ORIGINAL

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 Petition for Discretionary Review
of a Decision of the
Third District Court of Appeal

PETITIONERS' AMENDED JURISDICTIONAL BRIEF

Law Offices of
R. Stuart Huff, Esq.
330 Alhambra Circle
Coral Gables, Florida 33134
(305) 448-8000

Lawrence & Daniels
100 North Biscayne Boulevard
21st Floor, New World Tower
Miami, Florida 33132
(305) 358-3371

Attorneys for Petitioners

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STATEMENT OF THE CASE AND FACTS

Facts

Juror Truman Skinner, a 30-year member of the Florida Bar, lied repeatedly on voir dire about his prior legal affairs. He misrepresented, at the outset, that he had "retired" from the practice of law. Post-trial investigation revealed that Skinner had not "retired." He had stolen $283,000 from his trust account over 15 months in what the Bar's auditor called a "pattern" of embezzlement, and faced certain disbarment. Based on this offense and Skinner's three prior disciplinary actions for misuse of clients' funds, this Court allowed Skinner to disciplinarily resign from the Florida Bar in 1994. The United States Supreme Court disbarred him in 1995.

Skinner lied about other legal matters. Defense counsel asked the jurors whether they had been parties to any "contract" actions. The plaintiffs' claims in this case were for breach of contract and fraud. Skinner represented that he had been a party to only two contract actions. Post-trial inspection of court records showed that Skinner had been a party in at least 23 contract actions, most in the 1990's, in Dade County alone.

The jurors also were asked whether they had been parties to any type of lawsuit *other* than one involving breach of contract. Skinner remained silent. Post-trial investigation showed that Skinner had been a party in over 26 *other* types of actions, many of them recent, including 24 in Dade County. These actions involved a variety of significant claims against Skinner including claims for fraud and intentional tort. Skinner likewise failed to reveal that he had been federally indicted for RICO fraud, and sued civilly for RICO fraud in federal court.

Skinner's undisclosed litigation was highly material to the jury selection process in this fraud and contract action. Had plaintiffs known of the magnitude and type of Skinner's prior litigation and wrongdoing they would have used a challenge to remove him.

Skinner was elected foreperson of the jury. He immediately began disparaging the plaintiffs' theories and proofs to other jurors in violation of the judge's instructions not to discuss the case. The jury rendered a verdict for the defendants.

The trial judge denied plaintiffs' motion for new trial and motion to interview Skinner and other jurors under Fla. R. Civ. P. 1.431(h), and entered judgment for defendants. Plaintiffs appealed.

The Third District Court of Appeal affirmed in a "Per Curiam" decision that cited, inter alia, Tejada v. Roberts, 25 Fla. L. Weekly D 475 (Fla. 3d DCA February 23, 2000), clarified, 25 Fla. L. Weekly D 1070 (Fla. 3d DCA May 3, 2000); App.3-7. Kelly v. Community Hospital of the Palm Beaches, et al., 25 Fla. L. Weekly D 626 (Fla. 3d DCA March 8, 2000); App.1-2. The district court denied plaintiffs' motion for rehearing on May 10, 2000, and petitioners filed their notice invoking this Court's jurisdiction on June 6, 2000.

SUMMARY OF ARGUMENT

In its per curiam affirmance of the trial court's judgment, the Third District Court of Appeal relied upon Tejada v. Roberts. Tejada expressly and directly conflicts with a decision of this Court, De La Rosa v. Zequeira, and with a decision of the Second District Court of Appeal, Ford Motor Co. v. D'Amario, on the same question of law: whether an investigation into a juror's voir dire answers concerning the juror's litigation history, if done post-trial, comes too late to preserve the issue of the juror's misrepresentations for appellate review.

A petition for review is presently pending before this Court in Tejada. Review already has been granted in Ford Motor. Under well-

established principles of conflict jurisdiction exemplified by cases such as Jollie v. State, the present case should be accepted for review and should remain in the same appellate 'pipeline' as Tejada and Ford Motor.

ARGUMENT

Tejada Announces a New Rule of Trial Procedure that Expressly and Directly Conflicts with a Decision of this Court and of another District Court of Appeal On the Same Question of Law

A.

Jurisdiction

Jurisdiction in this case is proper under Fla. R. App. P. 9.030(a)(2)(A)(iv). The decision in Tejada v. Roberts expressly and directly conflicts with the decisions in De La Rosa v. Zequeira, 659 So.2d 239 (Fla. 1995), and Ford Motor Co. v. D'Amario, 732 So.2d 1143 (Fla. 2d DCA 1999), on the same question of law.

A petition for discretionary review was filed in Roberts v. Tejada, SC00-1080, on May 15, 2000, and is still pending before this Court. Review was previously granted in Ford Motor Co. D'Amario, as reported at 743 So.2d 508 (Fla. 1999).

Jurisdiction is therefore proper in this case under the rule stated in, inter alia, Newell v. State, 714 So.2d 434 (Fla. 1998), State v. Lofton, 534 So.2d 1148 (Fla. 1988), Harrison v. Hyster Co., 515 So.2d 1279 (Fla. 1987), and Jollie v. State, 405 So.2d 418 (Fla. 1981). These cases hold that where, as here, a "Per Curiam Affirmed" decision cites as controlling authority a decision that is pending review in this Court, prima facie conflict exists for jurisdictional purposes.

B.

Law

Tejada v. Roberts, on which the district court relied, holds:

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

25 Fla. L. Weekly at D 476. This holding expressly and directly conflicts with De La Rosa v. Zequeira, 659 So.2d 239 (Fla. 1995), quashing, 627 So.2d 531(Fla.3d DCA 1993).

In De La Rosa, this Court explicitly approved the post-trial investigation of juror voir dire answers. In the district court opinion in De La Rosa, 627 So.2d at 533 n.6, which this Court quashed, the majority stated with respect to the requirement of diligence in discovering the falsity of a juror's voir dire answers:

> There is also considerable doubt about the [diligence] condition. The information about [juror] 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 not only invites the question of why the investigation was not "diligently" conducted previously but, more significantly, presents the disquieting practice of exposing jurors, who have done nothing more than honestly perform their civic duty, to the invasion of their private affairs because they have had the temerity to find against a particular litigant.

Judge Baskin, in dissent, responded to each of these concerns:

> As for the due diligence branch of the test, I find counsel's efforts sufficient. The prospective jurors were questioned in different ways regarding involvement in prior lawsuits. The majority's holding would require counsel to question each juror individually and obtain a response. 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 Parejo had previously been a defendant in a personal injury lawsuit.")(e.s.); *Wilson*, 537 So.2d at 1102 ("Industrial Fire learned *after the trial* that juror Norbert Perets (who was the jury foreperson) had been insured by Industrial Fire....")(e.s.). 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. [underlined emphasis supplied]
>
> Finally, I disagree with the majority's suggestion that counsel's investigation concerning information given during voir dire is a "disquieting practice," slip op. at 6 n.6, where, as here, a juror fails to reveal lawsuit participation. "It is the duty of a juror to fully and truthfully answer questions on voir dire, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause." *Loftin v. Wilson*, 67 So.2d 185, 192 (Fla. 1953)(citations omitted). The juror in question was not "honestly perform[ing his] civic duty...," slip op. at 6 n.6; a search of the public records is by definition not an "invasion of [a juror's] private affairs," id; and the "disquieting" facet of such practice is the juror's failure to disclose the requested information, not counsel's efforts to seek the truth.

Id. at 534.

This Court adopted Judge Baskin's dissent and quashed the district court's decision:

> Judge Baskin's dissenting opinion contains a complete yet concise analysis of all of the issues involved herein. Rather than repeat that analysis, we approve and adopt her opinion as our own. [e.s.]

Id. 659 So.2d at 242. It is therefore clear that the precise rule announced in Tejada — that any public records investigation of a juror's litigation history must be concluded before the jury is empanelled — was explicitly rejected by this Court in De La Rosa.

The holding in Tejada v. Roberts on the foregoing issue also expressly and directly conflicts with the decision in Ford Motor Co. v. D'Amario, 732 So.2d 1143 (Fla. 2d DCA 1999), rev. granted, 743 So.2d 508 (Fla. 1999). Ford Motor states:

> After the jury rendered a verdict in favor of the appellant, the appellees hired an investigator to do a background check on the jurors solely based on the adverse verdict. This investigation was limited to a public records search. We would note that our courts have approved this type of post-verdict investigation without requiring a reasonable suspicion of prior misconduct [citing De La Rosa].

732 So.2d at 1145.

CONCLUSION

By virtue of the district court's reliance on Tejada, express and direct conflict exists between the decision in this case and the

decisions in De La Rosa and Ford Motor. This petition should therefore be granted.

CERTIFICATE OF TYPE SIZE

This brief was printed in 14 point Arial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Kenneth G. White, Esq., Haliczer, Pettis & White, P.A., 101 N.E. Third Avenue, 6th Floor, Fort Lauderdale, Florida 33301, and Peter M. Feaman, Esq., Buckingham, Doolittle & Burroughs, 4800 North Federal Highway, Suite 104A, Boca Raton, Florida 33431, on this 21 day of June 2000.

Law Offices of
R. Stuart Huff, Esq.
330 Alhambra Circle
Coral Gables, Florida 33134
(305) 448-8000

Lawrence & Daniels
100 North Biscayne Boulevard
21st Floor, New World Tower
Miami, Florida 33132
(305) 358-3371

By _____
Adam H. Lawrence
Florida Bar #188175

Attorneys for Petitioners

Appendix

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2000

THOMAS J. KELLY, M.D. and THOMAS J. KELLY, M.D., P.A.,	**	
Appellants,	**	
vs.	**	CASE NO. 3D98-907
COMMUNITY HOSPITAL OF THE PALM BEACHES, INC., d/b/a HUMANA HOSPITAL-PALM BEACHES, a Florida corporation and HUMANA, INC., a foreign corporation,	**	LOWER TRIBUNAL NO. 93-654
Appellees.	**	

Opinion filed March 8, 2000.

An Appeal from the Circuit Court for Dade County, Philip Cook, Senior Judge and Norman Gerstein, Judge.

Lawrence & Daniels and Adam Lawrence; R. Stuart Huff, for appellants.

Buckingham Doolittle & Burroughs and Peter M. Feaman and Jeffrey T. Royer; Haliczer, Pettis & White and Debra B. Potter, for appellees.

Before SCHWARTZ, C.J., and GREEN and FLETCHER, JJ.

PER CURIAM.

Affirmed. See Salmon v. State, ___ So. 2d ___ (Fla. 3d DCA

Case no. 3D00-307, opinion filed, March 1, 2000); Tejada v. Roberts, ___ So. 2d ___ (Fla. 3d DCA Case no. 3D99-1432, opinion filed, February 23, 2000); Taylor v. Public Health Trust, 546 So. 2d 733 (Fla. 3d DCA 1989), review denied, 557 So. 2d 867 (Fla. 1989); Sears, Roebuck & Co. v. McKenzie, 502 So. 2d 940 (Fla. 3d DCA 1987), review denied, 511 So. 2d 299 (Fla. 1987); Jimenez v. Gulf & Western Mfg. Co., 458 So. 2d 58 (Fla. 3d DCA 1984); Lynch v. McGovern, 270 So. 2d 770 (Fla. 4th DCA 1972), cert. dismissed, 277 So. 2d 786 (Fla. 1973).

Volume 25, Number 9
March 3, 2000

DISTRICT COURTS OF APPEAL

Wrongful death—Medical malpractice—Civil procedure—Jurors—Voir dire—Losing party is not entitled to automatic new trial upon showing that juror failed to disclose prior litigation history—Where court and counsel inquired of jurors as to whether they had been party to a lawsuit for damages, there was no concealment by juror who did not reveal that she had filed and then voluntarily dismissed petition for domestic violence injunction—Juror's nondisclosure of fact that she had been defendant in small claims matter and plaintiff in automobile negligence case more than twenty years prior to jury selection was not relevant and material to jury service—Party did not act with diligence where motion for new trial resulted from review of civil lawsuit index maintained by clerk after trial was over—Proper time to check jurors' names against clerk's lawsuit index is at conclusion of jury selection—Error to grant motion for new trial

FRANCISCO TEJADA, M.D., FRANCISCO TEJADA, M.D., F.A.C.P., P.A., and FRANCISCO TEJADA, M.D., F.A.C.P., P.A., d/b/a AMERICAN ONCOLOGY CENTERS, INC., Appellants, v. LUCILLE ROBERTS, personally and as personal representative of the Estate of FREDERICK ROBERTS, Deceased, Appellee. 3rd District. Case No. 3D99-1432. L.T. Case No. 96-12563. Opinion filed February 23, 2000. An appeal from the Circuit Court for Dade County, Steve Levine, Judge. Counsel: Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., and Shelley H. Leinicke, for appellants. Gaebe, Murphy, Mullen & Antonelli and David Kleinberg, for appellee.

(Before JORGENSON, COPE and LEVY, JJ.)

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

I.

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

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

Thereafter plaintiff searched the index to the public records for Miami-Dade County, which appeared to show that in 1996 Ms. Guerrero had filed a domestic violence petition, and voluntarily dismissed it nine days later. The public record appeared to show that Ms. Fornell had been party to two civil lawsuits over twenty years ago, one as defendant in a small claims case filed in 1973 and the other as plaintiff in an auto negligence case filed in 1975. The trial court concluded that the case law required the ordering of a new trial, so long as it was shown that there was a nondisclosure of litigation history, and that the moving party need not show any prejudice from the nondisclosure. The court ordered a new trial, and defendants have appealed.

II.

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

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

III.

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

> In determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. . . . First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence. We agree with this general framework for analysis . . . .

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

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

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

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

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

(Emphasis added).

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

> He [the judge] asked you if you had ever been a party to a lawsuit. And again, the reason isn't to embarrass you, because you know when you were in the lawsuit, you may have won and you thought it was great or you lost, thought it stunk. Or you may have been a defendant and think all the plaintiffs are *out to get their money* or you may have been a plaintiff and thought otherwise.
>
> It's really important what you bring to the stand on this issue. So I'm going to ask you, each one of you by name whether or not you have ever been a party to a lawsuit. And I mean, any kind of lawsuit, a divorce, a collection of a debt, a breach of contract, an assault and battery, an auto accident, a defective product, a medical negligence case, such as this case, a divorce, anything at all.

(Emphasis added).

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

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

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

We reach a different conclusion as to juror Fornell, who gave her occupation as "banker," evidently meaning bank officer. Since some bank officers through their work experience become quite familiar with the litigation process, plaintiff's showing was sufficient to call for an interview of juror Fornell on the issue of concealment.[4] *See De La Rosa*, 659 So. 2d at 241 (three-part test is used for deciding whether to grant jury interview or new trial). No interview will be needed in this case, however, because as explained later in this opinion, other elements of the *De La Rosa* test are not satisfied.

IV.

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

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

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

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

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

Turning to Ms. Fornell, we conclude that the nondisclosures were immaterial. She was allegedly named in two lawsuits over twenty years prior to jury selection in this case. One was a 1973 small claims matter in which she was a defendant, and the other a 1975 automobile negligence case in which she was a plaintiff. Both were resolved without trial. The point of asking about litigation history is to determine if the juror bears some animus about the litigation process, or about similarly situated litigants, which would adversely impact on the prospective juror's ability to consider the case fairly. *See De La Rosa*, 659 So. 2d at 241.

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

V.

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

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

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

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

VI.

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

Reversed and remanded.

---

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

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

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

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

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

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

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

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

* * *

Insurance—Arbitration

ALLSTATE INSURANCE COMPANY, Appellant, vs. ANDREW BRODKIN, et al., Appellees. 3rd District. Case No. 3D99-2507. L.T. Case No. 99-2669. Opinion filed February 23, 2000. An Appeal from a non-final order from the Circuit Court for Dade County, Eleanor Schockett, Judge. Counsel: Richard A. Sherman and Rosemary B. Wilder; Timothy W. Harrington, for appellant. Nicholas G. Sadaka, for appellee Andrew Brodkin.

(Before SCHWARTZ, C.J., and GODERICH and RAMIREZ, JJ.)

(PER CURIAM.) We affirm the trial court's order denying the insurer's motion to dismiss and compel arbitration. The affirmance, however, is without prejudice to raise the issue of the set-off at the trial court.

Affirmed without prejudice.

* * *

Civil procedure—Summary judgment—Vacation—No error in denial of motion to vacate final summary judgment where no new evidence was presented that was not discoverable at time final summary judgment was entered

FLORIDA ROCK & SAND COMPANY, INC., Appellant, vs. CREDIT GENERAL INSURANCE COMPANY, INC., Appellee. 3rd District. Case No. 3D99-2119. L.T. Case No. 93-19163. Opinion filed February 23, 2000. An Appeal from the Circuit Court for Dade County, David L. Tobin, Judge. Counsel: Elder, Kurzman & Vaccarella, Michael J. Kurzman and Maury L. Udell, for appellant. Welbaum, Guernsey, Hingston, Greenleaf & Gregory and John H. Gregory, for appellee.

(Before LEVY, GODERICH, and FLETCHER, JJ.)

(PER CURIAM.) We affirm the denial of the plaintiff's motion to vacate a final summary judgment. A review of the record reflects that the trial court did not abuse its discretion by denying the motion to vacate because the plaintiff failed to present new material evidence that was not discoverable at the time that final summary judgment was entered. *E.I. Dupont De Nemours & Co. v. Native Hammock Nursery, Inc.*, 698 So. 2d 267 (Fla. 3d DCA 1997), *review denied*, 717 So. 2d 1126 (Fla. 1998).

Affirmed.

* * *

Civil procedure—Speech—No demonstration of error in order denying motion for termination of order restraining parties and counsel from making public statements during pendency of class action trial against tobacco companies—Order does not violate First Amendment rights

R. J. REYNOLDS TOBACCO COMPANY, ET AL., Appellants, v. HOWARD A. ENGLE, M.D., ET AL., Appellees. 3rd District. Case No. 3D00-372. L.T. Case No. 94-8273. Opinion filed February 24, 2000. An appeal from a non-final order from the Circuit Court of Dade County, Robert P. Kaye, Judge. Counsel: Coll Davidson Smith Salter & Barkett; Cahill, Gordon, Reindel & Floyd Abrams; Winston & Strawn and Dan K. Webb, Bradley E. Lerman and Keivn J. Narko; Clark Silverglate Williams & Montgomery and Kelly Anne Luther; Dechert Price & Rhoads and Robert C. Heim, for appellants. Stanley M. and Susan Rosenblatt, for appellees. Aragon, Burlington, Weil & Crockett and Kevin C. Kaplan for Dow Jones & Company, Inc., as amicus curiae.

(Before LEVY, SHEVIN and SORONDO, JJ.)

(PER CURIAM.) Defendants appeal an order denying their motion for termination of an order restraining parties and counsel from making public statements during the pendency of the class action jury trial against various tobacco companies. After a careful review of the record and consideration of the issues raised in the briefs, we hold that defendants have not demonstrated error. We therefore affirm. Defendants' reliance on *Rodriguez v. Feinstein*, 734 So. 2d 1162 (Fla. 3d DCA 1999), is misplaced. The original order is supported by the record evidence and contains a specific finding regarding the necessity for its entry; thus, this case is clearly distinguishable from *Rodriguez*. Furthermore, the order that defendants now seek to terminate, entered in October 1998, was not appealed, and, in fact, was either invited or acquiesced to by defendants. Finally, the record does not reflect a change in circumstances to justify granting defendants' motion. *See U.S. Mfg. & Galvanizing Corp. v. Renfrow*, 592 So. 2d 1216 (Fla. 3d DCA 1992). Based on the foregoing, we conclude that the order under review does not violate defendants' First Amendment rights. As recognized by *Rodriguez*, limitations imposed by the court between the media and lawyers and/or litigants are permissible for good cause shown in order to assure a fair trial. *Rodriguez*, 734 So. 2d at 1164. Accordingly, we affirm the order.

Affirmed.

* * *

Civil procedure—Summary judgment—Error to enter partial summary judgment for plaintiff where plaintiff failed to negate defendant's affirmative defenses

MOHAMMED IBRAHIM, Appellant, vs. ADAM WINDER, Appellee. 3rd District. Case No. 3D99-2672. L.T. Case No. 98-20029. Opinion filed February 23, 2000. An appeal of a non-final order from the Circuit Court of Dade County, Alan Postman, Judge. Counsel: Zack Kosnitzky and Bruce Alan Weil and J. Ross Gibson, for appellant. Steven Friedman (Pembroke Pines), for appellee.

(Before LEVY, GODERICH, and FLETCHER, JJ.)

(PER CURIAM.) We reverse the partial summary judgment in favor of the plaintiff Adam Winder on counts I and II of his complaint as the plaintiff has failed to negate defendant's affirmative defenses. *See Gordon v. Felton*, 710 So. 2d 222 (Fla. 3d DCA 1998); *First Mortgage Investors v. Boulevard Nat'l Bank of Miami*, 327 So. 2d 830 (Fla. 3d DCA 1976).

Reversed and remanded for further proceedings.

* * *

Contracts—Jurisdiction—Forum selection clause—Dismissal

RICHARD SPERANDIO, Appellant, vs. WILLIAM ORTMAN, individually, and AAA TELEPHONE REPAIR SERVICE, INC., a Florida corporation, et al., Appellees. 3rd District. Case No. 3D99-1713. L.T. Case No. 95-14603. Opinion filed February 23, 2000. An appeal from the Circuit Court for Dade County, Margarita Esquiroz, Judge. Counsel: Ferdie and Gouz, and Ainslee R. Ferdie, for appellant. William E. Cassidy, for appellees.

(Before FLETCHER and SORONDO, JJ., and NESBITT, Senior Judge.)

(PER CURIAM.) We agree with the trial judge's underlying premise that the action was not maintainable in Florida due to the forum selection clause contained within the instrument sued on. Our concern, however, is that by awarding summary final judgment in appellees' favor, the order under review may be interpreted as having a preclusive effect upon appellant's attempt to assert the action in the proper forum. For this reason we treat the order in

sent him to visit Lamaletto; and that they needed to agree on some "form of payment." Alternatively, if no agreement was reached, the Venezuela investigation "will go on," and a *subpoena* was certain to follow. At that point, Jatar represented, he would pass along the subpoena to the media. After reviewing the transcript, the trial court granted defendants' motion for summary judgment.

The trial court properly granted summary judgment because Jatar had no reasonable expectation of privacy in his oral communication. In the absence of a reasonable expectation of privacy, Jatar's oral communications were *not* protected under section 934.03, and he is not entitled to civil remedies. Therefore, defendants are entitled to a judgment as a matter of law.

As stated in *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985),

> Section 934.02(2) in defining oral communication, expressly provides: 'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception *under circumstances justifying such expectation* . . . . From this language, it is clear that the legislature did not intend that every oral communication be free from interception without the prior consent of all the parties to the communication.

An oral communication is protected under section 934.03 if it satisfies two conditions: "A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy *as well as whether society is prepared to recognize* this expectation as reasonable." *Inciarrano*, 473 So. 2d at 1275. Although Jatar undoubtedly had a subjective expectation of privacy, here, as the court concluded in *Inciarrano*, his expectation was not justified. Jatar did not visit Lamaletto's office in the ordinary course of business. As held in *Inciarrano*, Jatar went to Lamaletto's office with the intent "to do him harm." *Id.* at 1275. Society is not prepared to recognize as reasonable an expectation of privacy in such activity. *See Id.*

We are not persuaded by Jatar's argument that the trial court's summary judgment should be reversed under *State v. Walls*, 356 So. 2d 294 (Fla. 1978). *Walls* held that an extortion threat delivered to the victim in the victim's home is an oral communication as defined by section 934.02(2), Florida Statutes (1975). However, *Walls* is distinguishable and its continued viability is questionable in light of *Inciarrano*.[2] *Walls* upheld the constitutionality of the statute but did *not* address whether the oral communication constituting extortion was imbued with a reasonable expectation of privacy. *See Inciarrano*, 473 So. 2d at 1275. Society is willing to recognize a reasonable expectation of privacy in conversations conducted in a private home. However, this recognition does not *necessarily* extend to conversations conducted in a business office. The reasonable expectation of privacy fails where, as here, the intent of the speaker does *not* justify such an expectation.

We are mindful of Justice Ehrlich's concurring opinion in *Inciarrano*, joined by Justice Shaw, where he asks, "Why were Walls's privacy rights not 'dissolved' by his extortionate threats?" *Inciarrano*, 473 So. 2d at 1277 (Ehrlich, J., concurring). Our holding in this case is derived from our view that, as Justice Ehrlich suggests, "[t]he proper analysis of these facts should rest solely upon [Jatar's] legitimate (as supposed to subjective) expectation of privacy in the business office of his victim. Because he had no legitimate expectation of privacy there, and because he freely and voluntarily gave his oral communication to his victim, the statute is inapplicable." *Inciarrano*, 473 So. 2d at 1277 (Ehrlich, J. concurring).

We also certify the following question of great public importance:

> DOES *STATE v. WALLS*, 356 So. 2d 294 (Fla. 1978), HAVE CONTINUED VALIDITY AND BAR SUMMARY JUDGMENT IN THE VICTIM'S FAVOR, WHERE AN EXTORTION THREAT WAS DELIVERED IN THE VICTIM'S OFFICE AND ELECTRONICALLY RECORDED BY THE VICTIM BECAUSE HE FEARED THAT SUCH AN EXTORTION THREAT WAS IMMINENT, IN VIEW OF THE HOLDING IN *STATE v. INCIARRANO*, 473 So. 2d 1272 (Fla. 1985)?

Jatar's remaining points lack merit.

Based on the foregoing, we affirm the summary final judgment.

Affirmed; question certified.

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[1]Jatar has been a fugitive from Venezuela since the time the extortion proceedings against him commenced.

[2]As this court has previously indicated, *Inciarrano* casts doubt on the continued validity of *Walls*. *See Morales v. State*, 513 So. 2d 695, 697 n.6 (Fla. 3d DCA 1987) (Pearson, J., concurring).

* * *

Wrongful death—Medical malpractice—Civil procedure—Jurors—Voir dire—Losing party is not entitled to automatic new trial upon showing that juror failed to disclose prior litigation history—Party did not act with diligence where motion for new trial on basis of jurors' failure to disclose prior litigation history resulted from review of civil lawsuit index maintained by clerk of court after trial was over, although index is public record which could have been consulted at any time

FRANCISCO TEJADA, M.D., FRANCISCO TEJADA, M.D., F.A.C.P., P.A., and FRANCISCO TEJADA, M.D., F.A.C.P., P.A., d/b/a AMERICAN ONCOLOGY CENTERS, INC., Appellants, v. LUCILLE ROBERTS, personally and as personal representative of the Estate of FREDERICK ROBERTS, Deceased. Appellee. 3rd District. Case No. 3D99-1432. L.T. Case No. 96-12563. Opinion filed May 3, 2000. An appeal from the Circuit Court for Dade County, Steve Levine, Judge. Counsel: Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., and Shelley H. Leinicke, for appellants. Gaebe, Murphy, Mullen & Antonelli and David Kleinberg, for appellee.

(Before JORGENSON, COPE and LEVY, JJ.)

On Motion for Rehearing, Clarification and Certification

[Original Opinion at 25 Fla. L. Weekly D475a]

(COPE, J.) We deny rehearing and certification but grant clarification.

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

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

Our point is that in *this* case a quick trip to the clerk's office would have revealed the possibility of an undisclosed litigation history, and the matter could have been cleared up by questioning the jurors immediately. It is unsound to allow parties to overturn a trial which has lasted days, weeks, or even months, on the basis of information which readily could have been obtained from the clerk's record in the very same courthouse where the case is being tried.

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

Plaintiff argues that consultation of the clerk's lawsuit index is not always as simple as it might seem. Counsel states that in his Key West experience, which we have alluded to in our opinion, certain

follow-up inquiries were necessary after the trial had already begun and that, based on information which came to light, the trial court struck one of the jurors and seated an alternate. Although the record of counsel's Key West experience is not now before us, we accept his description of events. If difficulties arise in obtaining access to the clerk's record, then that is a matter which should be addressed to the trial court in the first instance, and the resolution lies within the court's discretion. We do not say that civil trials must be held up for lengthy periods in jury selection, but we do say that the time to consult readily available public records is before, not after, the fact.

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

Clarification granted; rehearing and certification denied.

* * *

Foreclosure—Real property—Liens—Priorities—With regard to first foreclosure action, trial court erred in finding that first mortgage was junior to condominium association's lien—With regard to second foreclosure on same property, trial court erred in denying mortgagee's emergency motion to intervene as indispensable party—Remand for determination of mortgagee's right or entitlement to monies paid to association

BOSTON INVESTORS GROUP, INC., Appellant, v. GALLOWAY PROFESSIONAL CENTER CONDOMINIUM ASSOCIATION, INC., a Florida corporation, Appellee. 3rd District. Case Nos. 3D99-1204, 3D99-878. L.T. Case Nos. 98-13847, 96-9739. Opinion filed May 3, 2000. Appeals from the Circuit Court for Dade County, Ronald Friedman, Judge. Counsel: D.S. "Dar" Airan, for appellant. Hyman & Kaplan and Aaron R. Resnick and Michael Hyman, for appellee.

(Before LEVY, FLETCHER, and RAMIREZ, JJ.)

(PER CURIAM.) In this consolidated appeal, Boston Investors Group, Inc. ("Boston") appeals from two Orders entered in two separate foreclosure actions on the same subject property. We reverse both Orders and remand with the following instructions.

As to lower case no. 96-9739, Boston appeals the Summary Final Judgment of Foreclosure which held that Galloway Professional Center's ("Condo. Association") lien was superior to Boston's first mortgage. We reverse the lower court's finding that Boston's first mortgage is junior to Condo. Association's lien. Based upon the record, as well as from the concession of the Condo. Association before this Court on appeal, we find that Boston's lien is superior to that of the Condo. Association.

As to lower case no. 98-13847, Boston appeals from an Order denying Boston's Emergency Motion to Intervene as an Indispensable Party. We reverse the Order denying Boston the right to intervene and remand the matter back to the trial court for a determination of Boston's right or entitlement to the monies paid to Condo. Association pursuant to said Order.

Accordingly, these cases are remanded to the trial court for such further proceedings as may be appropriate and as are consistent with this opinion.

Reversed and remanded.

* * *

Civil procedure—Error to dismiss complaint without affording plaintiffs opportunity to amend

KAPPA GROUP, INC., Appellant, v. GARCIA, PEREZ-SIAM & GRUENINGER, a Florida partnership, et al., Appellees. 3rd District. Case No. 3D99-2171. L.T. Case No. 98-24437. Opinion filed May 3, 2000. An Appeal from the Circuit Court for Dade County, David L. Tobin, Judge. Counsel: Liebler, Gonzalez & Portuondo and J. Randolph Liebler, for appellant. Perez, Goran & Rodriguez and Javier J. Rodriguez, for appellees.

(Before SCHWARTZ, C.J., and GODERICH and SHEVIN, JJ.)

(PER CURIAM.) We reverse the trial court's order dismissing the complaint and remand with instructions to permit plaintiffs to amend the original complaint to allege that defendants failed to obtain an adequate estoppel letter. "The mere possibility that the plaintiff has a cause of action requires that leave to amend the pleadings be given, provided the privilege to amend has not been abused." *General Container Serv., Inc. v. William H. McGee & Co.*, 734 So. 2d 570, 570 (Fla. 3d DCA 1999).

Reversed and remanded.

* * *

Torts—Damages—Future—New trial on damages required where trial court failed to give standard jury instruction dealing with reduction of damages to present value, after it had agreed to do so during charge conference

ROLANDO DIAZ and WINN DIXIE STORES, INC., Appellants, vs. BELINDA FAYE GREEN, etc., Appellee. 3rd District. Case No. 3D98-2867. L.T. Case No. 96-13746. Opinion filed May 3, 2000. An Appeal from the Circuit Court for Dade County, Philip Cook, Judge. Counsel: Adorno & Zeder, Raoul G. Cantero, III, and Stephanie G. Kolman, for appellants. Ginsberg & Schwartz and Arnold G. Ginsberg; Roland Gomez, for appellee.

(Before JORGENSON, GERSTEN and GODERICH, JJ.)

(PER CURIAM.) In the instant case, the jury awarded damages for the loss of ability to earn money in the future and for future medical expenses. Because the trial court failed to give Standard Jury Instruction 6.10 (Civ.), dealing with the reduction of damages to present value, after it had agreed to do so during the charge conference, we reverse and remand for a new trial on damages. *See Norman v. Mullin*, 249 So. 2d 733 (Fla. 2d DCA 1971); *Capone v. Winn-Dixie Stores, Inc.*, 233 So. 2d 175 (Fla. 2d DCA), *cert. denied*, 238 So. 2d 105 (Fla. 1970); *see also Lawn v. Wasserman*, 248 So. 2d 548 (Fla. 3d DCA 1971).

As a result of our disposition, we do not address the remaining issues raised by the appellants.

Reversed and remanded.

* * *

Maritime law—Maintenance and cure—Error to grant motion to reinstate maintenance and cure because contradicting medical evidence existed indicating maximum medical improvement had not been reached

RIO MIAMI CORP., Appellant, v. JULIO BALBUENA, Appellee. 3rd District. Case No. 3D98-3296. L.T. Case No. 96-15378. Opinion filed May 3, 2000. An Appeal from the Circuit Court for Miami-Dade County, David L. Tobin, Judge. Counsel: Fowler, White, Burnett, Hurley, Banick & Strickroot, and Allan R. Kelley, and J. Michael Pennekamp, for appellant. Cooper & Wolfe, and Marc Cooper; and Huggett & Scornavacca, for appellee.

(Before GERSTEN, FLETCHER, and RAMIREZ, JJ.)

(PER CURIAM.) The trial court erred in granting the plaintiff/appellee's motion to reinstate maintenance and cure because contradicting medical evidence existed which indicated the plaintiff/appellee had not reached maximum medical improvement. *See Langmead v. Admiral Cruises, Inc.*, 610 So. 2d 565 (Fla. 3d DCA 1992); *Quarrel v. Minervini*, 510 So. 2d 977 (Fla. 3d DCA 1987), *review denied*, 519 So. 2d 987 (Fla. 1988).

Accordingly, the order below is reversed and the case is remanded with instructions to send the issue to the jury. *See Hendricks v. Dailey*, 208 So. 2d 101 (Fla. 1968); *Quarrel v. Minervini*, 510 So. 2d at 977.

Reversed and remanded.

* * *

Dissolution of marriage—Child support modification—Reduction for period when one child was away at summer camp for more than 28 days and other child attended high school abroad for summer

WILLIAM WEINTRAUB, Appellant, vs. JANET WEINTRAUB, Appellee. 3rd District. Case No. 3D98-2214. L.T. Case No. 88-9827. Opinion filed May 3, 2000. An appeal from the Circuit Court for Dade County, Maynard Gross, Judge. Counsel: Abrams, Etter & Marks, P.A., and Brenda Abrams, for appellant. James M. Schiff; Langbein & Langbein, P.A., and Evan J. Langbein, for appellee.

(Before SCHWARTZ, C.J., and COPE and GREEN, JJ.)

On Motion for Rehearing Denied

[Original Opinion at 25 Fla. L. Weekly D627a]

(COPE, J.) By motion for rehearing, the father argues that we have misapprehended *Roshkind v. Roshkind*, 717 So. 2d 545 (Fla. 4th DCA 1998), and asks that we take judicial notice of the Fourth District Court of Appeal record in that case. We decline to do so. *See*