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

PETITIONER'S BRIEF ON THE MERITS

JAMES K. CLARK, ESQUIRE
Attorney for Petitioner
Clark, Robb,

TABLE OF AUTHORITIES

CASES

INTRODUCTION

This is an appeal from a Final Judgment entered after a jury verdict in favor of the Plaintiff and against Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, the Plaintiff's underinsured motorist insurance carrier, and, DAVID R. FISH, an underinsured motorist. The verdict under appeal was rendered by a jury which counted among its members a juror who had denied on *voir dire* that she had ever been involved in a "serious automobile accident" when, in fact, just six years before, she had been involved in a fatal automobile accident while operating her vehicle under the influence of alcohol. Post-trial, after discovery of the juror's misrepresentations, STATE FARM moved for a new trial. Because the juror's misrepresentation was not discovered until after the trial, the motion was denied as untimely on the basis of *Tejada v. Roberts*, 760 So. 2d 960 (Fla. 3d DCA 2000). The Third District affirmed that decision, again based upon the *Tejada* decision. 791 So. 2d 591 (Fla. 3d DCA 2001). *Tejada* has now been reversed by this court. In *Roberts ex rel. Estate of Roberts v.* Tejada, 814 So. 2d 334 (Fla. 2002), this court found that the requirement of the prerequisite of conducting a jury investigation during trial to a later, valid challenge to juror nondisclosure was too onerous a burden to impose upon

trial counsel. Accordingly, STATE FARM asks for a new trial in this cause.

Throughout this Brief, the Appellant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, will be identified as "STATE FARM." The underinsured motorist involved in this car accident case, DAVID R. FISH, shall be identified as "FISH." The Plaintiff in the case, SUSAN LEVINE, will be identified as LEVINE.

References to the Record on Appeal will be symbolized by "(R.)". All emphasis throughout this Brief will be supplied by the writer unless otherwise indicated.

STATEMENT OF FACTS AND THE CASE

This action was brought by LEVINE against FISH and STATE FARM as a result of a car accident that occurred on October 22, 1997. (R. 1-5). LEVINE alleged that she was operating her motor vehicle on I-95 when she sustained serious personal injuries after being struck in the rear by a vehicle operated by FISH. (R. 1-5). She also alleged that FISH was an underinsured motorist and accordingly joined STATE FARM to recover underinsured motorist benefits available under a policy of insurance issued to her by STATE FARM.

After discovery, the matter proceeded to trial. (R. 117-192).

At the beginning of the trial, as is customary, the Court asked the preliminary *voir dire* questions of the jury panel to determine whether the panel members were eligible to sit on the jury.

For instance, the Court made sure that everyone spoke and understood English. (R. 121-122). The Court asked if any member of the panel had any physical disability which would limit them from paying attention to the trial. (R. 122).

The Court told the jury that the case involved an automobile accident where the Defendants had admitted liability and asked if the panel members had any difficulty, under those circumstances, following the law which was to be given to them by the Court. They all indicated they would. (R. 122).

The Court also indicated to the panel that if, during the *voir dire* questioning, anything came up that might be embarrassing a panel member should merely ask to come sidebar. At that point the Court and the attorneys would deal with the matter in a confidential manner. (R. 129-130). The Court offered various examples of types of potentially embarrassing situations, including one where a prospective juror had been convicted of a crime many years before for which he had been pardoned. (R. 130).

Thereafter the Court asked if anyone on the jury panel had ever been involved in a "serious car accident." (R. 136). Several of the panel members responded to that question by discussing serious car accidents that they had been involved in. Significantly, however, a panel member named Ms. Albury failed to disclose that she had indeed been involved in a "serious car accident," one in which the passenger in the other vehicle had been killed.

In response to various questions, counsel did get to know something about Ms. Albury:

- That her name was Dorothy Jean Albury. She lived in Kendall. She was a dental assistant. She lived with her boyfriend. Her boyfriend owned a radiator shop. She had one daughter, age thirteen, who went to public school. (R. 146).
- That her non-occupational activities were "taxi for my teenage daughter, orchids, boating, Girl Scouts." (R. 167).
- That she had been involved with Girl Scouts since her daughter was born. (R. 167).
- That she knew what arthritis was. It was "fluid in the joints." (R. 189).
- That she had some experience with litigation in the past because she had gone through a divorce.

(R. 203). She had also been involved with an on-the-job accident claim with her boyfriend. (R. 203). Her boyfriend had fallen and broken his leg. She took care of him. (R. 203). She was not sure against whom her boyfriend's claim was prosecuted because "I don't get real involved in all of that." She considered herself to be just a witness. (R. 204).

- The attorneys' conducting *voir dire* also learned that Ms. Albury had to finish the trial, if she was to sit as a juror, by Friday [the trial began on a Tuesday morning] because she was going out of town. (R. 220, 232).
- By not responding affirmatively to general questions directed to the jury panel as a whole, the trial attorneys learned the following about Ms. Albury:
  - (a) She spoke and understood English. (R. 121-122).
  - (b) She had no physical disability which would limit her from sitting for three to four days. (R. 122).
  - (c) That she would, if selected, determine damages only and follow the law as the

Judge instructed her. (R. 122).

(d) That she thought she could listen to the evidence, evaluate it, and make a decision. (R. 124).

(e) That she had no problem with the Plaintiff bringing a lawsuit under state and federal constitutions which allow it. (R. 126).

(f) She also had no problem with the Defendants disputing injuries or the amounts being sought. (R. 126).

(g) That she had no preliminary thoughts about not being able to yield or give more than a certain amount of money despite the proof and the evidence. (R. 126).

(h) That she would be able to deal with the facts given as fairly and honestly as she could. (R. 128).

(i) That she could base her opinions on the facts presented, the evidence presented, the arguments of the lawyers, and the instructions on the law. (R. 129).

(j) She was not a lawyer. (R. 131).

(k) She never sat on a jury. (R. 132-135).

(l) As indicated above, she was never involved

in a serious car accident. (R. 135-140).

(m) That she had never been convicted of a crime. (R. 140).

(n) That she was not insured with STATE FARM. (R. 148-149).

(o) That she had no feelings that lawyers were “not exactly trustworthy.” (R. 159).

(p) That she had never had a bad experience with a lawyer where she felt that things “didn’t work out when the lawyer let you down.” (R. 160).

(q) She had no negative feelings of any type about personal injury lawsuits, about people who bring personal injury lawsuits, or about verdicts. (R. 161).

(r) That she had never worked in a job where she had anything to do with adjusting claims. (R. 177).

(s) That she knew none of the witnesses who were going to testify in the case. (R. 177-178).

(t) That she would draw no negative conclusions about the fact that the Plaintiff had treated with a psychiatrist

for over twenty years. (R. 178).

(u) That she never had a back injury that had bothered her for a significant period. (R. 178).

(v) She agreed that she would not give “credit or a discount” to the Defendants because they had admitted liability. (R. 184).

(w) She had no problem with a figure in excess of $1,000,000.00 to be awarded in the case, assuming the evidence supported it. (R. 185).

(x) That she had no problem with awarding a substantial award of money for pain and suffering and loss of capacity to enjoy one’s life. (R. 187).

(y) She agreed to afford the Plaintiff full justice based upon the Judge’s instructions and the evidence and her common sense. (R. 187).

(z) She agreed to hear all of the evidence before making a decision. (R. 188-189).

(aa) She did not believe that just because there was an automobile accident that injuries were sustained. (R. 189).

(bb) She agreed that the number of witnesses that the Plaintiff or the Defendants actually put on was irrelevant as opposed to what the witnesses were going to say. (R. 190).

(cc) She did not believe that the Defendants had a “strike” against them because they weren’t able to work the case out prior to trial. (R. 190-191).

(dd) She agreed that the jury system “works.” (R. 191).

(ee) She did not believe that the Plaintiff was automatically entitled to a lot of money because she sued STATE FARM .(R. 211).

(ff) She agreed that if the evidence showed that the Plaintiff was not injured as a result of the accident that she was not entitled to any money. (R. 212-213).

(gg) She had never had problems dealing with insurance companies. (R. 213).

(hh) She denied having a family member or someone close to her suffer from chronic depression. (R. 215).

(ii) She denied having any "problem" with dealing with the issue of chronic depression as it relates to the accident involved in the case. (R. 217).

During *voir dire*, the Court instructed the jury as follows:

> Remember we had a lady that talked about her nephew being killed in a car accident. And she said, look, I just can't be fair. And who was she talking about? She said she can't be fair to the Defendant. She was excused right a way because she was candid. We don't expect people to be robots here. But *we do expect you to be honest with us*.

(T.42).

At the conclusion of the *voir dire*, the attorneys met with the Court and selected prospective juror Albury to sit in judgment in the case as juror number three.

However, despite the court's admonition to be candid and honest, despite his willingness to keep potentially embarrassing matters confidential, and despite the fact that Juror Albury directly, or indirectly, imparted much information concerning her background and beliefs, she chose not to reveal the one critical piece of information which could most have a bearing on her ability to sit as an impartial juror.

After the verdict was returned in favor of the

Plaintiff in this case, it was discovered that juror Dorothy Jean Albury, despite the fact that she had denied being involved in any prior "serious car accidents" was, in fact, driving while under the influence of alcohol at the time of a serious automobile accident which resulted in a traffic fatality in January of 1994. (R. 312-318). Ms. Albury, at the time of that accident, was driving her vehicle through an intersection when another vehicle turned in front of her. This caused her vehicle to strike the right side of the other vehicle killing the passenger in the other car. The police report from that accident indicates that Ms. Albury had a blood alcohol content of .23 percent at the time of the collision. (R. 317). Defendant, FISH, moved for a new trial on several grounds, including the non-disclosure and/or misrepresentations made by prospective juror Albury during *voir dire*. (R. 293-301). STATE FARM joined in the grounds for that Motion For New Trial. (R. 302-304).

As indicated above, because Albury's misrepresentation was not discovered until after the trial, the motion was denied by the trial court as untimely on the basis of *Tejada v. Roberts*, 760 So. 2d 960 (Fla. 3d DCA 2000). The Third District affirmed that decision as consistent with its *Tejada* case. 791 So. 2d 591 (Fla. 3d DCA 2001).

Tejada has now been reversed by this court. This court, in *Roberts ex rel. Estate of Roberts v.* Tejada, 814 So. 2d 334 (Fla. 2002), reversed the Third District and determined that requiring the prerequisite of conducting a jury investigation during trial to a later, valid challenge to juror nondisclosure would be too onerous a burden to impose upon trial counsel.

POINT 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?

SUMMARY OF ARGUMENT

It is the duty of a prospective juror to make full and truthful answers to questions asked on *voir dire*. Any prospective juror who falsely misrepresents their situation, or conceals a material fact relevant to the controversy being tried, is guilty of misconduct. Such misconduct is prejudicial to the rights of the parties to an action because it impairs the right to exercise preemptory challenges granted to them by law.

This Court has established a three-pronged test to be met in judging whether a new trial is required in a situation where a prospective juror conceals or misrepresents relevant information during *voir dire*. That test requires a new trial where there is (1) a *relevant and material* (2) *concealment* of fact by a juror on *voir dire* examination, and (3) the failure to discover the concealment was not due to the *want of diligence* by the complaining party.

This court has also expressly found, contrary to the rule followed by the Third District below, that the discovery of juror concealment does not require counsel to discover the concealed facts *prior to the return of a verdict*. To require trial counsel to discover such concealed facts during the time of the trial, would impose a "onerous burden of investigating the venire during the trial."

In the case *sub judice*, after the trial of the matter, it was discovered that one of the jurors had been, in the fairly recent past, involved in a fatal motor vehicle accident where she had been operating her vehicle while under the influence of alcohol. This same juror, during *voir dire*, had concealed her involvement in that accident by denying ever being "involved in a serious car accident."

Because of the juror's nondisclosure of relevant information material to the action, a new trial should be ordered in this case.

ARGUMENT, POINT ON APPEAL

Almost fifty years ago, this court recognized the importance of a potential juror's candor during the *voir dire* process:

> It is the duty of a juror to make full and truthful answers to such questions as are asked him, 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. 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.

Loftin v. Wilson, 67 So. 2d 185, 192 (Fla. 1953), *quoting Pearcy v. Michigan*, 111 Ind. 59, 12 N.E. 98 (1887).

Without such candor from a prospective juror the entire *voir dire* process is undermined because the parties are deprived of the right "to ascertain whether a challenge exists, and to ascertain whether it is wise and expedient

to exercise the right to preemptory challenge given by law." *Id.*

In *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995), this court established a three-prong test to be met in judging whether a new trial is required in a situation where a juror conceals or misrepresents relevant information during *voir dire.* A new trial is mandated where all three of the following elements appear:

> 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.

659 So. 2d at 241 (citations omitted).

This three-prong test was reiterated in this court's decision in *Roberts ex rel. Estate of Roberts v.* Tejada, 814 So. 2d 334 (Fla. 2002). There this court disapproved the Third District's holding in *Tejada v. Roberts*, 760 So. 2d 960 (Fla. 3d DCA 2000), that, to satisfy *De La Rosa*'s "due diligence" prong, trial counsel must conduct an investigation of the venire during trial as contrary to the *De La Rosa* decision. 814 So. 2d at 344. This court reasoned that,

> the ultimate goal is to have all

> information properly disclosed during the jury selection process to afford confidence in the final product of trial proceedings and eliminate any unnecessary or properly avoidable extension or repetition of the proceedings. However, we cannot and must not sacrifice the integrity of the jury process in the name of expediency. We must also recognize that conditions should not be imposed that would require additional teams of investigative lawyers to become involved as a necessary ancillary activity to the trial process.
>
> The trial lawyer cannot be expected to be both in the courtroom presenting a case and at the same time in a different location, or even in a different location of the same courthouse at the same time. Such would only serve to further complicate trial proceedings and increase the costs of participating in the system. While we do not encourage concepts that lead unnecessarily to repetitive proceedings, we must never fear reconsideration when the integrity of the jury process itself is subject to serious question.

814 So. 2d at 345.

Accordingly, the determination by the trial court and the Third District below that the discovery of juror Albury's misrepresentations was "untimely" because it occurred after the trial had concluded should be reversed.

The three-prong test established by this Court in situations involving a juror's concealment of material facts during *voir dire* has otherwise been met in this case.

First, it appears clear that the information not disclosed was relevant and material to jury service in this case. This was a car accident case where the Plaintiff was alleging significant injury as a result of the accident involved. The juror in question, Dorothy Jean Albury, had been involved in a fatal traffic accident just six years prior to the trial. Although that accident was apparently not her fault, the police report indicates that she was under the influence of alcohol when the accident occurred. Indeed, her blood alcohol content was noted on the police report to be .23 percent, well over the legal limit. Certainly, this fact was highly relevant and material to her sitting on a jury in another car accident case where a significant injury was being alleged.

Secondly, there can be no question but that the prospective juror concealed the information during questioning. At the beginning of the *voir dire* process, the trial judge specifically asked the jurors "have any of you . . . been involved in a serious car accident." (R. 135-139). While several jurors did admit to being involved in serious car accidents, and discussed them in depth, the juror in question, Ms. Albury, did not. Indeed, when questioned about her experience with the Court system, Ms. Albury only acknowledged that she had been involved in a

case involving her boyfriend's on-the-job accident but she failed to mention the fatal car accident where she had been drinking.

Long before *De La Rosa* or *Roberts*, this court held that non-disclosure by a juror of a material fact during *voir dire* is "prejudicial to the party, for it impairs his right to challenge." *Loftin*, at page 192. Prejudice can therefore be presumed where the non-disclosure is material to the issue in litigation.

In discussing the potential prejudice that a person involved in prior litigation may have when sitting on a jury, this court noted,

> A person involved in prior litigation may sympathize with similarly situated litigants or develop a bias against legal proceedings in general. In these circumstances, counsel must be permitted to make an informed judgment as to the prospective juror's impartiality and suitability for jury service.

De La Rosa at page 241.

In the same way, jurors who had been involved in significant car accidents in the near past may likewise sympathize with individuals who are also involved in car accidents.

The prospective juror in this case was involved in a significant car accident resulting in a fatality. While

the accident was apparently not her fault, she had been drinking at the time of the accident. It can certainly be said that an individual with this type of experience would have strong feelings concerning car accidents in general and specifically car accidents, such as the one presented here, where the Plaintiff was not at fault in the accident. Albury likely had intense feelings of either guilt, anger or remorse which trial counsel was not allowed to investigate because of the her concealment of her involvement in this previous incident.

Because, then, trial counsel was not allowed the opportunity to fully investigate the juror's feelings concerning car accidents in general and the accident involved in this litigation in particular, an essential element of the fairness of the process was undermined and a new trial should be ordered in this case.

CONCLUSION

The final judgment entered in favor of the Plaintiff should be reversed for a new trial based upon the non-disclosure of material facts during *voir dire* which affected the juries' determination in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on June 21, 2002, to ALL COUNSEL ON ATTACHED LIST.

CLARK, ROBB, MASON & COULOMBE
Suite 720, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Telephone: (305) 373-3322
Facsimile: (305) 373-0017

By:_____
_

JAMES K. CLARK

Attorney for Petitioner

CERTIFICATE OF TYPEFACE COMPLIANCE

The typeface font used in the body of this document is Courier New 12 which complies with the Rules of this Court.

TABLE OF CONTENTS

i

Mason & Coulombe
Suite 720 – Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Telephone: (305) 373-3322
Florida Bar No.: 161123