

ORIGINAL

**IN THE SUPREME COURT
OF FLORIDA**

Case Number: SC00-1255

FILED
THOMAS D. HALL
JUL 07 2000
CLERK, SUPREME COURT
BY DJ

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

Petitioners,

v.

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

Respondents.

On Petition for Discretionary Review
of a Decision of the Third District Court of Appeal
Case Number: 3D98-0907

RESPONDENTS' BRIEF ON JURISDICTION

BUCKINGHAM, DOOLITTLE
& BURROUGHS, LLP
2500 North Military Trail, Suite 480
Boca Raton, FL 33431
Phone: (561)241-0414
Fax: (561)241-9766

HALICZER, PETTIS & WHITE
101 N.E. Third Avenue
Sixth Floor
Ft. Lauderdale, FL 33301
Phone: (954)523-9922
Fax: (954)522-2512

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case and Facts 1

Summary of the Argument 3

Argument 4

This Court should not accept discretionary review of this case where the district court’s per curiam affirmance does not expressly and directly conflict with other decisions of this Court or other district courts of appeal. 4

A. The Third District’s decision cited to a number of cases, other than Tejeda, all of which support its affirmance of the verdict and the trial court’s refusal to permit a jury interview or grant a new trial.. . . . 5

B. Even if Tejeda had been cited for the reasons Kelly suggests, the per curiam affirmance does not expressly and directly conflict with De La Rosa or its progeny. 8

Conclusion 10

Certificate of Compliance with Rule 9.210 (Font Size and Style) 11

Certificate of Service 11

TABLE OF AUTHORITIES

Case Law

<u>De La Rosa v. Zequiera,</u> 659 So. 2d 239 (Fla. 1995)	7, 8, 9, 10
<u>Ford Motor Co. v. D’Amario,</u> 732 So. 2d 1143 (Fla. 2d DCA 1999)	8
<u>Jollie v. State,</u> 405 So. 2d 418 (Fla. 1981)	8
<u>Kelly v. Community Hospital of the Palm Beaches,</u> 756 So. 2d 144 (Fla. 3d DCA 2000)	2
<u>Newell v. State,</u> 714 So. 2d 434 (Fla. 1998)	8
<u>Salmon v. State,</u> 755 So. 2d 148 (Fla. 3d DCA 2000)	6
<u>State v. Lofton,</u> 534 So. 2d 1148 (Fla. 1988)	8
<u>Taylor v. Public Health Trust of Dade County,</u> 546 So. 2d 733 (Fla. 3d DCA 1989), <i>rev. denied</i> , 557 So. 2d 867 (Fla. 1989)	5-6
<u>Tejeda v. Roberts,</u> 25 Fla. L. Weekly D475 (Fla. 3d DCA February 23, 2000), <i>clarified</i> , 25 Fla. L. Weekly D1070 (Fla. 3d DCA May 3, 2000)	2-3, 4, 5, 7, 8, 9, 10
 <u>Court Rules</u>	
9.030, Florida Rules of Appellate Procedure	3, 4, 5
9.210, Florida Rules of Appellate Procedure	11

STATEMENT OF THE CASE AND FACTS

The Petitioners' recitation of the facts is an attempt to shock this Court into accepting discretionary review of this matter based upon facts that are mischaracterized and unsupported by the record. These tactics were rejected by the trial court and the Third District Court of Appeal. Additionally, a review of those "facts" is not necessary for this Court to make a jurisdictional determination in this matter. Once again, however, the Respondents are compelled to briefly respond, lest silence be interpreted as agreement.

This was a breach of contract and fraudulent inducement case between Dr. Kelly and Humana Hospital of the Palm Beaches and Humana, Inc. (collectively, Humana). Following a defense verdict, Kelly's counsel conducted an investigation of the jurors, including personal interviews with several of the jurors/alternates, and subsequently moved for a formal jury interview or new trial due to alleged juror misconduct. The motions were denied by the trial court, as was Kelly's motion for rehearing. Kelly then appealed the case to the Third District Court of Appeal based on alleged jury misconduct, and other various evidentiary and jury instruction issues. The Third District Court of Appeal affirmed the verdict and the trial court's rulings including the refusal to allow a jury interview or grant a new trial. The affirmance was per curiam with cites to a number of authorities. *See Kelly v. Community*

Hospital of the Palm Beaches, 756 So. 2d 144 (Fla. 3d DCA 2000). Following this unfavorable result, Kelly sought rehearing, rehearing en banc, certification to this Court as passing on a question of great public importance, and consolidation with Tejeda v. Roberts, 25 Fla. L. Weekly D475 (Fla. 3d DCA February 23, 2000), *clarified*, 25 Fla. L. Weekly D1070 (Fla. 3d DCA May 3, 2000), one case cited in the per curiam affirmance. The Third District promptly denied each motion.

During the post-trial and appellate proceedings, Humana took the position that Kelly was not entitled to a jury interview or a new trial. Kelly failed to prove that Mr. Skinner omitted material facts during voir dire questioning because, at best, Mr. Skinner's responses to the questions were ambiguous, and were not misrepresentations of material facts. More importantly, Kelly's counsel never took the opportunity to inquire about Mr. Skinner's occupation, the circumstances surrounding his retirement or his prior litigation history in an attempt to clarify his responses to those questions. In support of this argument, Humana cited to Kelly's own brief filed with the Third District Court of Appeals, where his attorneys readily admitted that they "forgot to ask the jurors about their prior lawsuits" and "inadvertently failed to ask Skinner any questions about his prior litigation." Further, in order to allow the jury interview requested by Kelly, the court would have necessarily inquired into the thought processes of the jurors, which is

impermissible under Florida law.

Neither of the parties, nor the trial court raised the issue of the timeliness of Kelly's investigation of the jurors. Nevertheless, Kelly seeks discretionary review from this Court based on his assumption that the Third District cited to Tejeda for the proposition that the jury investigation must be conducted, if at all, prior to the commencement of the trial, and that Tejeda expressly and directly conflicts with pre-existing law. There was no explanation or clarification for why Tejeda was cited by the Third District Court of Appeals.

SUMMARY OF THE ARGUMENT

The only basis upon which the Petitioners can possibly seek discretionary review in this case is pursuant to Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure, for decisions of the district courts of appeal that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." There is no such express and direct conflict that can be determined from the per curiam affirmance of the Third District.

The Third District affirmed the trial court's decision to refuse a new trial or a jury interview based on long-standing principles of law. The decision cites to a number of different authorities, all of which support the affirmance of the trial court's ruling based on Kelly's failure to present sufficient evidence to show that the

jurors concealed information, that such information was relevant or material to their jury service in this case, and/or that the failure to disclose that information was not due to Kelly, or his counsel's own lack of diligence.

Kelly's contention that the Third District's citation to its earlier opinion in Tejeda, among the other cases cited, was related to the timing of the jury investigation is speculative and unsupported by the record in this case. None of the parties ever raised this issue during the post-trial or appellate proceedings. Even if Tejeda had been cited solely for that reason, the per curiam affirmance in this case does not expressly and directly conflict with any prior decision of this Court or the other district courts of appeal.

ARGUMENT

This Court should not accept discretionary review of this case where the district court's per curiam affirmance does not expressly and directly conflict with other decisions of this Court or the other district courts of appeal.

Rule 9.030 of the Florida Rules of Appellate Procedure sets forth the grounds upon which a party may seek discretionary review in this Court. This particular case does not involve state statutes, constitutional issues or state officers. Although the Petitioners' requested that the case be certified to this Court as passing on an issue of great public importance, the Third District refused. Additionally, the case was not certified based on any asserted conflict with decisions of other district courts

of appeal and Kelly did not request such certification. Thus, the Petitioners' quest for discretionary review by this Court is based on an argument that the Third District's per curiam affirmance expressly and directly conflicts with a decision of this Court, or a decision of another district court of appeal. See 9.030(a)(2)(A)(iv), Fla. R. App. P. It does not. Therefore, there is no basis for review.

A. The Third District's decision cited to a number of cases, other than Tejeda, all of which support its affirmance of the verdict and the trial court's refusal to permit a jury interview or grant a new trial.

A review of the cases cited in support of the Third District's per curiam affirmance negates Kelly's argument. It is evident that the per curiam affirmance was based on various pre-existing rules of law. Those cases support the affirmance independent of and in addition to the reasons why the Third District Court of Appeals may have cited to Tejeda.

For example, the Third District's per curiam affirmance cites to Taylor v. Public Health Trust of Dade County, 546 So. 2d 733 (Fla. 3d DCA 1989), *rev. denied*, 557 So. 2d 867 (Fla. 1989). Taylor involved a factually similar situation wherein the plaintiff alleged misconduct on the part of a juror who eventually became the foreman. In Taylor, the Third District held that the trial court had not abused its discretion in denying the plaintiff's motion for a new trial based on a one-word response during voir dire examination. Id. at 734. The court further

concluded that the statement was not necessarily a misrepresentation and also pointed out plaintiff's counsel's lack of diligence:

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

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

This is exactly the position taken by Humana in the present case. Mr. Skinner's responses to voir dire questions by the defense were, at worst, ambiguous, and Kelly's counsel failed to use due diligence despite being given a second opportunity to question the jury panel. In fact, Kelly's counsel elected not to question Mr. Skinner about these issues at all. The Third District's citation to Taylor and Salmon is in line with Humana's arguments and, alone, supports the affirmance of the trial court's action.

It is also important to point out that the timing of the background investigation

of the jurors was never an issue in this case. This issue was never previously raised by Kelly. It was not raised by Humana in response to Kelly's post-trial motions or on appeal. Kelly's assumption that this Court's citation of Tejeda was based on this principle is, therefore, an unsupported one. Tejeda, in fact, speaks to a number of other issues, all of which are applicable to this case.

Like Kelly, Humana can only speculate about the reasons for the Third District's citation to Tejeda. However, a review of Tejeda suggests that the Third District's reversal was not based on the timing of the juror investigation but, rather, the 3-prong test set forth in De La Rosa v. Zequiera, 659 So. 2d 239 (Fla. 1995); i.e., that the alleged non-disclosures were not concealed, were not material, and/or were due to a lack of diligence on the part of the complaining party. These are exactly the issues addressed in the Kelly briefs and at oral argument.

The Third District's affirmance of the trial court's decision in this case was based on various cites other than Tejeda, all of which support the opinion and are in line with the arguments presented by Humana. As such, the cases cited by Kelly for the proposition that this case should remain in the appellate "pipeline" are not applicable. *See, generally, Newell v. State*, 714 So. 2d 434 (Fla. 1998)(where underlying opinion cited case authority that had been quashed by the Supreme Court of Florida); State v. Lofton, 534 So. 2d 1148 (Fla. 1988)(where underlying

district court decision merely cited two cases which were pending review in the Supreme Court of Florida); Jollie v. State, 405 So. 2d 418 (Fla. 1981)(where underlying opinion only cited to a case pending review in the Supreme Court of Florida). Further, Kelly's suggestion that the Third District's affirmance and citation to Tejeda were based on the timing of the jury investigation is entirely speculative where that issue was not even raised in the trial court or on appeal.

A. Even if Tejeda had been cited for the reasons Kelly suggests, the per curiam affirmance does not expressly and directly conflict with De La Rosa or its progeny.

Kelly's second assumption, and the basis for which he seeks discretionary review, is that Tejeda states a new rule of law that is expressly and directly in conflict with this Court's decision in De La Rosa, 659 So. 2d at 239, and Ford Motor Co. v. D'Amario, 732 So. 2d 1143 (Fla. 2d DCA 1999), in which the Second District cites to De La Rosa. No such conflict can be found.

As an initial note, counsel for Kelly took the position at oral argument before the Third District that Tejeda set forth a new rule of law. The argument was not well-received by the panel who suggested, to the contrary, that Tejeda merely followed rules of law that existed for some time. In fact, the Tejeda opinion itself mentions that court's impression that existing case law had been misinterpreted and attempts to clarify the analysis to be utilized in cases of alleged juror concealment.

Following the Third District's per curiam affirmance, Kelly also sought rehearing and certification based upon the arguments now presented here: (1) that the Tejeda opinion conflicts with established precedent; and (2) that Tejeda passes upon a question of great public importance. The Third District refused to allow rehearing or to grant certification to this Court. This Court should likewise refuse to grant discretionary review in Kelly.

In De La Rosa, this Court adopted the three-prong test that most courts utilized to determine whether a juror's nondisclosure of information during voir dire warranted a new trial. De La Rosa, 659 So. 2d at 241. Specifically, this Court agreed that the complaining party must establish that the information is relevant and material to jury service, that the juror concealed the information, and that the failure to disclose the information was not attributable to the complaining party's lack of diligence. Id. (citation omitted). This Court's opinion did not directly address the issue of when a jury investigation should, or should not, take place. As such, there is no direct and express conflict, as further evidenced by the Tejeda opinion itself.

The Third District concluded in Tejeda that the plaintiff was not entitled to a new trial because she had failed to satisfy the pre-existing three-prong test adopted by this Court in De La Rosa. Tejeda, 25 Fla. L. Weekly at D475-477. Specifically, the court determined that some of the information had not been

“concealed” by the jurors, and that other information was not “material” to jury service in that case. Id. The portion of the opinion discussing the plaintiff’s lack of due diligence and describing the timing of a jury investigation expressly states that the argument was never even raised by the parties. Therefore, the “new rule of law” Kelly contends was created in Tejeda does not appear to have been applied to preclude a jury interview or a new trial in Tejeda itself. This certainly undermines Kelly’s contention that the timing of the jury investigation had any bearing on the Third District Court of Appeal’s per curiam affirmance in Kelly.

CONCLUSION

The jury issues and all other evidentiary matters on appeal in this case appear before this Court and the other Florida courts on a regular basis and no special issue of great public importance has been raised. The Third District relied on well-settled case law in affirming the verdict and the trial court’s refusal to allow a jury interview or a new trial. Accordingly, this Court should refuse to accept discretionary jurisdiction of this per curiam affirmance which, in and of itself, does not conflict with any prior decisions of this, or any other, Court.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I HEREBY CERTIFY that this brief was prepared in 14 point, proportionally spaced, CG Times.

KELLY v. COMMUNITY HOSPITALS OF PALM BEACHES
DADE CIRCUIT COURT CASE NO: 93-654 CA 21
3rd DCA CASE NO: 98-0907

MAILING LIST

R. Stuart Huff, Esquire
Mark Mallios, Esquire
330 Alhambra Circle
Coral Gables, FL 33134
Attorney for Plaintiffs
(305)448-8000 - FAX (305) 448-8494

Adam Lawrence, Esquire
Lawrence & Daniels, P.A.
100 North Biscayne Boulevard
21st Floor, New World Tower
Miami, FL 33132
Co-counsel for Plaintiff
(305) 358-3371