IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC01-2085

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs.

SUSAN LEVINE,

Respondent.

_____/

Lower Tribunal Case Number: 3D00-1861

Florida Bar No.: 161123

AMENDED REPLY BRIEF OF PETITIONER

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ISSUE ON APPEAL

> WHETHER A NEW TRIAL IS MANDATED IN AN AUTOMOBILE ACCIDENT CASE WHERE IT IS DISCOVERED, POST-TRIAL, THAT ONE OF THE JURORS HAD CONCEALED HER INVOLVEMENT IN A FATAL TRAFFIC ACCIDENT?

ARGUMENT IN REPLY

Despite the fact that it is universally accepted that trial counsel are entitled to truthful responses to questions propounded during the jury selection process, the Appellee argues that juror Albury's false responses do not require a new trial in this case because STATE FARM would have welcomed juror Albury on the jury panel had it known the true facts of her accident history. Thus, the argument goes, the fact that Albury refused to disclose her past accident history, in the trial of a car accident case, was simply "immaterial" to a defendant.

As this court noted in *Loftin v. Wilson*, 67 So. 2d 185, 192 (Fla. 1953):

> A juror who falsely misrepresents his interest or situation or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct, is prejudicial to the party, *for it impairs his right to challenge.*

Hence it is the fact that the *voir dire* process has been perverted by false testimony that the right for a new

trial emerges. The right of preemptory challenge implies the right to make an intelligent judgment as to whether a juror should be excused. Whether any of the parties to this action would have excused Albury had she disclosed the true facts of her background requires rank speculation. Certainly, her revelation of her true background would have prompted close questioning by all counsel. Only an analysis of what her responses to further questioning would have revealed can indicate whether a peremptory or cause challenge would have been made. It is precisely because the parties were not allowed that additional inquiry that a new trial is required.

In *Mitchell v. State*, 458 So. 2d 819, 821 (Fla. 1st DCA 1984), it was been observed that:

> Examination of a juror on *voir dire* has a dual purpose, namely, to ascertain whether a legal cause or challenge exists and also to determine whether prudence and good judgment suggests the exercise of a preemptory challenge. The right of preemptory challenge implies the right to make an intelligent judgment as to whether a juror should be excused. Counsel has the right to *truthful* information in making that judgment. *See Minnis v. Jackson*, 330 So. 2d 847 (Fla. 3d DCA 1976); *Loftin v. Wilson,* 67 So. 2d 185 (Fla. 1953); *Skiles v. Ryder Truck Lines, Inc.,* 267 So. 2d 379 (Fla. 2d DCA 1972).

In *Minnis v. Jackson*, 330 So. 2d 847, 848 (Fla. 3d DCA 1976), the court acknowledged that a juror's failure to truthfully disclose matters during *voir dire* deprives both the court and counsel the opportunity to weigh the juror's qualifications and to make a considered determination as to whether or not that juror should be relieved from further service. It recognized the "well established rule" that:

> . . . The failure of a juror to honestly answer material questions propounded to him on *voir dire* examination constitutes bad faith requiring his disqualification from services on the jury in this case. S*eay v. State*, 139 Fla. 433, 190 So. 702 (1939). Further, the right of counsel to challenge a juror for cause or

> peremptorily being indispensable to the successful operation of our jury system, *the right of fair trial by an impartial jury is destroyed when the right to make an intelligent judgment as to whether a juror should be challenged is lost or unduly impaired.* When this occurs, the verdict should be set aside and a new trial granted. *Ellison v. Cribb*, Fla. App. 1972, 271 So. 2d 174. *For the question is not whether an improperly established tribunal acted fairly, but whether a proper tribunal was established. Skiles v. Ryder Truck Lines, Inc.*, Fla. App. 1972, 267 So. 2d 379.

In the ***Ellison v. Cribb*** case, 271 So. 2d 174 (Fla. 1st DCA 1972), ***cert. denied,*** 272 So. 2d 160 (Fla. 1973), a prospective juror was asked whether any member of his family had ever been involved in an automobile accident. He denied that was the case. As it happens, the juror's daughter had been killed in an automobile accident two and a half years prior to the trial. The court there noted:

> Appellants contend, and we must agree, that since the Plaintiff in the case was claiming substantial damages for the injuries sustained by him as a result of the alleged negligent operation of defendants' motor vehicle, it was of overriding importance to defendants *as well as to the court* for it to be known whether any juror or member of his immediate family had suffered a similar experience as that alleged by Plaintiff. Had the juror Nimmo honestly answered the question but to him and admitted that his daughter had died as a result of injuries sustained in an automobile accident, defendants' counsel would then have had the opportunity of developing by further interrogation whether the death of Nimmo's daughter occurred under circumstances which would disqualify him as a juror for cause or provide a basis

> for a judgment as to whether he should be challenged peremptorily.

At page 177.

The *Ellison* court went on to state that where a prospective juror in a personal injury action fails to honestly answer questions put to him on *voir dire* examination regarding the his involvement in previous automobile accidents, a verdict rendered by a jury composed of such a juror must be set aside and a new trial granted. *Id*. at page 178. *See also Consolidated Gas & Equipment Company of America v. Carver*, 257 F.2d 111 (10th Cir. 1958); and, *Photostat Corp. v. Ball*, 338 F.2d 783 (10th Cir. 1964).

Here, the juror in question, Dorothy Albury, had been intoxicated when she was involved in a significant automobile accident in January of 1994 when another vehicle made a left turn in front of her causing her to strike the right passenger side of that vehicle killing its passenger. (R. 312-318). The passenger in her vehicle suffered an incapacitating injury. At the time of that accident, she had a blood alcohol test reading of .023 percent. That this is significant information to be disclosed in a car accident case which cannot be seriously disputed. The likelihood that she would have been disqualified, through peremptory challenge or challenge for cause, is manifest. That incredible feelings of guilt can arise from participating in such an event are a real and distinct potential. By testifying falsely as to her prior experiences, juror Albury precluded counsel from delving into the matter and prevented a considered determination as to whether a challenge for cause or peremptory challenge should be exercised. Because she denied that such an event had occurred, it is impossible to determine whether this juror would have been qualified to sit on this trial. One may make an assumption that she would not be, however. As Judge Baskin noted in *Zequeira v. De La Rosa*, 627 So. 2d 531, 533 (Fla. 3d DCA 1993):

> Here, as in *Bernal* v. Lipp, 580 So. 2d 315 (Fla. 3d DCA 1991)], the juror's involvement in six prior lawsuits as both defendant and plaintiff is material. He was a defendant in five prior lawsuits brought by creditors; *his involvement may well have affected his point of view in this action.*

Finally, Respondent argues that the trial judge looked at the "dynamics and context" of the entire trial before perceiving that Albury would have been favorable to the defense. Respondent's Brief on the Merits, page 10. This close examination of the "dynamics and context" of the trial, however, did not take place. Nor did the trial court make any determination as to the party-bias of the juror. The trial court felt that it had no alternative but to deny the motion for new trial simply because the information regarding the juror did not come to light until after the trial. The trial court said,

> One second. Judge Sorondo clearly says in the Birch case that the time to check the jurors' names against the lawsuit index is at the conclusion of jury selection, and if the party does not request the opportunity to make a record search, then that litigant will not be heard to complain later about the nondisclosure of information which could have been disclosed by reference to the Clerk's index. I mean, we have some clear law on the issue. Do you want to add something other than what I've said for this record?
>
> . . .
>
> All right. Denied.

(Appendix to Respondent's Brief on the Merits, pps. A37-A38).

Accordingly, because the right to make an intelligent judgment as to whether juror Albury should have been challenged was lost by her false testimony, the parties' right to a fair trial by an impartial jury was destroyed. *See Ellison v. Cribb*, 271 So. 2d at 197. For that reason, a new trial should be ordered.

CONCLUSION

The decision of the district court below should be reversed with instructions to order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on September 11, 2002, to ALL COUNSEL ON ATTACHED LIST.

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CERTIFICATE OF TYPEFACE COMPLIANCE

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