IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1255

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

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' REPLY BRIEF

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INTRODUCTION

Respondents' unwieldy Answer Brief consists of two physically distinct sets of arguments: The Answer Brief in this Court ("ABSC"), and an attached copy of the answer brief the respondents filed in the district court ("ABDC"). Petitioners' reply brief responds to both of these documents.

ARGUMENT

POINT I

THE RESPONDENTS DEMAND AN IMPERMISSIBLE REMEDY.

Respondents, recognizing the erroneousness of Tejada v. Roberts, 760 So.2d 960 (Fla. 3d DCA 2000), and the conflict between Tejada and existing case law, do not attempt to defend Tejada. Instead, respondents argue that even if this Court were to quash Tejada, the outcome of the present case would be the same — the Third District Court of Appeal, on remand, would simply reaffirm on other grounds. Based on this unfounded assumption, the only relief respondents demand in their Answer Brief is for review in this case to be dismissed as "improvidently granted."

Respondents' request for dismissal confuses the jurisdictional issue of conflict with the non-jurisdictional issue of how this case will be decided on its merits. Conflict jurisdiction exists where "one of the cases cited [by the lower court] as controlling authority is pending before this Court." The Florida Star v. B.J.F., 530

So.2d 286,288 n.3 (Fla. 1988). The Third District's opinion in this case cited Tejada as controlling authority, and Tejada is pending review before this Court. Conflict jurisdiction in this case is thus fully established.

Once established, conflict jurisdiction is not lost based on how, after Tejada is quashed, this Court, or the Third District on remand, might rule on the merits. Respondents' request that review be dismissed as "improvidently granted"— an outcome reserved for instances in which jurisdiction is lacking — is inappropriate.

POINT II

THE CASES ON WHICH THE LOWER COURT RELIES CALL INTO QUESTION THE THOROUGHNESS OF ITS ANALYSIS.

Respondents argue that quashing Tejada will not change the result on remand because they never argued the Tejada rule below. Although the Third District raised Tejada in this case sua sponte, how Tejada came into this case is unimportant. The only relevant consideration is that the district court cited Tejada as controlling authority.

The other cases that the district court cites as controlling authority and that respondents discuss are simply not analogous to the present case. In Taylor v.Public Health Trust of Dade County, 546 So.2d 733 (Fla. 3d DCA 1989), rev.denied, 557 So.2d 867 (Fla. 1989), a juror uttered one word, "no," in response to an attorney's

statement to him on voir dire that he had neglected to answer a question on the jury questionnaire concerning prior lawsuits. Id. 546 So.2d at 734. A new trial was denied because the attorney did not attempt to follow up on the juror's obviously ambiguous response.

The Third District's and the respondents' reliance on Taylor is misplaced. Skinner's assertion that he was "retired" from the practice of law was unambiguous. Nothing in Skinner's response even remotely suggested that he had been functionally disbarred. Nor was there anything ambiguous in Skinner's disclosure of only "two" prior contract lawsuits when he had been a party in over 45 legal matters of all types in Dade County alone, including civil fraud and a federal indictment for fraud.

The Third District and the respondents also erroneously rely on Salmon v. State, 755 So.2d 148 (Fla. 3d DCA 2000). Salmon arose in a procedural context totally unrelated to the present case – a motion for post-conviction relief based on ineffective assistance of counsel – and implicated an entirely different burden of proof. Moreover, the trial judge in Salmon *did* conduct a jury interview and was satisfied that the jurors' failure to disclose their prior arrests did not render them partial to the prosecution. Id. at 149-150.The Third District's reliance on the patently distinguishable cases of Salmon and Taylor suggests why, if this Court quashes Tejada, it should retain jurisdiction and address the very significant voir dire issues

in this case on their merits.

POINT III

THE TRIAL JUDGE ABUSED HIS DISCRETION BY REFUSING TO ALLOW A JURY INTERVIEW OR GRANT A NEW TRIAL.

A. Plaintiffs Did Not Violate The Rules Relating To Post-Trial Juror Interviews

After the jury retired to deliberate and alternate juror Herrero was excused she stayed to speak to plaintiffs' counsel. This juror-initiated contact later resulted in a telephone conversation between plaintiffs' counsel and Herrero in which Herrero disclosed the facts that plaintiffs set forth in their "Verified Amendment..." (VII 1260-1261), and in their argument at the hearing on the motion for new trial (XI 1682-1690).

Following the verdict, before he discharged the jurors, the judge gave the jurors and the attorneys leave to speak with one another (XLV 3911-3912,3914). See Baptist Hosp. of Miami, Inc. v. Maler, 579 So.2d 97,98 (Fla. 1991)(attorneys spoke to jurors who approached them after receiving a similar instruction). After receiving this instruction juror Hall and most of the other jurors mingled outside the courtroom to discuss the case with counsel for *both* sides. Jurors also exchanged telephone numbers with counsel (XI 1653-1654,1683-1684).

Jurors Hall and Herrero had wanted to speak to plaintiffs' counsel even before

the verdict. They were so disturbed by what Skinner and Tarkoff were doing that they drove to the offices of plaintiffs' counsel one afternoon after trial and parked, but, fearing they might get into trouble by complaining, never went inside (XI 1687-1689).

Defendants presented no evidence to the trial judge that plaintiffs' counsel initiated any contacts with Hall and Herrero. The judge properly found that plaintiffs' counsel had done nothing wrong in speaking to these jurors (XI 1683-1684).

None of the respondents' authorities hold to the contrary. In Walgreens, Inc. v. Newcomb, 603 So.2d 5 (Fla. 4th DCA 1992), rev. denied, 613 So.2d 7 (Fla. 1993), and Seymour v. Solomon, 683 So.2d 167 (Fla. 3d DCA 1996), the attorney initiated the attorney-juror contact. Rule Regulating Fla. Bar 4-3.5(d)(4) prohibits an attorney from "initiat[ing] communication" with a juror and not, as occurred here, from talking with a juror who initiates the contact. Rule 4-3.5(d)(4), in any case, is not controlling because the trial judge authorized counsel for both sides to speak to the jurors. Florida Ethics Op.66-47 (1966), which respondents also cite, interprets Canon 23 of the Florida Code of Professional Conduct. Canon 23, however, was superseded by Rule 4-3.5.

1. Juror Skinner

Respondents contend that Skinner's description of himself as "retired," was accurate. Skinner, however, did not "retire." He petitioned for disciplinary resignation.

"Disciplinary resignation" is defined by this Court as "the functional equivalent of disbarment." Amendments To Rules Reg.Fla.Bar, 26 Fla. L. Weekly S79, App.S10 (Fla. Feb. 8, 2001). Skinner knew that he was about to be disbarred because "[d]isbarment is the presumed sanction for lawyers found guilty of theft from a...trust account." Id. at S4. Skinner did not in any sense freely "retire"from the law; he fled to avoid certain prosecution and severe punishment.

Respondents' assertion that "the details of [Skinner's] lawsuits are irrelevant," is equally meritless. First, the respondents previously conceded the materiality of Skinner's non-disclosures (XI 1716). Secondly, the "details" of Skinner's prior fraud cases were vitally important in this fraud case. They showed Skinner's unlimited capacity and long-standing propensity for committing fraud. These were obviously traits that Dr. Kelly did not want in a juror. De La Rosa v. Zequeira, 659 So.2d 239, 241(Fla. 1995)("[a juror] involved in prior litigation may sympathize with similarly situated litigants or develop a bias against legal proceedings in general").

Respondents rely heavily on the irrelevant fact that Skinner lied about his prior litigation while being questioned by the defendants not by the plaintiffs. A party, however, is entitled to rely on a juror's false voir dire answers regardless of who asks the questions. The issue is never simply whether the complaining party failed to ask the right questions. The issue is whether the juror's concealment and non-disclosure

were attributable to that failure. The answer in Skinner's case is clearly "no."

Skinner displayed his intention to reveal nothing negative about himself by his dishonest response to whether he was still practicing law. He then purposely led the parties to conclude that he had been involved in only two contract actions and in no other legal actions. His answers were totally irreconcilable with his involvement as a party and as a criminal defendant in over 50 civil, criminal and disciplinary proceedings in Dade County alone and in the federal courts. Despite numerous opportunities provided by questions from defense counsel that should have elicited his full litigation history, Skinner intentionally remained mute.

Secondly, following the defense voir dire, plaintiffs' counsel re-voir dired the jury (XIX 171). The purpose of re-voir dire is to allow counsel to follow up on information that the other side has just elicited from a juror. Barker v. Randolph, 239 So.2d 110,113 (Fla. 1st DCA 1970), cert. denied, 242 So.2d 137 (Fla. 1970). Here, Skinner's plausible lies and concealment during his voir dire by the defendants gave plaintiffs' counsel no reason to question Skinner further on the innocuous matters of his retirement from the practice of law and his "two" contract actions.

The position of plaintiffs' counsel when he rose to re-voir dire Skinner and the rest of the panel was therefore the same as that of plaintiff's counsel following the judge's voir dire in Wilcox v. Dulcom, 690 So.2d 1365 (Fla. 3d DCA 1997). There

a juror did not answer the trial judge's questions honestly. The district court found that a new trial was appropriate because plaintiffs had a right to expect that the juror had answered the judge's questions "truthfully and completely." There was no lack of diligence by the plaintiffs in their subsequent voir dire because they were forced to conduct their voir dire "according to the incomplete information given by the juror" to the preceding questioner. Id. 690 So.2d at 1367. Accord Mitchell v. State, 458 So.2d 819,821 (Fla. 1st DCA 1984)("The [judge's] question and [the juror's] negative answer being both clear and straightforward it was not incumbent upon defense counsel to explore the topic further...."); Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379, 381 (Fla. 2d DCA 1972)(new trial granted on defendant's motion because juror's "failure to respond truthfully" to plaintiff's voir dire questions "deprived defendant...of the opportunity to examine [the juror] concerning these matters....").

The cases respondents cite for their absence of diligence argument (ABDC 28), are all distinguishable. In De La Rosa, 659 So.2d at 241-242, the Supreme Court *approved* the grant of a new trial because of a juror's failure to reveal a history of prior lawsuits. In Blaylock v. State, 537 So.2d 1103,1106-1107 (Fla. 3d DCA 1988), rev. denied, 547 So.2d 1209 (Fla. 1989), defense counsel made a tactical decision not to clarify a juror's obviously ambiguous response because he liked the juror.

In Ford Motor Co. v. D'Amario, 732 So.2d 1143,1145-1146 (Fla. 2d DCA

1999), a juror answered "no" to the question whether any member of her immediate family had been a party to a lawsuit. The juror had in fact disclosed the pertinent litigation in her juror questionnaire, and the subjects of the prior lawsuits were not material to the case on which the juror was sitting.

In Mazzouccolo v. Gardner, McLain & Perlman, M.D., P.A., 714 So.2d 534 (Fla. 4th DCA 1998), a juror failed to disclose that a suit had been filed against a business entity of which he was the chief operating officer. The juror, however, had merely been asked whether *he or a member of his immediate family* had been a party to litigation.

None of these cases is applicable here. Skinner was squarely and repeatedly asked about his litigation history and he failed to reveal or even to suggest its enormity. Skinner's lies were plausible, unambiguous and carefully calculated not to invite further inquiry by the judge, by the defendants or by the plaintiffs on re-voir dire.

2. Juror Tarkoff

Whether plaintiffs would have challenged Tarkoff if all she had admitted to was a divorce and not the attendant financial improprieties with her husband is irrelevant. A jury interview does not require proof that the juror would have been challenged had she answered truthfully, only that the juror was not truthful about a material matter.

Untruthfulness per se supports an inference of juror bias. See McDonough Power Equip., Inc. v. Greenwood, 464 U.S.548, 556 (1984) (Blackmun, J. concurring) ("in most cases, the honesty or dishonesty of a juror's response is the best indicator of whether the juror in fact was impartial"); United States v. Perkins, 748 F.2d 1519,1532-1533 (10th Cir. 1984) (same). Tarkoff, it should be recalled, also demonstrated a propensity for wrongdoing by inviting juror Castro to her house in mid-trial to lobby her on behalf of the defendants.

3. Juror Dawson

Plaintiffs' February 24, 1998 "Verified Amendment" to their motion for new trial and jury interview was timely. Fla.R.Civ.P. 1.530(b) allows a motion for new trial to be amended in the court's discretion "at any time before the motion is determined." The trial judge allowed plaintiffs' amendment, denied defendants' motion to strike the verified amendment, and accepted counsel's argument based on the verified amendment at the March 9, 1998, motion hearing (XI 1684).

The verified amendment was also timely under Fla.R.Civ.P. 1.431(h). The purpose of a jury interview is to make a record in support of a motion for new trial. Bernal v. Lipp, 562 So.2d 848,849 (Fla. 3d DCA 1990). A Rule 1.431(h) motion is therefor timely if it allows the inquiry into juror misconduct to be concluded "by the time post-trial motions are determined." United States Fire Ins. Co. v. Bellefeuille,

723 So.2d 847,849 (Fla. 4th DCA 1998), rev. denied, 729 So.2d 396 (Fla. 1996). Here, the judge did not rule on plaintiffs' original October 1, 1997, motions for new trial and jury interview until March 24, 1998, when he denied both motions (XI 1812). The verified amendment to plaintiffs' motion for jury interview was therefore timely as well.

Respondents speculate, in defense of Dawson's biases, that "[i]t is just as likely that Dawson's statements were...reactions to the testimony" (ABDC 32). Respondents' ruminations beg one of the questions that a jury interview would have resolved. Significantly, in each of the three cases respondents cite for this point, the appellate court *had* the benefit of a jury interview that explored the sources of the juror's biases.

4. Juror Discussions

Respondents offer the same speculations with respect to this issue that they advanced, *supra*, in defense of Dawson. The jurors' discussions, respondents contend, were "a reaction to testimony" and were not based on extrinsic evidence. Dr. Kelly's response to this question-begging assertion is the same as it was above: only a jury interview could have determined what in fact motivated the jurors' patently improper discussions and mid-trial agreements to favor the defendants. Henderson v. Dade County School Board, 734 So.2d 549,550 (Fla. 3d DCA 1999).

POINT IV.

THE RESPONDENTS MISSTATE THE TEST FOR A JURY INTERVIEW

Respondents erroneously assume that the 3-point test in De La Rosa v. Zequeira, 659 So.2d at 241, applies to motions for jury interview (ABSC 5; ABDC 24). The 3-point test, however, only applies to motions for *new trial*. The test for a jury interview is simply whether "the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial." Baptist Hosp. v. Maler, 579 So.2d at 100. Plaintiffs' factual allegations satisfied this test.

POINT V.

THE TRIAL JUDGE FAILED TO GIVE APPROPRIATE JURY INSTRUCTIONS.

A. Negligent Misrepresentation

Defendants repeatedly acknowledged their awareness in their filings in this case that plaintiffs were pursuing a claim for negligent misrepresentation as well as one for intentional fraud. See, e.g., defendants' Unilateral Pretrial Stipulation that states:

> III. Disputed Issues of Law and Fact
> 1. Breach of contract
> 2. Fraud
> 3. Negligent misrepresentation

(II 281).

The trial judge gave Fla. Std. Jury Instr. (Civ.) MI 8a., the intentional fraud

instruction, and refused to give MI 8c., the negligent misrepresentation instruction (XLIII 3518-3519). An MI 8a. instruction does not encompass, and is not intended to encompass, the elements of MI 8c. MI 8a., unlike MI 8c., does not mention the word "negligent" in its introduction, does not include the "should have known" negligence standard, and does not instruct the jury on the negligence concept of "reasonable care." MI 8a., without MI 8c., gave the jury nothing to distinguish misrepresentation based on a lack of due care from misrepresentation based on dishonesty.

B. Implied Contractual Terms

The concept of implied contractual terms is a rule of law that the jury needed to know in order to interpret the parties' ambiguous contracts. If the contracts were unambiguous as a matter of law, as respondents contend (ABDC 38), the trial judge would have resolved the issue of their meaning by directed verdict and would not have submitted the consultants-fee issue to the jury.

Dr. Kelly was a third-party beneficiary of the agreement between Flowers Management and the Hospital to pay the "non-salary costs" of his adolescent unit. Dr. Kelly's contract with the Hospital also expressly envisioned a contractual relationship between himself and Flowers (I 2, Ex. A, Addendum ¶11). Moreover, the Hospital itself was contractually obligated to pay Dr. Kelly's consulting fees under its direct contract with Dr. Kelly. The jury was entitled to an instruction on implied contractual

terms to make sense of these interlocking agreements.

POINT VI.

THE TRIAL JUDGE IMPROPERLY EXCLUDED EVIDENCE OF POST-APRIL 30, 1990 EVENTS.

Events after April 30, 1990, were relevant in several ways. First, the parties' continuing contractual relationship after April 30, 1990, was placed in issue through Exhibits C (a May 29 letter from Dr. Kelly's attorney to Vernegaard) and D (Vernegaard's May 31 letter response), to the complaint (I 104-130). These letters discussed the terms of the parties' on-going, but not yet completely defined, post-April 30 contractual relationship.

The letters prove that both parties regarded Dr. Kelly's contractual relationship with the Hospital as continuing. The jury should have been allowed to consider these properly pled post-April 30 contractual documents and events surrounding and following them.

Secondly, the parties' post-April 30 conduct toward each other was evidence of the terms of their post-April 30 agreement. The subsequent course of dealings between ostensibly contracting parties may be considered to determine the meaning of their ambiguous agreement. Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp., 302 So.2d 404,407 (Fla. 1974).

Thirdly, post-April 30, 1990, events were relevant to the issue of Dr. Kelly's

damages from defendants' fraud. Contrary to defendants' treatment of the issue (ABDC 40), fraud damages go to the elements of a cause of action for fraud, not just to the amount of the plaintiffs' monetary recovery.

CONCLUSION

For the foregoing reasons and those in the initial brief, Tejada should be disapproved, the judgment should be reversed, and the matter should be remanded for a new trial or, at the very least, a jury interview.

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 March, 2001.

CERTIFICATE OF TYPE SIZE AND STYLE

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