relevant information about the juror...

The Plaintiff made legitimate and, I think, adequate inquiry that should have elicited a response revealing that information...

However, the question by the Plaintiff during voir dire was broad enough that it should have elicited that response.

Certainly it should have at least elicited that she had been involved in a court case ... all of those facts should have been elicited.

They were fair game for either attorney to go into, if they affected her opinions on being a juror in the case".

THERE WAS CONCEALMENT

Respondents protest the 'label' "concealing jurors" as inflammatory because it was not intentional. This game of semantics is exposed on p.4 of this Brief. The jurors 'concealed'. They 'held back'. They 'failed to disclose'. Call it what you want. Make it a legal term of art. But no doubt, it was 'concealment' under *de la*

Rosa.

Respondents go on to say that the jurors did disclose *other* information they deem important, so the litigation concealment is forgiven. There is no legal, factual or intellectual basis for that statement. Fornell could have disclosed her husband's cancer, but not her own, and that would be concealment. She would not and should not be forgiven just because she provided some information, yet withheld or concealed other information.

Respondents argue the law requires *knowing concealment*. It doesn't:

> "**The fact that the false information was unintentional and that there was no bad faith, does not effect the question,** as the harm lies in the false information, regardless of the knowledge of its falsity on the part of the informant; **while willful falsehood may intensify the wrong done, it is not essential** to constitute the wrong . . . a new trial follows **as a matter of law**". *Loftin*, 67 So.2d 185 (Fla. 1953).

Beyel's use of "knowingly concealed" results from the judge not finding the juror was the same person in court records. The Fourth District affirmed, respecting his findings and discretion. Here, the Judge did find that the jurors were the same:

> "I think that I can find from this record that Thelma Fornell is personally named in at least two cases... and I think I can find from this record that Paula Guerrero was the petitioner in the domestic violence case. A named petitioner."

In fact, counsel for the Respondents (p. 20) essentially admitted[5] this:

> "Judge, we are not – I don't think I can admit as a matter of law that

[5] Respondents devote more than a full page of their brief, in vain, to arguing non-identity.

> this was absolutely that juror. **I think it's as close as we can come to admitting, we're able to do that**, but I disagree that she came and filed an action. She did not seek a lawyer, she did not file a lawsuit."

The Third District accepted this, together with the evidence before the Trial Court, that the jurors were "correctly matched to the prior litigation". *Tejada*, at 963 FN. 3. Also, the complaining party in *Beyel* did not request an interview. Petitioner repeatedly did, but the Trial Court found it unnecessary. (p. 44).

The jurors knew they were involved in the litigation. Guerrero personally signed and filed her assault petition in 1996 and this trial was in 1998. Even the Third District concluded that Fornell must have known of the need to disclose. *Tejada*, at 964. The records showed her involvement as a named party including: service, interrogatories, production, affidavits, trial settings, **even her deposition**! (See R.Vol. IV, 534-743, at Ex. G). Thus, *Rouede* is not of moment because:

> "it was **shown** that the juror did not know at the time that he was questioned on *Voir Dire* that the lawyer ...was a partner of the attorney for the plaintiff and that there was no sign on the office door or other indication that the two attorneys were partners". *Rouede*, at 376.

Fornell and Guerrero *knew* of the cases. *They* were there, and *knew* who they were.

DILIGENCE OF PETITIONER ON *VOIR DIRE*

Respondents rely upon the Third District's flawed logic[6] on "diligence". Respectfully, this Supreme Court has not, and has expressly rejected it:

[6] In both *Tejada*, and *Birch v. Albert*, 761 So.2d 360 (Fla. 3rd D.C.A. 2000).

> "The majority mandates pre-verdict discovery of juror concealment ... **I see no reason to extend *Bernal* 's due diligence requirements and would not impose on counsel the onerous burden of investigating the venire during the trial.**" *de la Rosa, supra* at 534.

Rather than repeat *ad nauseum*, Petitioner re-asserts p.12-19 of her Merits Brief.

EX-POST FACTO APPLICATION

Respondents' cases on "procedural modifications to pending cases" have no bearing on Petitioner's *ex-post facto* position. *El Portal* applied the 'contribution' statute at the trial, even though it was not law at the time of the original tort. *Pasakarnis* dealt with apportionment, at trial, of 'seat belt' damages. The appeals court didn't apply a new *procedure* two years after trial. *Nash* applied a new pleading requirement before trial and held:

> "Even though the law was unsettled, the decision in *Mesmer* was issued in 1991, ... prior to the time the instant case went to trial. Yet, [the] answer to Nash's complaint did not include an affirmative defense ... nor was such a defense raised by Wells Fargo during the pretrial conference. In fact, [the] negligence was not at issue because Methodist was not a defendant in the case." *Nash*, at 1265.

The Defendant in *Nash* was not subjected to a new procedural requirement two years after the trial. But Petitioner was. The rational of *Nash* demonstrates the harm in changing the rules after the game ends: "Notice prior to trial is necessary because [it] may affect both the presentation of the case and the trial court's rulings."

If one needs to know of apportionment *before* a trial, Petitioner needed to know of the investigation requirement sometime *before* the jury was sworn. Not *two years later*. And unlike *Nash*, the law on diligence was very well settled. This Supreme Court expressly held that intra-trial investigation was not needed. Two years later, the Third District re-wrote the requirement retroactively.

RHETORIC AND POLICY POSITIONS

Petitioner posed rhetorical questions in her Merits Brief for good reason. The existing law in *de la Rosa*, *Lowrey*, *Rodgers* and *Loftin*, and the factual findings of the Trial Court must result in a reversal and new trial. Petitioner believes that this Court wanted more - a study of the progression of the law, a look at why and how the law should be interpreted. If the analysis or rhetorical questioning is either unnecessary, or offensive, an honest apology is offered.

But Petitioner's brief is not an 'objectionable closing argument', nor is it a 'flight of fancy'. The "what ifs" cannot be read as an "attempt to bootstrap speculative, hypothetical into fact". The 'facts' are in the ignored findings of the Order Granting New Trial. The rhetorical questions were intended to provoke thought on the possibilities and results under developing cases. In fact, Respondents' cry of speculation misses the point. It is *because* of the non-disclosure that we must speculate on 'why', 'what', and 'agendas'.

Respondents' 'Orwellian' cry is unavailing, as is the position that the continued rule of *de la Rosa*, *Loftin*, and *Lowrey* will result in an "indescribable waste, expense, and burden". A wrong answer "caused by nervousness, or oversight" need not result in contempt or perjury. The judge, in his discretion, would say who is intentional vs. nervous. But admonishing the jurors to take the *voir dire* process seriously will make them think hard. It will result in fairer juries, and 'final' results, where people will know, and accept, who has won and lost - fairly. Not merely because it was expedient to declare a winner right now.

Respondents offer, as proof of a lack of burden, that counsel did an intra-trial investigation in another case. This has no merit. It was *quite a burden*, and questionably effective. The Key West trial took 2 weeks. Even there, it took 5 days for a full time investigator to gather even minimal information. Much information was likely missed. A litigant should not be *forced* into the burden of hiring an investigator or waiting 5 days to seat a competent jury.

That 'other case' had already been appealed and affirmed based on the exact issue of juror non-disclosure. *AMS v. Hoeffer*, 723 So.2d 852 (Fla. 3rd D.C.A. 1998). Counsel handled both trial and appeal in *Hoeffer* and in this case. By January 2000, he had studied the non-disclosure issues, and the direction of the District Courts. He did not want to come back to the Third District twice on the

same issue, in the *same* case, for a third expensive trial. Thus, he ***chose*** to make expensive and extraordinary efforts, which may or may not have been successful in finding even local prior litigation. A **choice** is not a **legal requirement**.

The Third District's opinion *penalizes* the Petitioner, for that extraordinary *choice*, simply because the same extraordinary *choice* was not made in her case 2 ½ years **before**, when *de la Rosa* was still respected by the district courts.

III. CONCLUSION

Respondents do not challenge the discretion or findings of the Trial Court. The jurors concealed material information and not for Petitioner's lack diligence. Under the existing and well-reasoned law of this Supreme Court, Petitioner was deprived of her *right* to a fair trial. She is now entitled to a new, fair trial before honest and competent jurors. That is not a 'playground do-over', nor is it 'presto-chango' a rabbit from a hat. It is the law. It is *the* fundamental concept of justice. The Third District's Opinion should be reversed, and the Trial Court's Order Granting New Trial affirmed.

Respectfully submitted,

By: _____

David Kleinberg
Florida Bar No. 765260
Attorney for Petitioner

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that Petitioner's Reply Brief on the Merits has been furnished this 5th day of January, 2001 to: Shelley H. Leinicke, Esq., Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., Post Office Box 14460, Ft. Lauderdale, Fl. 33302.

GAEBE MURPHY MULLEN & ANTONELLI
Attorneys for Petitioner
420 S. Dixie Highway, Third Floor
Coral Gables, FL 33146
(305) 667-0223
(305) 284-9844 Facsimile

By _____
David Kleinberg, Esq.
Florida Bar No. 765260