IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1255

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

Petitioners,

vs.

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

Respondents.

On Conflict Review of a Decision
Of the Third District Court of Appeal

PETITIONERS' INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF THE CASE AND FACTS

Thomas Kelly, M.D., and his professional association sued Humana, Inc., and a Humana-owned hospital, Community Hospital of the Palm Beaches, Inc., for fraud, breach of contract and for the destruction of his medical program. The defendants' fraud consisted of inducing Dr. Kelly to transfer his successful adolescent treatment program to Community Hospital with promises that they would furnish his program with certain professional designations, marketing services and physical facilities. Plaintiffs' breach of contract claim, after the judge refused to allow evidence that the defendants destroyed Dr. Kelly's program, was reduced to the assertion that the defendants had failed to pay certain consultants to the program (I.1-32,104-30;XXIII. 649,659-60,664-66).

The jury decided in the defendants' favor (VII.1212-14). The plaintiffs' motions for new trial and to interview jurors were denied (XI.1812). The Third District Court of Appeal affirmed, 756 So.2d 144 (Fla. 3d DCA 2000), based in part on Tejada v. Roberts, 760 So.2d 960 (Fla. 3d DCA 2000). Review was granted in this case based on express and direct conflict between Tejada and opinions of this Court and the district courts of appeal.

Dr. Kelly's Program

In the early 1970's Dr. Kelly, a child psychiatrist, began developing a residential treatment program for severely disturbed adolescents (XXV.910; XXVII.1202-04; XXVIII.1349;XXV.1676-77;XXXI. 1774, 1777-83). The core of the program was its residential community in which patients would live and obtain therapy for between 12 and 18 months (XXIII.609,615; XXVI.1054; XXVII. 1212; XXXI 1790-92). By mid-1980 the program was obtaining extraordinary therapeutic results. Most residential psychiatric programs considered a 50% readmission rate a sign of success; Dr. Kelly's program, working with the hardest cases, was achieving non-readmission rates of 85-90% (XXV.919-20;XXX.1681,1691;XXXI. 1797-98.Pl.Ex.33).

The Defendants' Fraudulent Inducements To Dr. Kelly To Bring His Program To Community Hospital

In 1985, Dr. Kelly sought to move his program from Lake Hospital to a more suitable location. Because the physical and therapeutic heart of his program was the residential treatment center ("RTC")(XXVII.1358; XXXI.1849), Dr. Kelly con-sulted with several companies which specialized in building psychiatric facilities -- the last being First Hospital Corporation -- about building his own RTC. Land was purchased, financial projections were made, and plans for an RTC were roughed out (XXIX.1549-51,1555-61,1575-78). Dr. Kelly, however, ceased pursuing his plans with First Hospital in November 1986, after speaking with defendant Community Hospital (XXXI.1832-33; XLIII.3463-65. Pl.Exs. 1,11,65,66).

Neils Vernegaard had become the Executive Director of Community Hospital in 1985. He had unused space in his hospital's new

psychiatric Pavilion to fill (XXVII.1213. Pl.Ex.64), and his compensation was based, in part, on his Hospital's economic performance (XXVII.1213,1214; XXXI.1835; XXXVII.2592-93,2641-42). Community Hospital, however, was an osteopathic hospital with troubled finances and a mediocre reputation (Pl.Ex. 56 p.3. XXXI. 1835-36; XXXVII.2595-98). Vernegaard was excited by the prospect of acquiring Dr. Kelly's prestigious program and thereby improving the perception and the profitability of his own hospital (XXVII.1214; XXXII.1999-2001; XXXVII.2597-98,2607-09,2613,2629-30, 2633.Pl.Exs.1,11 p.2).

Humana marketed its hospitals by designating a hospital a "Center of Excellence" ("COE") in some medical specialty. Humana believed that once it designated and marketed one department within a hospital as a prestigious COE, that hospital's other departments would experience greater patient demand and physician referrals as a result of the association (XXXVI.2450-52[R.1562-63];XXXVII.2616).

In his initial meetings with Vernegaard, and with Humana executives David Rollo and Thomas Moore, Dr. Kelly was promised that his program would be designated a COE in adolescent psychiatry if he moved it from Lake to Community Hospital (XXVI.1068; XXVII.1214; XXVIII.1360-61;XXXI.1838,1840;XXXVII.2623-24,2629.Pl.Ex.11). Dr. Kelly understood that his program would become a COE shortly after its arrival at Community Hospital and that the designation was, in his words, already a "done deal." (XXVI.1068;XXVII.1215-16,1278-79;XXVIII.1361,1363,1387;XXXI.1848-49;XXXIV.2160-61).

The defendants promised Dr. Kelly two specific benefits along with his COE designation. First, Humana would assist him in publishing, in professional journals, statistics proving the success rate of his program and the results of research in adolescent psychiatry that members of his staff were conducting (XXIII.686; XXV.939,948; XXVII.1214; XXVIII.1360-62;XXX.1704;XXXI. 1814,1824-26,1842-43,1847). Second, Humana would heavily market Dr. Kelly's COE program regionally, nationally, and inter-nationally. In these ways, his program's success would become widely known and the program could draw on a broader patient and physician base (XXIII.684,686-89,692; XXIV.781; XXV.939-41,948; XXVII.1214-15,1216-17;XXVIII.1360,1361,1432-33;XXXI.1838,1840-44).

These promises were of the utmost importance to Dr. Kelly. He had long anticipated and feared the growing impact of "managed care" on long-term residential treatment programs like his. Insurance companies and HMO's were beginning to resist paying for extended care (XXV.918; XXVI.1090-91,1108-12,1114,1117-18; XXVII. 1261,1284-85,1298-99;XXVIII.1390,1393-94;XXXI.1822,1886-87).

Dr. Kelly told the defendants during negotiations that the best way his program could weather the rapid onset of managed care was if, (1) it were widely marketed so as to draw on an affluent patient base that was not dependent upon insurance or HMO benefits, and, (2) its therapeutic success were professionally published. In this way, insurance companies and HMO's, despite their preference for shorter treatments, would pay for his program because of his professional

reputation and documented results (XXIII.685-86;XXIV.778-79,781-82;XXV.919,934-35,937-38;XXVII.1214; XXXI.1822-24,1827,1886-87; XXXII.1998-99; XXXVII.2638-39; XL.2985. Pl.Ex.55).

The defendants also promised Dr. Kelly that they would build an RTC and other facilities for his program (XXIII. 691; XXVIII.1360-61.XXXI.1853,1858-59,1909;XXXVII2635-36). The RTC was an essential part of Dr. Kelly's program: it kept long-term patient costs down and it would have given Dr. Kelly's type of self-contained therapeutic community the room it needed to expand (XXV.928-29;XXVI.1094;XXVII.1206;XXXI.1796,1854). The small wing that Dr. Kelly's program would occupy at Community Hospital's Pavilion, while adequate for the program's short-term needs, was not the long-term residential facility his program required (XXIII.635-36).

On the strength of the defendants' promises of a prompt COE designation and attendant marketing, research, and publication support, and that they would build a new RTC and other facilities for his program, Dr. Kelly did not pursue his plans for an RTC with First Hospital. He signed a one-year, self-renewing contract with Community Hospital effective January 1, 1987, and moved his staff and patients from Lake to Community Hospital approximately 3 weeks later. Dr. Kelly's contract, called a "Professional Services Agreement," denominated him the "Medical Director" of the Hospital's adolescent psychiatric unit (Def.Ex. A.; Pl.Ex. 13. XXIII.694;XXIV.764,774;XXXI.1864-65,1920-21;XXXII. 1941-43).

The defendants, however, refused to designate Dr. Kelly's program a COE until November 1, 1988, twenty-two months after the initial contract began (XXXVI.1075. Pl.Ex.24). After he filed suit, Dr. Kelly learned the reason for Humana's inaction: on January 23, 1987, just a few days after Dr. Kelly had moved his program to Community Hospital, Thomas Moore, Humana's Director of Centers of Excellence, wrote a letter to Vernegaard revealing that Humana never had any intention of giving Dr. Kelly the COE support he had been promised (Pl.Exs.14, 18).

After belatedly and begrudgingly bestowing a COE designation on Dr. Kelly's program, basically to keep Dr. Kelly from moving (Pl.Ex. 25;XXVI.1034; XXXVII.2656), Humana withheld every other inducement it had promised. Humana refused to market Dr. Kelly's program (XXIII.692;XXVII.1218-19;XXXI.1876-77), refused to support or help publish his program's research studies and therapeutic successes in order to convince insurance companies and HMOs to patronize the program (XXIII.693;XXVI.1051;XXVII.1219-20; XXXI. 1876,1886-87), and refused to provide Dr. Kelly with an RTC and other promised facilities (XXXI.1870-72,1908-09;XXXIV.2261-64. Pl. Ex. 19, 23,40, 44-49,59,60).

David Rollo, Humana's Senior Vice-President of Medical Affairs, admitted that Humana ultimately gave Dr. Kelly nothing more than a bare and useless COE designation:

> Q. When Doctor Kelly finally got the decision that it did to be a Center of Excellence some 23 or 24 months after you were down there [to meet and recruit Dr. Kelly], was

there any single benefit other than hollow name, Center of Excellence, that Humana conferred upon Kelly?

A. Not that I know of.

(XXXVI.2520[R.1632]).

The Defendants' Destruction Of Dr. Kelly's Program

Dr. Kelly's May 1, 1989, contract with Community Hospital was to expire on April 30, 1990. Not pleased with Community Hospital, but not wanting to move his staff and patients again, Dr. Kelly began negotiating a new contract. His previous contracts had not been renewed on their anniversary dates leading Dr. Kelly to believe that some delay between the expiration of his old contract and its renewal was to be expected (XXXII. 1961-62. Pl.Ex.21). Vernegaard told Dr. Kelly in May 1990 that a new contract had already been prepared, that it should be in soon (I.128-30;XXXI. 1760;XXXIII.2075-76. Pl.Exs.1-P,1-Q for I.D.), and that, pending the written contract, he "should continue to act as though [he] had one" (XXXII.1962).

Dr. Kelly continued to exercise all the functions of Medical Director of the adolescent psychiatric unit until September 4, 1990. On that day he was shocked to receive a letter from the Hospital advising him that "discussing a possible future contract at this time" would not be in the Hospital's interests and relieving him of his duties as Medical Director (XXIII.731, 732; XXV.980,983-84;XXXII.1961.Pl.Ex.37).

Events between the expiration of Dr. Kelly's last contract on April 30, 1990, and his termination as Medical Director on September 4, 1990, were vital components of the plaintiffs' case. While Dr. Kelly's program began being adversely impacted by the defendants' actions prior to April 30, 1990, it was during the next four months that the defendants irrevocably destroyed his valuable program. The judge, however, ruling that no contractual relationship existed between the parties after April 30th, excluded virtually all evidence and testimony of events from May 1, 1990, to September 4, 1990 (XXIII.728-34;XXIV.866-85;XXV-XXVI.952-1013, 1136-44;XXXI.1175,1757-72,1914-18;XLII.3409-10), and directed the jury not to consider what happened during that period (XXXI.1773).

Pursuant to this ruling, the plaintiffs were prevented from developing evidence of the disintegration of Dr. Kelly's program during the post-April 30th period (XXV.952-93;XXVII.1142-68,1178-79;XXXI.1749-51;XXXII.1986-87;LIII.2901,et seq.), as well as from proving the destructive effects of the defendants' actions on Dr. Kelly's program (XXX.968;XXXII.1970-79).

Dr. Kelly was unable to prove how he was prevented from admitting new patients to his program. Nor could Dr. Kelly prove how his program, which the Hospital agreed was to be self-contained and under his exclusive control, was affected when outside physicians hostile to his methods admitted inappropriate patients to the program (Def.Ex.B,"Addendum" ¶¶C,D.Pl.Ex.38. XXVI. 1119;XXXI.1905-06).

Other forms of destructive interference by persons in the Hospital unsympathetic to Dr. Kelly's program similarly could not be fully explored and were excluded by the judge's ruling (XXIII.706-14;XXVI.1136-37). Dr. Kelly, for example, was unable to show how the defendants tried to force him to resign by threats of administrative action and how they tried to "blackmail" him by trumped-up charges of improper record-keeping, or how threats and destructive behaviors by the Hospital's administrative personnel resulted in the departure of key members of his skilled and dedicated staff (XXII.459-460;XXIII.717-733;XXV.952,957,969-70; XXVI.1001-1002,1014-16,1026).

Dishonest Juror Responses On Voir Dire And Juror Misconduct

1. Jury Foreman Truman Skinner

a. Disbarment

When it was juror Truman Skinner's turn to be questioned by the judge on voir dire, the judge suddenly realized that he knew Skinner. The following colloquy ensued:

> COURT: Truman Arnold Skinner. And I didn't recognize you at first. How are you?
>
> SKINNER: Good to see you.
>
> COURT: Good to see you.
>
> SKINNER: .... I am age 61.
>
> ....
>
> SKINNER: .... I ... practiced law in Miami for 31 years and am now retired.
>
> COURT: Oh, how nice. I didn't know that you had retired. When did you do that?

SKINNER: About two years ago.

COURT: You're either doing a lot of fishing or golf or what have you. Too young to retire though.

(XIX.80-81). Skinner did not respond.

Post-verdict investigation revealed that Skinner had not "retired" from The Florida Bar. This Court had suspended him from the practice of law in July 1994 on the Bar's Petition for Emergency Suspension which alleged that Skinner had "caused great public harm" (XLVII.1887 Tabs 2,3; The Florida Bar v.Skinner, 641 So.2d 1347 (Fla. 1994)). The Petition was supported by the affidavit of a Bar accountant who stated "that there is clear, convincing and undeniable evidence that respondent misappropriated funds entrusted to him" and that, as of April 1994, Skinner had a $283,651.43 shortage in his trust account.

In October 1994, Skinner filed in this Court a "Petition For Disciplinary Resignation" without leave to apply for readmission for 5 years (XLVII.1887 Tab 4). Skinner admitted in the Petition to prior wrongdoing in 1985, 1987, and 1989, including an incident involving "the manner in which he handled funds entrusted to him" for which he was privately reprimanded in 1991 (XLVII.1887 Tab 4). The Petition was granted. The Florida Bar v. Skinner, 650 So.2d 992 (Fla. 1994).

The United States Supreme Court subsequently ordered Skinner to show cause why he should not be disbarred, In re Disbarment of Skinner, 513 U.S. 1124 (1995), and thereafter disbarred him. In re Disbarment of Skinner, 514 U.S. 1012 (1995) (XLVII.1887 Tab 5).

b. <u>Prior crimes and lawsuits</u>

During the defendants' voir dire, the following occurred:

COUNSEL: This is a contract case, and I didn't ask you, has anybody ever been involved in a lawsuit involving breach of a contract in any way? Raise your hand. Anybody?

Okay, Mr. Skinner, was that personally or professionally?

SKINNER: Both.

COUNSEL: Both. All right. And in connection with your personal contracts suit -- professionally, I'm sure a lot, but, personally, were you a plaintiff or the defendant?

SKINNER: Both.

COUNSEL: Both. Was this more than one suit?

SKINNER: Yes.

COUNSEL: And how long ago are these suits?

SKINNER: Oh, <u>one</u> a couple of weeks ago [e.s.].

COUNSEL: And the <u>one</u> a couple of weeks ago, are you the plaintiff or the defendant? [e.s.].

SKINNER: That one, defendant, but --

COUNSEL: And what was the nature of the contract claim?

SKINNER: Money damages.

COUNSEL: And, then, you were in <u>one</u> where you were a plaintiff? [e.s.].

SKINNER: Yes.

COUNSEL: Now, did these contract claims involve oral or written agreements or both?

SKINNER: I think all of them have been written contract disputes.

COUNSEL: Written contract disputes?

SKINNER: Yes. I think so.

COUNSEL: And on all of the times when you were either being sued or were suing on a written contract dispute, were there any allegations as to any oral representations in those suits or did the written contract contain the entire agreement of the parties?

SKINNER: There were allegations with oral modifications in one of them.

COUNSEL: Is that the one where you were the plaintiff or the defendant? [e.s.].

SKINNER: Defendant.

(XIX.162-164).

Defense counsel subsequently asked the panel:

> Now, I asked you if you had been involved in any contract actions. Let me ask you this, has anybody been involved in a lawsuit, other than those, of course, that I already asked? Just a lawsuit of any kind, ever been involved before, personally?

(XIX.167). Another prospective juror-attorney named Minsker volunteered that he had been involved in various lawsuits including a partnership dispute, landlord-tenant disputes, and "commercial business matters" (XIX.167). Other panel members disclosed other lawsuits (XIX.168-170). Skinner, however, remained silent.

Plaintiffs' attorney re-voir dired the jury (XIX.171-72), and accepted Skinner as a juror based on the foregoing questions and responses (XIX.177-78).

Post-verdict investigation revealed that between 1980 and 1996 Skinner had been a party in over 50 legal proceedings (XLVII.1887 Tabs 6-11). The approximate breakdown of only those cases shown on the Dade Circuit Court computer printout is as follows: 23 contract, 1 eminent domain, 1 landlord-tenant, 6 mortgage, 2 professional, 1 real property and 13 general "civil." Skinner appears to have been a defendant in approximately 25 of these cases, a plaintiff in 7, and an unspecified party in 14 (XLVII.1887 Tabs 6-11).

Several of the foregoing cases involved fraud. In Toyota Motor Credit Corp. v. Lake Worth Hosp. Corp. & Truman Skinner (1995), Skinner was accused, essentially, of converting an automobile (XLVII.1887 Tab 9). In Berg v. Skinner (1996), Skinner was accused of misrepresentation and fraud (XLVII.1887 Tab 8). In Citibank v. Singh (1994), Skinner, along with others, was accused of a "conspiratorial scheme" to commit "fraud on the judicial system and other lien-holders." (XLVII.1887 Tab 11). In Lake Worth Hosp. Corp. v. Skinner (1993), Skinner was accused of defrauding his client, Lake Worth Hospital (XLVII.1887 Tab 7).

Skinner apparently had the latter case in mind during his voir dire. When defense counsel asked the panel collectively whether any one had had a "personal experience" that biased them against hospitals, Skinner stated:

SKINNER: Let me ask you this, because I think it could be important. Is Community Hospital of the Palm Beaches located in Lake Worth?

COUNSEL: It's located in Riviera, on 46th Street.

SKINNER: Not on 10th, in Lake Worth.

COUNSEL: No, that's Lake Hospital.

SKINNER: It used to have a corporate name of Community Hospital or something like that.

(XIX.146-147). Skinner never disclosed his Lake Worth Hospital lawsuit.

Skinner also had been a defendant in federal civil and criminal proceedings (VII.1222-23). In Citibank, N.A., v. Data Lease Financial Corp., 828 F.2d 686 (11th Cir. 1987), cert. denied, 484 U.S. 1062 (1988), Skinner, as a director of the Miami National Bank, was accused of civil theft, fraud, false statements and untruthfulness.[1] In United States v. Stefan, 784 F.2d 1093,1103 (11th Cir. 1986), and United States v. Freedman, 686 F.2d 1364 (11th Cir. 1982), Skinner, Leo Greenfield, and others, were indicted for conspiracy to defraud the Miami National Bank.

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[1] This case was apparently settled in 1988 by a payment from Skinner and his fellow Directors, to Data Lease, of $1 million. Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498, 1500 (11th Cir. 1990). This case was related to a dispute in state court involving Data Lease, Miami National Bank and Citibank, see, e.g., Citibank, N.A. v. Data Lease Fin. Corp., 478 So.2d 76 (Fla. 4th DCA 1985), as well as to another protracted dispute between Data Lease and Blackhawk Heating & Plumbing Co. See, e.g., Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp., 446 So.2d 127,128 (Fla. 4th DCA 1983)("Since 1973 this case has appeared in either this Court or the Supreme Court of Florida more than ten times").

2. Juror Karen Tarkoff.

The day after Skinner's voir dire, in order to supplement the panel that had just lost several jurors for hardship reasons, a new group of potential jurors was voir dired. One, Karen Tarkoff, stated, in response to plaintiffs' counsel's question to the panel about prior lawsuits, that she had been sued on a contract by a swimming pool contractor (XXI.315).

About 14 transcript lines later, in response to counsel's question about prior lawsuits, another juror asked, "Does divorce count?" to which plaintiffs' counsel replied, "It does unfortunately" (XXI.316). Several jurors then disclosed their divorce cases (XXI.318-19).

Plaintiffs' counsel asked the panel members to reveal anything in their private lives that might affect their fairness as jurors (XXI.320,352,363). Defense counsel asked the panel, collectively, whether they had any feelings regarding "fraud" actions "which might predispose [them] to one side or the other?" (XXI.328-29). Tarkoff remained silent.

Post-trial investigation disclosed that Tarkoff was the petitioner in a recently-filed divorce action. In her 1996 verified complaint in that action Tarkoff swore that her husband "earns a substantial income as a successful criminal defense attorney," that "[a] significant portion of [that] income is undeclared," and that as a result of her husband's "substantial income," she and her husband "enjoy a life of luxury" (XLVII.1887 Tab 12).

Investigation further revealed that Tarkoff's husband had been federally indicted for participating in a conspiracy to commit Medicare fraud and launder the fraud proceeds between 1994 and 1997. While the indictment is undated, the last overt act alleged in the indictment occurred on June 16, 1997 (XLVII.1887 Tab 13). The trial in the present case began August 18, 1997.

3. Juror Robert Dawson

Dawson was repeatedly told by the judge and plaintiffs' counsel of the importance of having impartial and unbiased jurors (XIX.67,95-97,117,123). During voir dire, plaintiffs' counsel described Dr. Kelly's earnings at some length, stated that Dr. Kelly was a "very successful psychiatrist," and observed that most people will never earn what Dr. Kelly earned. The jury was collectively asked whether, as a consequence, any juror had any "prejudice or resentment" or "feelings like that" concerning Dr. Kelly's wealth that might affect his or her ability to award him money (XIX.104-105). Dawson did not admit to any prejudice against Dr. Kelly's wealth (VII.1260;XI.1689).

4. Skinner-Tarkoff-Dawson Misconduct.

The judge instructed the jurors that they "should not form or express any opinion about the case until you are retired to the jury room to consider your verdict," and that, "[d]uring [trial] recesses, you shall not discuss the case amongst yourselves or with anyone else. Nor permit anyone to say anything to you or in your presence about [the] case." (XX.231-233).

In a sworn amendment to plaintiffs' motion for new trial and to interview jurors, plaintiffs' attorney stated that he was told by alternate juror Herrero, that,

> jurors Skinner, Tarkoff and Dawson decided this case in favor of the Defendants from the outset of trial, and they repeatedly violated the Court's directives by discussing the case among themselves and attempting to persuade other jurors to pro-defense positions throughout the trial. They ignored the requests of the other jurors to stop discussing the testimony and evidence. Mrs. Tarkoff, upon information, invited Juror Castro to her home to discuss the case; Juror Castro declined.

(VII.1260). Dawson was reported by Juror Herrero to have "expressed his dislike for Dr. Kelly because he had made a lot of money, but was suing for more." Dawson, from the beginning, told his fellow jurors that Dr. Kelly was making a lot of money so "How dare he sue for more" (XI.1689). As a result of this "repeated trial misconduct," jurors Hall, Herrero and Castro "distanced themselves" from Skinner, Tarkoff and Dawson "during recesses to avoid being in violation of the Court's orders." (VI.1260).

At the hearing on plaintiffs' motions for new trial and to interview jurors, plaintiffs' counsel elaborated on what Herrero had told him. By the second day of jury selection, Herrero reported that "Skinner was already discussing the case ... and that his bent was always either mocking or being cynical about or being critical of the plaintiffs' side of the case." (XI.1685). Skinner was "always ... trying to find a way to put down and change what the plaintiff's evidence had been." (XI.1686). Hall and Herrero repeatedly had to

tell Skinner and Tarkoff, who was also "involved in that from the beginning" and who, like Skinner, was "completely pro Humana and anti [plaintiff]" to follow the judge's orders and not make up their minds. Tarkoff nevertheless "tried very hard to work on Castro to get her to ... the pro defense point of view," even inviting her to her house to talk about the case. The situation became so bad that Hall, Herrero and Castro stopped going to lunch with the Skinner/Tarkoff group (XI.1686-87).

Refusal to Give Jury Instructions

1. Implied Contract

Using professional health care consultants as adjunct staff, as defendants knew, was and had always been a vital part of Dr. Kelly's program (XXV.918,929-30;XXVIII.1350-53;XXX.1677-80,1701-02,1707;XXXI.1787-89,1792-93). Defendants agreed in their negotiations with Dr. Kelly, and reaffirmed their agreement after Dr. Kelly moved to the Hospital, to pay his consultants' fees through the Hospital's managing agent, Flowers Management (XXVII.1213;XXXI.1863,1865-66;XXXIV.2265-66.Pl.Ex.53, p.1).

In its January 1, 1987, contract with Dr. Kelly the Hospital promised to "furnish" and "provide" all "services required in the operation of the [psychiatric] Department at its own expense." (I.14 ¶III. B.,106 ¶III.B.). In its contract with Flowers the Hospital promised to "provide any non-salary costs of the [psychiatric] unit not specified in this contract." (Pl.Ex. 64, ¶2.d.XLIII.3077). The Hospital paid Flowers an override to cover such costs

(XXXI.1884;XXXIV. 2266.Pl.Ex.21), and Flowers had used some of this money to pay members of Dr. Kelly's non-consultative staff. Flowers, however, refused to pay Dr. Kelly's consultants claiming it was the Hospital's responsibility (XXXI.1883).

The defendants refused to pay Dr. Kelly's consultants claiming that nothing in any contract required them to do so (XLI.3115,3414-15;XLIV.3579). Although the Hospital told Dr. Kelly that it would get Flowers to pay his consultants it never did (XXIII.659-60; XXV.1062,1064; XXVII.1174,1863,1884-85; XXXII.2105; XXXIV.2265;XLII.3421-22,3430).

As a result, Dr. Kelly had to pay $445,835.00 to his consultants from his own funds (XXX. 1683,1684-85,1703-04, 1706; XXXIV.2266-67). Plaintiffs submitted an instruction that would have allowed the jury to infer an agreement by the defendants to pay consultants' fees but the judge refused to give it (XLIV. 3579;XLVI.1822).

2. Negligent Misrepresentation

Some evidence, if construed favorably to the defendants, suggested that Vernegaard and others may have carelessly, rather than maliciously, misrepresented their intentions to Dr. Kelly. Some of their false representations could be interpreted as a product of a reckless enthusiasm to acquire Dr. Kelly's program and boost the reputation and earnings of their mediocre hospital rather than of a willful intent to defraud (XXI.436, 439, 441; XXVII.1213-14;

XXVIII.1453-59,1472-73; XXXI.1909-10; XXXVII.2640, 2644, 2647). Some evidence indicated that Vernegaard may have been legitimately disappointed and surprised by Humana's refusal to immediately designate Dr. Kelly's program a COE (XXI.436,439, 441; XXXVII.2649,2653-54;XXXVIII.2689-90.Pl.Ex.18), and that he made some effort to obtain the physical facilities, and the COE designation that Dr. Kelly had been promised (XXIV.797;XXVI. 1069;XXVIII.1360-61,1363;XXXI.1867;XXXII.1944-45;XXXVI.2660;XXXIX. 2914,2931-6.Pl.Exs.40,44).Other evidence suggested that Vernegaard and Humana's own consultant were under the impression that once Humana designated Dr. Kelly's program a COE Humana would provide the program with marketing support (XXVII.1458,1479,1480-83; XXXVIII.2689-90).

Still other evidence, extensively discussed by plaintiffs in closing (XLIV.3683-3716), showed that the defendants may have carelessly induced Dr. Kelly to come to Community Hospital without first determining whether they were properly licensed for his type of program. After the State of Florida accused the Hospital of violating its certificate of need by acquiring Dr. Kelly's program, the defendants unilaterally agreed with the State to cut Dr. Kelly's long-term beds thus virtually halving the capacity and profit earning potential of his program (XXXI.1867-69;XXXVII. 2662-63;XXXVIII.2677-78;XL.3035-39; XLI.3064-66,3113-15. Def.Ex.A, Addendum No.3.Pl. Exs.22,23).

The defendants may also have been careless in failing to initially recognize the future effect of Dr. Kelly's long-term-bed

rates on the Hospital's ability to raise its short-term-bed rates. The jury could have found that the defendants became disinclined to honor their promises to Dr. Kelly when they became convinced that his program was preventing them, under certain Hospital Cost Containment Board formulae, from maximizing rates for the Hospital's other beds (XXXVIII.2691-2703.Pl. Exs.28,35,36).

Based on the possibility the jury might find from the foregoing evidence that the falsity of the defendants' promises and representations to Dr. Kelly evidenced more a want of due care than intentional fraud, plaintiffs submitted Fla. Std. Jury Instr. (Civ) MI 8c., on "negligent misrepresentation" (XLVI.1822 "Breach of Contract"; XLVII.1887 Tab 15). The trial judge, however, did not believe that the defendants' misrepresentations could have been negligent and denied the requested instruction (XLIII.3498-3500,3512-19).

SUMMARY OF ARGUMENT

A new trial is required because of juror dishonesty and misconduct. Jury foreman Skinner knowingly lied when he said that he had "retired" from the practice of law. He had resigned from the Bar to avoid disbarment for repeated thefts from trust accounts. Skinner also knowingly lied when he admitted to only two prior contract lawsuits. Court records showed that he had been a party in over 50 civil and criminal actions of all types including at least 23 contract actions in Dade County alone.

Juror Tarkoff lied when she concealed her divorce action in which she admitted to fraudulently living off her indicted husband's unreported income. Juror Dawson lied when he claimed on voir dire that he had no bias against Dr. Kelly's wealth and then, throughout the trial, argued to his fellow jurors that Dr. Kelly had a nerve to ask for more money. Skinner, Tarkoff and Dawson repeatedly violated the judge's instructions not to discuss the case during trial by trying to convince their fellow jurors to decide in the defendants' favor.

The Third District Court of Appeal affirmed, relying in part on Tejada v. Roberts. Tejada formulated an unwise and unworkable rule of trial procedure that requires a juror's litigation history to be investigated before trial begins. The Tejada rule, by precluding post-trial inquiry into Skinner's and Tarkoff's backgrounds, validated a tainted trial caused by the dishonesty of those jurors. The Tejada rule conflicts with Rules 1.431 & 1.530 and established case law and should not, in any event, have been applied retroactively.

The plaintiffs' proofs supported causes of action for negligent misrepresentation, fraudulent misrepresentation and implied contract. Some of the defendants' promises and assurances to Dr. Kelly may have been careless or reckless rather than malicious. By refusing to instruct on negligent misrepresentation and implied contract, the judge deprived plaintiffs of the benefit of alternative theories of their case.

The judge erred by excluding evidence of the defendants' destruction of Dr. Kelly's program between May 1 and September 4, 1990. The judge's ruling prevented the plaintiffs from proving that the defendants breached their contract with Dr. Kelly by destroying his program. Because damage is also an element of a cause of action for fraud, the exclusion of these proofs prevented plaintiffs from fully proving the defendants' liability for fraud.

STANDARDS OF REVIEW

Point I.

The trial judge's refusal to grant a new trial for juror misconduct is reviewed under an abuse of discretion standard. Allstate Ins. Co. v. Manasse, 707 So.2d 1110, 1111 (Fla. 1998); Seaboard Air Line R.R. Co. v. Holt, 92 So.2d 169, 170 (Fla. 1957).

Point II.

The trial judge's refusal to allow jurors to be interviewed is reviewed under an abuse of discretion standard. Schofield v. Carnival Cruise Lines, Inc., 461 So.2d 152, 155 (Fla. 3d DCA 1984), rev. denied, 472 So.2d 1182 (Fla. 1985).

Point III.

The District Court of Appeal's announcement in Tejada of an erroneous rule of law is reviewed non-deferentially, or de novo. Walter v. Walter, 464 So.2d 538, 539-540 (Fla. 1985).

Point IV.

The trial judge's refusal to instruct on negligent misrepresentation and implied contract is reviewed under an abuse of

discretion standard. Goldschmidt v. Holman, 571 So.2d 422, 425 (Fla. 1990); Barton Protective Servs., Inc. v. Faber, 745 So.2d 968, 974 (Fla. 4th DCA 1999).

Point V.

The trial judge's exclusion of evidence of the destruction of Dr. Kelly's program is reviewed under an abuse of discretion standard. Sims v. Brown, 574 So.2d 131, 133-134 (Fla. 1991). However, to the extent the trial judge based his ruling on the erroneous legal conclusion that no contract existed between the parties, his ruling is reviewed de novo. Walter, supra.

ARGUMENT

POINT I
THE TRIAL JUDGE ERRED BY REFUSING TO GRANT A NEW TRIAL FOR JUROR DISHONESTY AND MISCONDUCT.

A. Jury Foreman Skinner

1. Lying about his disciplinary resignation and federal disbarment proceedings.

Skinner knew that he had not, as he represented to the judge and the parties, "retired" from the practice of law. He had resigned in disgrace from The Florida Bar in order to avoid certain disbarment for his repeated thefts and frauds. The Florida Bar v. Grayson, 427 So.2d 732 (Fla. 1983); The Florida Bar v. Garcia-Navarro, 419 So.2d 329 (Fla. 1982). Once disciplinary proceedings were initiated against him Skinner knew that he could not, under R. Regulating Fla. Bar 1-3.5, "retire" voluntarily from The Florida Bar. He could only petition, as he did, for a disciplinary resignation under R.

Regulating Fla. Bar 3-7.12. The Florida Bar v. Segal, 663 So.2d 618,621 (Fla. 1995).

Skinner's recent involuntary separations from the Florida and U.S. Supreme Court Bars for his repeated acts of fraud were obviously material in this fraud case. Zequeira v. De La Rosa, 627 So.2d 531,533 (Fla. 3d DCA 1992) (Baskin, J., dissenting: "A person involved in prior litigation may sympathize with similarly situated litigants or develop a bias against legal proceedings in general"), dissent approved, De La Rosa v. Zequeira, 659 So.2d 239,242 (Fla. 1995). Skinner's dishonesty concerning his professional status, "in and of itself, [wa]s a strong indication that he was not impartial." United States v. Perkins, 748 F.2d 1519,1532 (11th Cir. 1984).

2. Lying about his prior litigation.

re to disclose on voir dire his involvement in prior

lawsuits justifies a new trial. De La Rosa, 659 So.2d at 241-242)[2]; Castenholz v. Bergmann, 696 So.2d 954 (Fla. 4th DCA 1997); Wilcox v. Dulcom, 690 So.2d 1365 (Fla. 3d DCA 1997); Perl v. K-Mart Corp., 493 So.2d 542 (Fla. 3d DCA 1986); Minnis v. Jackson, 330 So.2d 847 (Fla. 3d DCA 1976); Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379 (Fla. 2d DCA 1972), cert. denied, 275 So.2d 253 (Fla. 1973). Skinner's more than 50 civil, criminal and disciplinary proceedings appear to set

[2] The courts have adopted a 3-point test for determining whether a juror's nondisclosure warrants a new trial. The undisclosed information must be material, the juror must have concealed it, and the juror's failure to disclose the information must not be attributable to the complaining party's lack of diligence. De La Rosa, 659 So.2d at 241.

a new record for concealment of prior litigation by a juror in this state.

That Skinner's nondisclosures were intentional is shown by the fact that Skinner had practiced law for 31 years (XIX.80-81), and obviously knew of, and had just been reminded about (XIX.95-97), the openness that was expected of him on voir dire. Skinner was not a lay person cowed into silence by public courtrooms and legal proceedings. Indeed, Skinner went out of his way to volunteer innocuous information about himself and his family (XIX.80-81,111-12,121-22,146).

A juror is expected to volunteer information that no one has specifically asked for when the information is patently of the type that the questioner was attempting to obtain. Cf. De La Rosa, 659 So.2d at 241; Marshall v. State, 664 So.2d 302,304 (Fla. 3d DCA 1995), rev. denied, 675 So.2d 122 (Fla. 1996); Singletary v. Lewis, 584 So.2d 634, 636-637 (Fla. 1st DCA 1991); Mobil Chem. Co. v. Hawkins, 440 So.2d 378,381 (Fla. 1st DCA 1983), rev. denied, 449 So.2d 264 (Fla. 1984). This rule applies with special force to Skinner who, as one trained in the law, and personally and professionally steeped in litigation, indisputably knew what information counsel were seeking and that he had an affirmative duty to volunteer that information.

3. Refusal to follow the judge's instructions.

The judge instructed the jurors not to discuss the case until they had heard all the evidence (XX.231-33). Jurors Skinner, Tarkoff

and Dawson immediately and repeatedly ignored this direction by discussing the case during trial and actively prejudicing their fellow jurors against the plaintiffs. The behavior of Skinner and his cohorts were clearly improper and prejudicial and warrant a new trial. Johnson v. State, 696 So.2d 317,323 (Fla. 1997); Singletary, 584 So.2d at 640 (Ervin, J., concurring and dissenting).

Skinner's participation in these improper discussions had more than the usual potential for prejudice because Skinner, to his fellow jurors, was an honorably retired attorney. Cf. State v. Williams, 659 S.W.2d 778,781 (Mo. 1983) ("An attorney ... is likely to have the capacity to exert undue influence over his fellow jurors"); Commonwealth v. Kloch, 230 Pa.Super. 563, 327 A.2d 375,388 (Pa.Super.Ct. 1974) ("... lawyers because of their training possess the potential of being overly influential in a jury's deliberations"). Skinner was also authoritative enough in the jury room to be selected by the jurors as their foreperson (VII.1214). See Pierce v. Altman, 147 Ga.App. 22, 248 S.E.2d 34,36 (Ga.Ct.App. 1978) ("... if there was any bias here, even a subtle or vague one, its effect could be compounded by the fact that this particular juror has been elected jury foreman, which may well indicate that he has a charisma or prestige which would accentuate the impact of his opinions and augment his persuasiveness"). Accord State v. Brooks, 520 N.W.2d 796,801-2 (N.D. 1994).

B. Juror Tarkoff

Tarkoff admitted a prior contract action but concealed her contemporaneous divorce action. Her concealment came in response to a direct question to the panel by plaintiff's counsel asking about the jurors' prior lawsuits and his statement to the jury that prior lawsuits included divorce actions. Tarkoff's intentional concealment of her divorce action, without more, placed in doubt her honesty and ability to serve as a juror. Wilcox, 690 So.2d at 1366; U.S. v. Perkins, 748 F.2d at 1532.

Furthermore, Mr. Tarkoff, at the very moment his wife was in the jury box, was about to be, or just had been indicted for money laundering and fraud. Ms. Tarkoff's acknowledgement in her divorce complaint that she and her husband had been living lavishly off the husband's unreported income revealed, at the very least, her tolerance for fraud.

Tarkoff was also guilty, with Skinner and Dawson, of violating the judge's instructions not to discuss the case. Indeed, Tarkoff's act of inviting a juror to her home to privately lobby her on the defendants' behalf was an extraordinarily blatant violation of the court's instructions. For the same reasons set forth with regard to Skinner, a new trial must be granted for Tarkoff's individual and joint derelictions.

C. Juror Dawson.

Dawson assured plaintiffs' counsel on voir dire that Dr. Kelly's wealth would be an irrelevant consideration. Once sworn, however, Dawson argued to the other jurors throughout the trial that a person

as rich as Dr. Kelly had a nerve to ask for more. Dawson's prejudice against Dr. Kelly's wealth was expressed before deliberations and thus did not inhere in the verdict. Compare Travent, Ltd. v. Schechter, 678 So.2d 1345 (Fla. 4th DCA 1996); Rabun & Partners, Inc., v. Ashoka Enters., Inc., 604 So.2d 1284 (Fla. 5th DCA 1992). Dawson's comments proved that he had lied about his personal biases and beliefs on voir dire:

> Litigants are entitled to impartial jurors, and jurors who misrepresent their beliefs or facts relating to themselves which would probably require they be excused, deprive the litigants of their right to challenge for cause or to make peremptory challenges.

Carver v. Orange County, 444 So.2d 452,454 (Fla. 5th DCA 1983). Accord Singletary, 584 So.2d at 639-40 (Ervin, J., concurring and dissenting).

Dawson was also guilty of other wrongdoing; in violation of the judge's explicit instructions, he joined in Skinner and Tarkoff's pre-deliberation discussions of the case as well as in their efforts to espouse the defendants' positions.

POINT II.

THE TRIAL JUDGE ERRED BY REFUSING TO ALLOW A JURY INTERVIEW.

If the evidence of multiple acts of falsification and misconduct by multiple jurors discussed in Point I did not warrant a new trial, it unquestionably warranted a jury interview. See Bernal v. Lipp, 562 So.2d 848,849 (Fla. 3d DCA 1990) (purpose of jury interview is to permit parties moving for a new trial on the grounds of juror

misconduct "to make their record in support of that part of their motion for new trial."); Fla.R.Civ.P. 1.431(h).

Skinner's and Tarkoff's concealment of their prior litigation required a jury interview. See, e.g., Lonschein v. Mount Sinai of Greater Miami, Inc., 717 So.2d 566,567 & n. 3 (Fla. 3d DCA 1998); Gray v. Moss, 636 So.2d 881,882 (Fla. 5th DCA 1994); Bernal, 562 So.2d at 849. See, also, Marshall, 664 So.2d at 304 n. 2 (issues of the juror's concealment and the attorneys' diligence in discovering it required a jury interview to resolve). Skinner's, Tarkoff's and Dawson's concealments, biases, and violations of the judge's instructions, also required a jury interview. See, e.g., Singletary, 584 So.2d at 636,637; Bickel v. State Farm Mut. Auto. Ins. Co., 557 So.2d 674,675 (Fla. 2d DCA 1990); Snook v. Firestone Tire & Rubber Co., 485 So.2d 496,498-99 (Fla. 5th DCA 1986).

The concert of action among Skinner, Tarkoff and Dawson, that went as far as Tarkoff inviting a juror to her house during trial to persuade her to favor the defendants, suggests an "actual, express agreement between two or more jurors to disregard their oaths." Baptist Hosp. of Miami, Inc. v. Maler, 579 So.2d 97,100 (Fla. 1991). Whether such a shockingly improper and potentially corrupt agreement existed required a jury interview as well.

POINT III.

TEJADA ANNOUNCES AN UNANTICIPATED, AND UNWORKABLE RULE OF TRIAL PROCEDURE THAT CONFLICTS WITH COURT RULES AND ESTABLISHED PRECEDENT.

A. The rule in Tejada is unwise and unworkable.

The Third District Court of Appeal nevertheless ruled, citing Tejada, that Skinner's and Tarkoff's failure to disclose their prior lawsuits was not a basis for a jury interview or a new trial because plaintiffs had waited until after the jury verdict to investigate the truthfulness of those jurors' voir dire responses. The rule announced in Tejada, that the only time "to check the jurors' names against the clerk's lawsuit index is at the conclusion of jury selection," 760 So.2d at 966, is wrong on many levels and should be repudiated by this Court.

Tejada is flawed, at the outset, because it is based on one 3-judge panel's speculative, untested hypothesis that mandatory pretrial juror investigation will save more litigant, attorney and court time than the present regime of optional, post-verdict investigation. This supposition is not informed by empirical evidence on such essential questions as how many jurors fail to disclose truly material prior litigation, and how many new trials are granted and judgments reversed on appeal based on those nondisclosures. It is thus impossible to determine, without answers to these and a host of related questions, whether the problem that Tejada purports to remedy by a cumbersome new procedure is illusory, trivial, or significant.

Tejada is also flawed because it implicitly formalizes a presumption that every juror has been dishonest. Tejada, in effect, requires every juror's litigation history to be investigated, if at all, before the juror has manifested bias or dishonesty during voir

dire, trial or deliberations, or in his or her verdict. Tejada thus forces every attorney to assume -- before the trial has even begun and without a single manifestation that the assumption is true -- that every juror has lied about or concealed prior litigation and will eventually vote against his client. Few trial attorneys, if Tejada is approved, will risk not indulging in this presumption because if their client loses and juror dishonesty is belatedly discovered, they could be sued for malpractice for having failed to conduct a pre-trial Tejada investigation of that juror.

Honesty should be presumed on voir dire as it is in other areas of the law. E.g., Fella v. State, 754 So.2d 165, 167 (Fla. 5th DCA 2000) ("All witnesses are presumed to speak the truth"). Participation and public confidence in the jury system will suffer from a rule that tells every juror: "Regardless of what you say or do not say under oath on voir dire the law simply does not believe you and will investigate your answers before it allows you to serve." Juror investigation is unseemly when it is court-driven in all cases as to all jurors instead of being left, as it was pre-Tejada, to the decision of some losing litigants in some cases with respect to some jurors. Tejada front loads a ponderous investigative procedure into a system in which the vast majority of jurors are honest in order to catch the occasional Truman Skinner.

The Tejada rule will abuse and offend jurors in other ways. Attorneys will request more time for trials and thus jury service will become longer. After seven jurors are preliminarily voir-

dired, they must be sequestered for an indeterminate time while the parties conduct a public records investigation. Honest jurors will learn as they sit around doing nothing, that their valuable time is being wasted because the law doubts their integrity. That awareness, and their forced idleness, is bound to make jurors hostile toward the attorneys, the judge and the system when proceedings resume.

If a records search turns up information that requires a juror to be further voir-dired, how and where will the juror be confronted with his embarrassing non-disclosures: in the public court room or, after being led away by the bailiff, in the stigmatizing environment of chambers? What does one then do with the jurors so interrogated who turn out not to have lied but who now harbor overt, or what is worse, undisclosed antipathy for the attorneys and the system who doubted and embarrassed them?

With every strike or challenge, the foregoing process must be repeated. Another group of jurors must be voir-dired, and the attorneys must again troop off to conduct additional record searches while the rest of the still-sequestered panel vegetates and smolders. Clearly, a procedure with such obvious potential to alienate all jurors before their jury service even begins is far less desirable than the present procedure that allows the selective investigation and recall of certain jurors after the case is over and the panel has been discharged.

The Tejada rule, for related reasons, promises to be physically unworkable. It is one thing -- we assume -- to check public records in the Gadsden County Courthouse. It is another to check records in the always-crowded Dade County Courthouse where even getting from an upper floor to the lobby can be a challenge.

Nor can it be presumed, once the record room is attained, that a simple name search will always suffice. The case file itself will have to be ordered and inspected to determine, for example, whether "John Smith" the juror is the same as "John Smith" the litigant, or whether "John Smith" the juror is the spouse of "Mary Smith" the litigant. Multiply, among other variables, the number of courthouse elevators, by the number of voir dires in progress, by the number of attorneys per trial, by the number of computer terminals, microfiche or microfilm machines, by the number of available records clerks, by the number of citizens already viewing or waiting to view the same public records, and one can begin to appreciate the insurmountable logistical problems and expense in implementing Tejada's pre-trial investigation requirement.

The foregoing problems aside, the rule in Tejada simply will not begin to solve the problem, if it is one, of juror non-disclosure of prior legal proceedings. A Tejada-type search of the civil litigation index in a local courthouse will not necessarily reveal a juror's federal, out-of-county, administrative, or criminal proceedings. Nor, of course, will such a search reveal any of the universe of non-litigation-related acts and events that a

juror might fail to disclose on voir dire. Thus, under Tejada, a juror could be voir-dired once in due course, a second time based on what courthouse records reveal and a third time, after the case is over, based on what an investigation outside the courthouse reveals.

B. The rule in Tejada conflicts with existing law.

The rule announced in Tejada could not be anticipated from this Court's and the district courts of appeals' prior decisions, and is in direct conflict with them. Until Tejada, it had always been proper to investigate a juror's statements about his or her litigation history after the trial concluded. E.g., Ford Motor Co. v. D'Amario, 732 So.2d 1143, 1145 (Fla. 2d DCA 1999), rev. granted, 743 So.2d 508 (Fla. 1999); American Medical Systems, Inc. v. Hoeffer, 723 So.2d 852 (Fla. 3d DCA 1998); Lonschein, 717 So.2d at 566; Wilcox, 690 So.2d at 1366, 1367; Bernal v. Lipp, 580 So.2d 315, 316, 317 (Fla. 3d DCA 1991); Perl, 493 So.2d at 542.

Post-trial investigation of juror voir dire answers was explicitly approved by this Court in De La Rosa v. Zequeira, 659 So.2d 239 (Fla. 1995), quashing, 627 So.2d 531 (Fla. 3d DCA 1993). In the Third District's opinion in De La Rosa, 627 So.2d at 533 n.6, the majority announced, in essence, what is now the Tejada rule:

> There is also considerable doubt about the [diligence] condition. The information about Mr. Edmonson was compiled from a computer search of the public records obviously conducted by plaintiff's counsel only after the jury had found against him. This set of

> circumstances...invites the question of why the investigation was not "diligently" conducted previously....

Judge Baskin, in dissent, responded:

> As for the due diligence branch of the test, I find counsel's efforts sufficient....In addition, the majority mandates pre-verdict discovery of juror concealment even though *Bernal* does not require counsel to discover the concealed facts prior to the return of verdict. *Bernal*, 580 So.2d at 316 ("*Subsequent to verdict*, plaintiffs learned that juror Paejol had previously been a defendant in a personal injury lawsuit.")....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. [e.s.]

Id. at 534. This Court approved and adopted Judge Baskin's dissent and quashed the Third District's decision. Id. 659 So.2d at 242. It is therefore clear that the rule the Third District first announced in De La Rosa and later enunciated in Tejada – that any public records investigation of a juror's litigation history must be concluded before trial begins – has been explicitly rejected by this Court.

Tejada is also inconsistent with Fla. R. Civ. P. 1.431(h). Rule 1.431(h) provides that a motion to interview a juror "shall be served within 10 days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time." The purpose of a jury interview under Rule 1.431(h) is "to make [a] record in support of [a] motion for new trial" under Rule 1.530(b). When a jury interview is allowed, it is only after the

interview that a "motion for new trial will be ripe for determination." Bernal, 562 So.2d at 849. Accord Forbes v. State, 753 So.2d 709, 710 (Fla. 1st DCA 2000).

Rule 1.431(h) is thus designed to act in tandem with Rule 1.530 as a post-trial procedural vehicle for obtaining a new trial. The rule in Tejada effectively amends Rule 1.431(h) and dilutes a litigant's Rule 1.530 procedural right to at least a 10-day post-trial investigation period, by requiring jurors to be hurriedly investigated, and a jury interview concluded, before an adverse verdict is even rendered.

This Court, which has the exclusive authority to adopt rules of practice and procedure, TGI Fridays, Inc. v. Dvorak, 663 So.2d 606, 611 (Fla. 1995), has preempted the field into which Tejada intrudes by defining procedures for determining a juror's prior litigation history. See Rule 1.431(h)(jury interview); Form 1.983 ("Questionnaire for Prospective Jurors"); Form 1.984 ("Jury Questionnaire" [which includes questions regarding prior litigation]). Tejada's impermissible amendment of Rules 1.431(h) and 1.530, and its modification of established trial procedures, can only be effected through this Court's rule-making powers. DeClaire v. Yohanan, 453 So.2d 375, 380-381 (Fla. 1984).

C. If the rule in Tejada is approved, it should only be applied prospectively.

The new procedure announced in Tejada is a rule of practice not a substantive principle of law. Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So.2d 730, 732 (Fla. 1991). If this Court approves

Tejada, the rule announced in that case, like procedural rules generally, should operate prospectively only. Cerniglia v. Cerniglia, 679 So.2d 1160, 1164 (Fla. 1996).

The prospective application of the Tejada rule (if this Court should approve it), is also required based on a consideration of the possible purposes for the rule. If the Tejada rule is concerned with the fairness or integrity of trials, then it should not be applied, as the Third District did, to cut off plaintiffs' right to challenge obviously dishonest jurors and a corrupted trial. If the Tejada rule is not a rule to enforce the integrity of trials but is simply a rule of expeditious procedure, then it is unfair to hold plaintiffs to a procedural standard of which they had not the slightest inkling three years ago when the jury in this case was chosen. Ripley v. Ewell, 61 So.2d 420, 424 (Fla. 1952); Culpepper v. Culpepper, 3 So.2d 330 (1941).

IV.

THE TRIAL JUDGE ERRED BY REFUSING TO INSTRUCT ON NEGLIGENT MISREPRESENTATION AND IMPLIED CONTRACT.

A. Negligent Representation

Some evidence in this case, discussed, supra, at 21-23, if construed in the light most favorable to the defendants, suggests that defendants made promises to the plaintiffs without first exercising reasonable care to determine whether they had, and would continue to have the ability or capacity to honor those promises. "Fraudulent misrepresentation" requires a defendant to have made a

false statement knowing it was untrue when made, or knowing that he did not know whether the statement was true. "Negligent misrepresentation", however, merely requires that the defendant, "in the exercise of reasonable care under the circumstances, ... should have known the statement was false." Fla.Std. Jury Instr.(Civ.) MI 8a.,c. The proofs outlined, supra, satisfy the elements of negligent misrepresentation.

Florida recognizes "fraudulent" and "negligent" misrepresentation as "two separate theories of recovery for damage occurring as a result of misrepresentation." Fla.Std.Jury.Instr. (Civ.) MI 8 "Comments," ¶1; Wallerstein v. Hospital Corp. of Amer., 573 So.2d 9,10 (Fla. 4th DCA 1990), rev.denied, 584 So.2d 997 (Fla. 1991); Atlantic Nat'l Bank of Fla. v. Vest, 480 So.2d 1328,1331-32 (Fla. 2d DCA 1985), rev. denied, 508 So.2d 16 (Fla. 1987). Both causes of action may be alleged, as plaintiffs did here (I.11-12), in the same complaint. See, e.g., Stephens v. Nationwide Mut. Ins. Co., 722 So.2d 208,209 (Fla. 2d DCA 1998), rev. denied, 731 So.2d 650 (Fla. 1999); Pearson v. Ford Motor Co., 694 So.2d 61,69 (Fla. 1st DCA 1997).

Parties are entitled to instructions on their theory of the case. Phillips v. Parkside of Fountainbleau Condo. Ass'n, Inc., 634 So.2d 1101,1101-02 (Fla. 3d DCA 1994). Negligent misrepresentation was one of the plaintiffs' theories of their case and was supported by ample evidence. Moreover, this theory addressed a slightly less culpable -- and thus easier to prove -- state of mind than

"fraudulent" misrepresentation. The judge's refusal to give plaintiffs' "negligent misrepresentation" instruction was prejudicial error.

B. Implied Contract

Because neither Dr. Kelly's contract with the Hospital nor the Hospital's contract with Flowers was explicit on the issue of consultants' fees, plaintiffs requested a contract instruction that read:

> A breach may occur with regard to either an express or implied provision of the contract .... An implied provision is one that is recognized by the parties to exist and bind them in their actions despite the fact that it was not specifically spelled out or agreed to by the parties to the contract. An implied provision often arises out of terms which were expressly set forth in the contract and agreed to by the parties, and an implied promise constitutes a valid part of the contract.

(XLVI.1822 "Breach of Contract"; XLIV.3576-79). See Pine Lumber Co. v. Crystal River Lumber Co., 61 So. 576,579 (Fla. 1913) ("Where a contract is ambiguous or incomplete, necessary provisions to effectuate its purpose may be implied....").

The jury would have learned from the plaintiffs' proposed instruction that the Hospital's obligation to pay for Dr. Kelly's consultants could be implied from the Hospital's agreement with Flowers to pay the "non-salary costs" of Dr. Kelly's program, and from its agreement with Dr. Kelly to "provide" and "furnish ... all ... services" and technical support required to operate his program. The judge refused to give this instruction (XLIV.3579).

The contract instruction that was given required the jury to find a promise by the Hospital to pay Dr. Kelly's consultants' fees within some "specific," "definite," or "expressed provision" of the contract (XLV.3875-77). Because the two agreements admittedly have no language that expressly or unambiguously mentions "consultants' fees," the judge's refusal to instruct on implied contractual terms effectively directed a verdict against the plaintiffs on their contract claim.

POINT V.

THE TRIAL JUDGE ERRED BY EXCLUDING EVIDENCE OF THE DEFENDANTS' POST-APRIL 30TH DESTRUCTION OF DR. KELLY'S PROGRAM.

Evidence of the post-April 30th destruction of Dr. Kelly's program was relevant for several reasons. First, the "program," with its almost 20-year continuous life, dedicated, loyal staff, professional credibility, and notable therapeutic success, had value (XXV.959,963,975,979-80,985,989;XXVII.1175). After September 4, 1990, Dr. Kelly's program had no value (XXXI.1914-18).

The plaintiffs were repeatedly prevented from proving that the defendants intentionally destroyed Dr. Kelly's program between April 30 and September 4, and that the program was not simply a victim, as defendants argued in closing (XLIV.3748-49, 3768; XLV. 3802), of the advent of managed care. The judge's rulings had the effect of preventing the plaintiffs from submitting to the jury, as an additional claim for breach of contract, the issue of whether the

defendants breached the contract after April 30 by destroying the on-going value of Dr. Kelly's program.

Secondly, the judge erred in finding, as a matter of law, that no contract existed between the parties after April 30th. When Dr. Kelly's last written contract expired on April 30, 1990, he continued to perform under the contract while his new contract was being negotiated. Dr. Kelly's patients and staff remained at the Hospital after April 30 and Dr. Kelly did not, and was not asked to, abandon them. He continued to perform until September 4, 1990, when he was terminated as "Medical Director," the position he had occupied under his written contracts. When Dr. Kelly continued to render his professional, personal services after April 30, 1990, a presumption arose that Dr. Kelly and the defendants had mutually assented to a new contract containing the same terms as the previous one. Zimmer v. Pony Express Courier Corp. of Fla., 408 So.2d 595,597 (Fla. 2d DCA 1981), rev. denied, 418 So.2d 1280 (Fla. 1982); Rothman v. Gold Master Corp., 287 So.2d 735,736 (Fla. 3d DCA 1974). At the very least, whether the contract continued was a jury question.

Thirdly, damage or detriment was an essential element of the defendants' liability for, not merely the plaintiffs' damages from, fraud. See Stokes v. Victory Land Co., 128 So. 408, 410 (Fla. 1930); Sheen v. Jenkins, 629 So.2d 1033 (Fla. 4th DCA 1993); National Aircraft Servs., Inc. v. Aeroserv Int'l, Inc., 544 So.2d 1063,1065 (Fla. 3d DCA 1989). Plaintiffs were prevented from fully proving all elements of their cause of action for fraud, and thus of defendants'

liability for fraud, when they were barred from proving that the defendants destroyed Dr. Kelly's program.

Without evidence that the defendants destroyed Dr. Kelly's program, the jury could only consider, on the issue of defendants' liability for fraud, the profits that Dr. Kelly may have lost when he gave up the opportunity to go with First Hospital. The viability of the First Hospital deal, however, and the profits Dr. Kelly might have earned from placing his program with that group were sharply disputed issues at trial (XXIX-XXX.1545-1671;XXXIV. 2225-2305;XLI.3129-3229;XLII.3233-3394). If the jury found that Dr. Kelly had not lost a viable opportunity by foregoing the First Hospital deal in favor of moving to Community Hospital, it would have had no alternative damage or detriment theory on which to find defendants liable for fraud.

Fourthly, the exclusion of post-April 30th events affected the trial in several telling ways. It shielded the jury from exposure to the full range of defendants' malicious behavior and thus prevented the jury from fully assessing the credibility of the defendants' witnesses who carefully sought to depict themselves as always treating Dr. Kelly fairly.

The exclusion, furthermore, created a discontinuity in the plaintiffs' proofs including the testimony of several key witnesses, such as Berghman, Runyon, Dr. Kelly, and Vernegaard. The jury could not have understood why it was not allowed to fully hear about, or consider, the last four months in what appeared to be a seamless 3-

year relationship between the parties. The exclusion of post-April 30 events substantially compromised the effectiveness of the plaintiffs' presentation of their case.

CONCLUSION

For the foregoing reasons, the judgment should be reversed, Tejada should be disapproved, and the matter should be remanded for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Haliczer, Pettis & White, P.A., 101 N.E. Third Avenue, 6th Floor, Fort Lauderdale, Florida 33301, and Buckingham, Doolittle & Burroughs, 4800 North Federal Highway, Suite 104A, Boca Raton, Florida 33431, on this ___ day of February 2001.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief was typed in 12 point Courier New a non-proportionately spaced font of ten characters per inch.

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