

**IN THE SUPREME COURT
OF FLORIDA**

Case Number: SC00-1255

THOMAS J. KELLY, M.D. and
THOMAS J. KELLY, M.D., P.A.

Petitioners,

v.

COMMUNITY HOSPITAL OF THE
PALM BEACHES, INC., d/b/a
HUMANA HOSPITAL - PALM BEACHES,
and HUMANA, INC.

Respondents.

On Review of a Decision of
The Third District Court of Appeal
Case Number: 3D98-0907

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

As set forth in Respondents' Brief on Jurisdiction, Petitioners' recitation of the facts is an attempt to shock this Court into a de novo review of the Third District's per curiam affirmance of the trial court's rulings based upon facts that are irrelevant and, as such, should be disregarded. These tactics were rejected by the trial court and the Third District Court of Appeal.

This was a breach of contract and fraudulent inducement case between Dr. Kelly and Humana Hospital of the Palm Beaches and Humana, Inc. (collectively, "Humana") (1R 1-32, 104-130, 171-177, 182-183). Following a defense verdict, Kelly's counsel conducted an investigation of the jurors, including personal interviews with several of the jurors or alternates, without the court's permission, and subsequently moved for a formal jury interview or new trial due to alleged juror misconduct (7R 1215-1237, 1260-1262). Humana opposed the motions (7R 1238-1239, 1242-1256) and the trial court denied them (11R 1812). Kelly appealed to the Third District Court of Appeal raising alleged juror misconduct and other evidentiary and jury instruction issues (9R 1523-1526). Humana cross-appealed on the issues of punitive damages and the economic loss rule (9R 1538-1542).

The Third District Court of Appeal per curiam affirmed, with citations, the jury's verdict. (SR 2913-2914). See Kelly v. Community Hospital of the Palm

Beaches, Inc., 756 So. 2d 144 (Fla. 3d DCA 2000) (A1 1).¹ Kelly sought rehearing, rehearing en banc, and certification to this Court as passing on a question of great public importance (SR 2915-2940). The Third District promptly denied the motions (SR 2941). Kelly then sought conflict jurisdiction in this Court, citing Tejada v. Roberts, 760 So. 2d 960 (Fla. 3d DCA 2000), one of the cases cited in the Third District’s per curiam affirmance. This Court granted jurisdiction on the basis of direct or express conflict, presumably “piggybacking” this case onto its acceptance of jurisdiction in Tejada.

SUMMARY OF THE ARGUMENT

Resolution of the conflict issue in Tejada will have no effect on this appeal. The Third District cited multiple cases in its per curiam opinion, all of which independently support an affirmance in this case. Thus, this Court should discharge this case as conflict jurisdiction was improvidently granted.

Presumably, this Court accepted jurisdiction in Tejada to resolve a conflict with DeLaRosa v. Zequeira, 659 So. 2d 239 (Fla. 1995), regarding when a party must review public records to investigate a juror’s truthfulness in response to questions asked during voir dire. In Tejada, the Third District held that a party must conduct this investigation before the trial concludes, preferably during voir

¹ All citations to the attached Appendix include reference to the appendix number and page number (i.e., (A1)).

dire, and that a party's failure to do so constitutes a lack of due diligence, precluding a new trial or juror interview after an unfavorable verdict.

In the present case, even though the Third District cited Tejada, neither party raised the timing of the juror investigation. Humana never contended that Kelly's failure to investigate the jurors prior to the conclusion of voir dire and the commencement of trial in any way precluded a new trial or a juror interview. Rather, Humana argued that the jurors did not misrepresent any information material to jury service in this case, and that Kelly's counsel's own lack of diligence, or failure to inquire about the jurors' backgrounds, resulted in the waiver of any argument that the jurors concealed anything at all.

Importantly, the Third District cited to several cases besides Tejada that independently support the affirmance. Thus, regardless of how this Court decides Tejada, the Third District's affirmance is wholly supported by case law. Accordingly, "piggyback" jurisdiction is not appropriate and the Third District's affirmance should stand.

The other issues raised by Petitioners, which this Court has the discretion not to address, also resulted in a per curiam affirmance by the Third District. The Third District determined that Petitioners had not demonstrated an abuse of discretion or prejudice from the exclusion of post-contract evidence or the

requested jury instructions on negligent misrepresentation or implied provisions of a contract.

ARGUMENT

The district court’s per curiam affirmance in this case cited to a number of cases, other than Tejada, addressing each issue on appeal and supporting its affirmance of the jury verdict wholly independent of Tejada. Accordingly, this case will not be affected by this Court’s decision in Tejada, and the petition for review should be dismissed as improvidently granted.

A review of the cases cited in support of the Third District’s per curiam affirmance negates Kelly’s argument that Tejada can have any affect on this case. This is particularly true in light of the fact that the timing of juror background investigations was not raised by the parties below.

The additional cases cited by the Third District, discussed in detail below, support the affirmance of the jury verdict independent of (and in addition to) the reasons why the Third District Court of Appeal may have cited to Tejada. As such, Humana contends that it is not necessary, or appropriate, for the parties in this case to argue the merits of Tejada, or even to speculate why the Third District cited to Tejada in this case. Regardless of whether Tejada is a “flawed” decision, whether it conflicts with any existing law, or whether it should be applied prospectively, this case will remain unaffected, as the remaining cases cited by the Third District, standing alone, support the affirmance in Humana’s favor

I. The trial court and district court properly concluded that Kelly was not entitled to a new trial or a juror interview based on alleged juror misconduct.

Humana's answer brief filed before the Third District responded in detail to Kelly's allegations of juror misconduct now reiterated almost verbatim in Kelly's initial brief on the merits. Rather than simply repeat the response, a copy of Humana's answer brief is attached for the Court's convenience (A2 21-33).

Kelly failed to prove that the jurors omitted material facts during voir dire questioning. At best, the jurors' responses to the questions posed were ambiguous, and were not misrepresentations of material facts. More importantly, Kelly's counsel never took the opportunity to inquire about Mr. Skinner's occupation, the circumstances surrounding his retirement or his prior litigation history in an attempt to clarify his responses to those questions posed by defense counsel. Kelly's own attorneys readily admitted that they "forgot to ask the jurors about their prior lawsuits" and "inadvertently failed to ask Skinner any questions about his prior litigation." (A3 14, 31).

In its per curiam affirmance, the Third District agreed with Humana, citing Taylor v. Public Health Trust of Dade County, 546 So. 2d 733 (Fla. 3d DCA 1989), *rev. denied*, 557 So. 2d 867 (Fla. 1989), a case cited throughout Humana's answer brief. Taylor involved a factually similar situation wherein the plaintiff alleged misconduct on the part of a juror who became the foreman. In Taylor, the

Third District held that the trial court had not abused its discretion in denying the plaintiff's motion for a new trial based on a one-word response during voir dire examination. Id. at 734. The court further concluded that the statement was not necessarily a misrepresentation and pointed to plaintiff's counsel's lack of diligence:

Contrary to the plaintiff's argument, the subject response was ambiguous in nature and did not constitute, as urged, a misrepresentation of fact concerning the juror's involvement with a pending lawsuit; moreover, the plaintiff's counsel made no inquiry into this matter and did not seek to clarify the ambiguous response.

Id.

The Third District's citation per curiam affirmance also cited to its earlier decision in Salmon v. State, 755 So. 2d 148 (Fla. 3d DCA 2000), wherein the court concluded that the complaining party's allegations of juror misconduct were "insufficient to find that the juror lacked the requisite impartial state of mind to render a fair verdict." Id. The Third District concluded the alleged non-disclosures by jurors were "insufficient as a matter of law to vitiate the entire trial." Id. (citation omitted).

Similarly, the jurors' responses to voir dire questions by the defense here were, at worst, ambiguous, and Kelly's counsel failed to use due diligence despite being given a second opportunity to question the jury panel. In fact, Kelly's counsel elected not to question the jurors about the issues of which they now

complain. Clearly, the Third District's decision, citing to Taylor and Salmon is sustainable regardless of Tejada.

II. The district court properly concluded that the trial court did not abuse its discretion in refusing to instruct the jury on the issues of negligent misrepresentation and implied contract.

Since this Court has preliminarily accepted conflict jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), it also retains discretion to address the other issues raised on appeal. However, Humana contends that this Court need not exercise that discretionary jurisdiction particularly where, as here, there is no conflict, apparent error or injustice. *See, e.g., In re M.F.*, 770 So. 2d 1189, 1195 n.15 (Fla. 2000)(declining to address issues raised that are not the basis of the Court's discretionary jurisdiction). The law cited by the Third District, on the issues of jury instructions and the exclusion of evidence (addressed below in Argument III), is well-settled.

With regard to the jury instructions, Humana contended, in the post-trial and appellate proceedings, that there had been no abuse of the trial court's sound discretion and that Kelly had not been prejudiced by the trial court's failure to utilize his requested instructions on negligent misrepresentation and implied contractual provisions. (A2 34-38). The Third District agreed, citing to Sears Roebuck & Co. v. McKenzie, 502 So. 2d 940 (Fla. 3d DCA 1987).

McKenzie stands for the proposition that, to demonstrate reversible error, the complaining party must establish that the requested jury instruction contained an accurate statement of the law, that the facts in the case supported giving the instruction, and that the instruction was necessary for the jury to properly resolve the issues in this case. Id. at 942 (citations omitted). Otherwise stated, Kelly was required to convince the Third District that the trial court's failure to give the requested jury instructions resulted in a "reasonable possibility that the jury could have been misled by the failure to give the instruction" or was otherwise prejudicial. Id. (citations omitted). The Third District concluded that Kelly did not meet this burden and affirmed in the absence of such prejudice.

The Third District also cited Lynch v. McGovern, 270 So. 2d 770 (Fla. 4th DCA 1972), which notes that it cannot be deemed error when a trial court does not charge the jurors as to each and every inference that they might, or might not, indulge. Id. at 772. Rather, if the jury charges, as a whole, are adequate to advise the jury of the law of the case (as Humana argued they were), there is no reversible error based on the trial court's refusal to charge the jury as requested. Id.

Thus, the Third District's decision to uphold the trial court's discretionary decisions as to the exclusion of requested jury instructions was wholly unrelated to, and independent from, its citation to Tejada, and, absent a showing of an abuse of discretion, the affirmance should be upheld.

III. The district court properly concluded that the trial court did not abuse its discretion in refusing to allow the introduction of post-contract conduct between the parties.

Kelly also appealed the trial court's exclusion of evidence of the parties' actions after the contract period had expired. Humana's argument on appeal, set forth in its answer brief (A2 38-40), was four-fold.

Humana argued that there were no allegations in Kelly's pleadings directed at the conduct or actions of Humana following the expiration of the contracts between the parties. Further, in light of Humana's numerous objections and the trial court's exclusion of this evidence the issue was clearly not tried by consent.

Second, with regard to Kelly's fraudulent inducement claim, Humana took the position that conduct taken by Humana or its agents after the contract had been entered into could not possibly support an argument that Kelly had been fraudulently induced into entering the contract.

Third, with regard to Kelly's breach of contract claim, Humana argued that any post-contract activity between the parties could not be deemed relevant to a breach of the contract, which must have occurred during the time the contract was in existence.

Finally, Humana recognized that the post-contract conduct between the parties may have been relevant to the damages that Kelly purportedly suffered. Because the jury did not find that Humana had fraudulently induced Kelly to enter

into the contract, or that Humana had unfairly breached the contract, the jury never reached the damages section of the verdict form, and the exclusion of the post-contract conduct was nonetheless harmless.

The Third District agreed with Humana and affirmed the trial court's discretionary ruling, citing Jimenez v. Gulf & Western Mfg. Co., 458 So. 2d 58 (Fla. 3d DCA 1984), also cited by Humana in its answer brief. Jimenez holds that "the admission of evidence is a matter within the sound judicial discretion of the trial judge, whose decision in that regard must be viewed in the context of the entire trial." Id. at 59 (citation omitted).

Again, the Third District based its affirmance on the trial court's evidentiary ruling on long-standing principles of law which were unrelated to, and will ultimately be unaffected by, the Tejada decision. Absent anything to suggest an abuse of discretion by the trial court, the Third District's affirmance should be upheld.

CONCLUSION

Although the Third District cited Tejada to support its per curiam affirmance, it also cited to separate, independent, well-settled case law supporting each issue on appeal. Each of the cases cited supports affirmance. As such, there is no need for this Court to accept discretionary review of this case. The Third District's affirmance based on the other cases cited is sufficient, independent of

this Court's review and disposition of Tejada, regardless of the outcome. Accordingly, Humana respectfully suggests that this Court should conclude that "piggyback" jurisdiction has been improvidently granted and dismiss the petition based on a finding that the Third District's opinion that Kelly was not entitled to a new trial or a juror interview should be sustained for reasons unrelated to Tejada.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I HEREBY CERTIFY that this brief was prepared in 14 point, proportionally-spaced Times New Roman font.

Debra Potter Klauber

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this 26th day of February, 2001, to all counsel on the attached mailing list.

Debra Potter Klauber