IN THE SUPREME COURT OF FLORIDA

Case No. SC01-2085

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

SUSAN LEVINE

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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STATEMENT OF THE CASE AND FACTS

Susan Levine was driving her car when she was rear-ended by David Fish. She suffered a brain injury and herniated disc and sued both Fish (the driver) and State Farm (her insurance company) (*4T*145-46; *1R*1-5).[1, 2] Liability was admitted, leaving the jury to decide the issue of damages only (*1R*89; *4T*73). After a three-day trial, the jury awarded Levine $615,000 (*A*55-56). Immediately after the verdict, the defendants ran a computer search looking for public information about the jurors (*A*22-23, 28-38). The search showed that a juror — Dorothy Jean Albury — had been in a car accident six years earlier (*A*22-23, 28-38, 44-54; *3R*312-18). She ran into the side of another car, killing a passenger in that car. The police report showed that both drivers were intoxicated (*3R*312-18; *A*44-48, 53).[3]

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[1] *R* is the record on appeal; *T* is the trial transcript and *A* is the appendix to this brief. The appendix contains Levine's supplemental record, which is part of the record on appeal (*3R*332-88). The appendix also contains a copy of the district court's opinion and the trial court's order denying State Farm's motion for new trial.

[2] The driver who hit Susan Levine (defendant David Fish) was insured for $100,000, not enough to cover Levine's injuries. Levine thus joined State Farm as an additional defendant, relying on the underinsured motorist policy issued by that company (*1R*4-5). Fish did not appeal the final judgment that was entered against him (*3R*327).

[3] For purposes of these proceedings, we have assumed that the Albury named in the accident report was the same Albury who sat on the jury. But we do not know whether that is true, nor do we know whether the traffic report gave a true account of the collision.

During voir dire, the trial court asked the jurors whether "any of [them had] been involved in a serious car accident" (*4T*19). Albury remained silent when she should have disclosed her accident. State Farm moved for a new trial based on Albury's nondisclosure (*3R*303; *see also 3R*296-99).[4] State Farm recited the details of the crash, how Albury hit and killed the passenger in another car, and how she may have been intoxicated (*3R*296-99, 303).

At the post-trial hearing, the court expressed doubt whether State Farm would have been troubled by Albury's accident history — where she hit and hurt someone *else* (*A*23-24, 36). Albury's undisclosed experience appeared to be better for the *defense* than other information she had disclosed but which had produced no challenge from the defense (*A*23-24, 36).[5] What's more, State Farm observed that Albury, because of her accident, may have been opposed to litigation and lawsuits, a fact favorable to the defense (*2R*298 at ¶ 15). And consistent with Albury's defensive posture in the accident, State Farm did not say it would have removed her from the

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[4] The arguments about Albury's non-disclosure were made by defendant Fish and adopted by State Farm (*3R*296-99; *3R*303).

[5] Albury's boyfriend — with whom she lived — was injured in a job-related accident. She had been taking care of him and was going to be a witness in his lawsuit (*4T*87-88). The trial court said this information could be *worse* for the defense than the information that Albury had hit and killed someone else (*A*36).

jury — or that a strike would have been likely — had it known about her accident (*3R*296-99, 303). As the record stood, there was no threat of any challenge from State Farm.

After considering these things, the trial court denied State Farm's motion for a new trial (*3R*323; *A*38). The district court affirmed, citing *Tejada v. Roberts,* 760 So. 2d 960 (Fla. 3d DCA 2000), *quashed*, *Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002), which was then pending review in this Court. It was the citation to *Tejada* that brought this case to the Court. *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981).

SUMMARY OF ARGUMENT

A juror's nondisclosure of information does not justify a new trial — it is not *material* — unless the complaining party proves it would have been influenced to strike the juror had the information been revealed. In this case, State Farm did not try to show that Albury's information was substantial and important enough that it may have been influenced to remove her from the jury. It did not say anything on that critical point. Thus the trial court did not abuse its discretion when it denied State Farm's motion for a new trial.

Considering Albury's posture in the accident, reasonable persons could agree that State Farm — as a defendant — would *not* have been influenced to strike her

from the jury. Albury had been a potential defendant, she had hit and injured someone *else* and she may have been intoxicated. She was not charged, she was not sued, she was assessed no damages, and had escaped liability. Her status in the accident was more closely aligned with the defense and she could fairly have been perceived as having a potential bias or sensitivity favoring the defense. Even State Farm observed that Albury may have been *opposed* to litigation and lawsuits — and thus more favorable to the defense. A reasonable person could therefore conclude that a strike by State Farm would have been unlikely, making the accident information immaterial. The trial court, then, did not abuse its discretion when it denied State Farm's request for another trial.

ARGUMENT

A. Standard of Review

If reasonable persons could agree with the trial court's ruling, there is no abuse of discretion and the ruling must be affirmed. State Farm, not surprisingly, ignores the standard of review in its appeal. It does not apply the reasonable-person test to the trial court's order. Thus it has not presented a sufficient challenge to the trial court's decision. See *De La Rosa v. Zequeira*, 659 So. 2d 239, 241-42 (Fla. 1995), adopting Judge Baskin's dissent in *Zequeira v. De La Rosa*, 627 So. 2d 531 (Fla. 3d DCA

1993) (when reviewing order on motion for new trial based on juror nondisclosure, appellate court must affirm unless trial court has abused its broad discretion); *Brown v. Estate of Stuckey*, 749 So. 2d 490, 498 (Fla. 1999) (no abuse of discretion if reasonable persons could agree with court's ruling).[6]

B. State Farm Was Not Entitled to Another Trial

The district court, when it affirmed the trial court's order, said that State Farm's investigation into Albury came too late (*A*57-58). But that was incorrect. State Farm ran its computer search soon after the return of the verdict, and thus its search was timely. *Roberts v. Tejada*, 814 So. 2d 334, 344-346 (Fla. 2002) (litigant may wait until after the verdict to investigate juror concealment); *see also Kelly v. Community Hosp. of Palm Beaches, Inc.*, 818 So. 2d 469, 476 (Fla. 2002) (same).

Yet this Court must affirm the trial court's ruling if it is correct for *any* reason appearing in the record. And here, the trial court's ruling was correct because State Farm did not prove that Albury's accident information was material to the company. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999)

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[6] Also, if the trial court's ruling is correct — not an abuse of discretion — for *any* reason appearing in the record, it must be affirmed. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999) (appellate court must affirm on any principle or theory supported by the record).

(if there is any principle or theory of law in the record that supports trial court's ruling, it must be affirmed).

State Farm, having learned about the accident, did not say it would have been likely to strike Albury from the jury (*3R*296-99, 303).[7] It was State Farm's burden to make this showing — to prove materiality — and it failed to do so. It was required to explain, clearly and credibly, why it would have been influenced to remove Albury from the jury — why she would have been unsuitable to the *defense*. But State Farm said nothing on this point; it said nothing on the issue of materiality (*3R*296-99, 303). Thus it did not satisfy its burden for gaining a new trial. *See Roberts v. Tejada*, 814 So. 2d at 341-42 (it is moving party's burden to prove materiality by, among other things, showing that the information, "in all likelihood would have resulted in a peremptory challenge," citing *De La Rosa*, 659 So. 2d at 242); *Birch ex rel. Birch v. Albert*, 761 So. 2d 355, 356-59 & nn. 4, 8-10 (Fla. 3d DCA 2000) (same); *Coleman v. State*, 718 So. 2d 827, 830 (Fla. 4th DCA 1998) (complaining party must

[7] Courts must apply a three-part test when determining whether the nondisclosure of information justifies a new trial. First, the complaining party must show that the juror actually concealed information (not disputed here). Second, the party must show that it may have been influenced to strike the juror in light of the undisclosed information. And third, the party must prove that it was sufficiently diligent in trying to discover the information (also not disputed here). *Roberts v. Tejada*, 814 So. 2d at 339.

affirmatively represent that it would have exercised a peremptory challenge against non-disclosing juror); *Mitchell v. State*, 458 So. 2d 819, 821 (Fla. 1st DCA 1984) (same); *see also Kelly*, 818 So. 2d at 476 (information was material because it "'would in all likelihood have resulted in a peremptory challenge,'" quoting *De La Rosa*, 659 So. 2d at 242).

Because State Farm did not prove or even attempt to prove it might have struck Albury, the law deems her accident immaterial, and insufficient for relief. Here, materiality is assessed from State Farm's perspective, the party requesting the new trial. Because State Farm did not show that a strike was likely or possible — a representation that had to be positively made and believed by the trial court — the test of materiality was not met. The trial court's ruling, then, must be affirmed. *See Roberts v. Tejada*, 814 So. 2d at 339-346 (it is moving party's burden to prove materiality); *Thi Phuong-Ngoc Tran v. Smith*, Nos. 5D01-1216, 5D01-1345, 2002 WL 726633, at **1-2 (Fla. 5th DCA April 26, 2002) (trial court did not abuse its discretion when it denied motion for new trial because there was nothing in the record to suggest that complaining party would have used a peremptory challenge against juror); *see also Birch ex rel. Birch v. Albert*, 761 So. 2d at 361 (Sorondo, J., concurring) (representation about desire to strike was not credible and thus motion for new trial

should have been denied).

Although we should not have to interpret State Farm's silent record on materiality, we think it fair to say the company wanted to get rid of the plaintiff-oriented jurors and that it therefore would have wanted to keep a potential defendant like Albury (*4T*81-102). Its voir dire questions were geared toward identifying and eliminating potential *plaintiffs* — jurors who had sued others or had been injured by others, particularly those with injuries like the ones that plaintiff Levine was claiming (*4T*81-102).

Staying true to its defense, State Farm struck only the plaintiff-type jurors. More specifically, it struck jurors who had *injuries* most like the plaintiff.[8] It excused the lawyer who had the same injuries that Susan Levine was alleging and who also represented personal-injury plaintiffs (*4T*14-15, 64, 101-02, 121). It struck the woman whose step-daughter had the same brain injury that Levine was claiming and who was a care-giver for sick people (*4T*58-59, 67-68, 75, 124 [using its last peremptory challenge]). It struck a man who, just like Levine, injured his back in an accident, was still in pain and was receiving therapy; this man also had a family member who had

[8] The similarity of *injuries* was most important to the defense because this was a damages-only trial (*A*38).

been killed in a car accident (*4T*21, 66, 123). State Farm then struck another plaintiff-oriented juror: a man who said the insurance company was supposed to pay claims (*4T*40, 98, 127).

After striking jurors with injuries most like the plaintiff, State Farm went on to *accept* other jurors, even those with serious accidents and injuries (*4T*23; *4T*67, 92; *4T*87-88; *4T*90-91).[9] What's more, the company accepted Albury, although her live-in boyfriend had been injured in a job-related accident, and although she was taking care of him and would be a witness in his lawsuit (*4T*87-88; *A*23-24, 36). Despite this particular experience, Albury was not close enough to the plaintiff's position to influence State Farm to strike her.

And even upon the revelation of Albury's accident, State Farm did not say the company had now turned against her (*3R*296-99, 303). And it did nothing to convince the trial court that the accident would have influenced a challenge from the defense (*A*23-24, 36). As it was, her posture in the accident made her even less like the plaintiff, and more like State Farm. She had been a potential defendant — she had hit and killed someone *else*, she had hurt a stranger, and she may have been intoxicated (*A*28-38, 44-54; *3R*296-99; *3R*312-18). She apparently had succeeded — as the

[9] *See 4T*23 [Camner]; *4T*67, 92 [Morris]; *4T*90-91 [Baxter]; and *4T*87-88 [Albury].

defense was hoping to do — in avoiding litigation, avoiding liability, and avoiding the payment of any damages (*3R*313-14; *A*47-48, 53).

Looking at the dynamics and context of the entire trial — as the trial court did here — reasonable persons might have perceived Albury as favorable to the defense.[10] Thus reasonable persons could agree that a strike by State Farm was unlikely — making her accident information immaterial. The trial court, then, did not abuse its discretion when it denied State Farm's motion for new trial. *See Roberts v. Tejada*, 814 So. 2d at 340-43 & n.2 (observing that information may be viewed as immaterial to the complaining party where it could reasonably be perceived as more favorable to that party, therefore making a peremptory challenge unlikely); *Garnett v. McClellan*, 767 So. 2d 1229, 1231 (Fla. 5th DCA 2000) (same); *Birch ex rel. Birch v. Albert*, 761 So. 2d at 356-59 & nn. 4, 8-10 (same); *Leavitt v. Krogen*, 752 So. 2d 730, 732 (Fla. 3d DCA 2000) (same); *James v. State*, 751 So. 2d 682, 683-84 (Fla. 5th DCA 2000) (same); *Ford Motor Co. v. D'Amario*, 732 So. 2d 1143, 1146 (Fla. 2d DCA 1999) (same), *quashed on other grounds, D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001); *Drew v. Couch*, 519 So. 2d 1023, 1023 (Fla. 1st DCA 1988) (same);

[10] The jurors — including the possibly defense-minded Albury — awarded plaintiff Levine less than she asked for (*A*17).

Schofield v. Carnival Cruise Lines, Inc., 461 So. 2d 152, 154 (Fla. 3d DCA 1984) (same); *see also Kelly*, 818 So. 2d at 475 (plaintiff suing for fraud would in all likelihood have struck juror who had been a *defendant* in numerous cases involving allegations of fraud, or the juror who had been the beneficiary of her husband's fraud).

Lastly this. When the district court affirmed the trial court's ruling, it observed that State Farm's search was "minimal" (*A*57-58). Indeed, there was no follow-up to the initial computer search, and that would reasonably suggest that the information was not substantial and important to State Farm and was therefore immaterial. *James v. State*, 751 So. 2d at 683-84 (information not material where litigant showed little interest in obtaining it); *see also Birch ex rel. Birch v. Albert*, 761 So. 2d at 358 n.8 (litigant's failure to follow up on information by making additional inquiry suggests that it was not material).

The company plainly learned of Albury's accident a week before the post-trial hearing — through its computer search (*A*28-30). That inquiry revealed the accident but did not show any litigation history (*A*47-48, 53). At the hearing, State Farm said that litigation and lawsuits were the things it was worried about (*A*34-37). But State Farm — apart from the minimal search — had done nothing else to investigate Albury. In the week-long period before the hearing, State Farm did not check any court,

lawsuit or other public records, though it insisted those records might exist had Albury been involved in this accident (*A*34-37). It showed little interest in gathering this information, thus supporting the view that the information was not sufficiently important and material to State Farm to justify another trial.

CONCLUSION

For the reasons stated and upon the authorities cited, the trial court did not abuse its discretion when it denied State Farm's motion for new trial. That ruling, then, must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that on August 7, 2002, we mailed a copy of this brief to James K. Clark, Esq., Clark, Robb, Mason & Coulombe (attorneys for appellant), Suite 720, Biscayne Building, 19 West Flagler Street, Miami, Florida, 33130 and Robert I. Buchsbaum, Esq., Kramer, Green, Zuckerman, Kahn, Greene, P.A. (attorneys for defendant Fish), 4000 Hollywood Blvd., Suite 485 South, Hollywood, FL 33021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure because it has been prepared in Times New Roman 14-point font.

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