THE FLORIDA SUPREME COURT

S. Ct. Case No.: 01-793
4DCA CASE NO.: 00-221

METISSIA RICKS,

Petitioner,

vs.

RENE LOYOLA, M.D.,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

Respectfully submitted,

Tilghman & Vieth, P.A.
One Biscayne Tower, Suite 2410
2 South Biscayne Boulevard
Miami, Florida 33131

-and-

Lauri Waldman Ross, Esq.
(Fla. Bar No.: 311200)
Lauri Waldman Ross, P.A.
Two Datran Center, Suite 1612
9130 S. Dadeland Boulevard
Miami, Florida 33156
(305) 670-8010

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STATEMENT OF THE CASE AND FACTS[1]

Following hospital admission and a surgical procedure, Metissia Ricks ("Plaintiff" or "Ricks") developed "compartment syndrome," and later "Volksmann's ischemic contracture," a blood flow interruption which turned her left hand into a claw. Ricks filed a medical malpractice action against Dr. Edward Wengler, ("Wengler), his partner Dr. Rene Loyola ("Loyola"), their professional association, Treasure Coast Surgical Group, P.A., and the hospital where Ricks was treated, HCA Health Services of Florida, Inc. d/b/a Columbia Medical Center of Port St. Lucie (R. 1-5; 81-86). Ricks asserted various acts of negligent diagnosis and post-operative care and treatment on the part of the doctors and hospital staff, following the surgical procedure. (R. 81-86).

All defendants answered the complaint, as amended, denying professional negligence, and asserting various affirmative defenses, including apportionment of fault with third parties, as yet unnamed. (R. 88-92; 93-95; 106-09). By special interrogatory, Ricks attempted to determine who else Dr. Loyola blamed for Ricks' post-operative condition, and when Dr. Loyola claimed Ricks' condition should have been diagnosed. Plaintiff asked Dr. Loyola specifically, "Do you contend that the injuries and/or damages suffered by Metissia Ricks were caused by or contributed to by the

[1] All references are to the record on appeal (R.) and the transcript of trial (T.).

negligence of any person?" If so, Dr. Loyola was asked *inter alia* to identify the third party and the factual basis for his contentions. (R. 361, Interrogatory #1). Dr. Loyola answered, on March 29, 1999, that:

> Rene Loyola contends only that there was no negligent act or omission on his part which caused or contributed to any injuries and/or damages suffered by Metissia Ricks. (R. 368).

In July, 1999, after pretrial skirmishing irrelevant here, Ricks settled with all defendants but Dr. Loyola, and the professional association vicariously liable for his actions. (R. 460-63; 467-70). Following the settlement, and within ten days of the trial, Dr. Loyola amended his answer to disclose that his defense would be the negligence of the settling parties, including his partner, Dr. Wengler. (T. 593; 611-612).

The underlying facts of this case were essentially undisputed. Dr. Wengler performed a surgical procedure on Ricks, on Thursday, January 23, 1997 at approximately 1:10 p.m. (T. 534). Dr. Wengler's partner Rene Loyola performed a second surgery on Ricks on Saturday January 25th, 1997 at 6:10 p.m. (T. 1034). In between the two surgeries, Ricks suffered from undiagnosed compartment syndrome. (T. 83; 87-88; 163; 295). Ricks' hand contracted into a claw, and she sustained a total loss of function in her left arm which the second surgery, and subsequent surgeries, couldn't cure. (T. 295; 300; 315; 435; 831).

During Plaintiff's opening statement, the only comment that

Plaintiff made to the jury regarding other parties was that, "at the end of the case, you will also have to decide whether or not somebody else, who is not in this courtroom to defend themselves, is at fault for the things that Dr. Loyola did." (T. 31). In contrast, defendant's opening was replete with derogatory statements about the plaintiff's expert and accusations of misconduct on the part of the witness. (T. 46-47).[2] The defense opening statement culminated with the following:

> [A]s Mr. Vieth has pointed out, Dr. Loyola is not the only health care provider that you will be hearing about. That is, I gather you've gleaned, from what I said up to this point, there's going to be testimony that the nurses should have done things differently, before it ever reached the point of ... of being contracted with permanent nerve damage. It just never should have happened.
>
> **It will not be something that you need to consider as to why they aren't in this courtroom, although you might want to ask yourself that question. I assure you, though, that Ms. Ricks and her attorney aren't going to tell you why they aren't here.** (T. 49, emphasis added).

Immediately following this opening statement, Plaintiffs' counsel moved for a conditional mistrial, pursuant to the procedure outlined in Ed Ricke and Sons, Inc. v. Green, 468 So. 2d 908 (Fla. 1985) ("Ed Ricke"). Plaintiff pointed out that the **only** possible

[2] Among other things, the defense accused plaintiff before the jury of retaining a "professional witness," and causing the witness to change his opinion to prevent the case from being thrown out on summary judgment. (T. 46-47).

explanation for these parties' absence from the courtroom was the prior settlement. Thus, in one fell swoop, the defense had intimated that plaintiff and "her attorney" were hiding evidence from the jury," i.e. "the reasons why those persons are not here" and had placed an insurmountable burden on the plaintiff to "explain" their absence - attributable to the (inadmissible) settlement. (T. 51).

The trial court was clearly disturbed by Defendant's argument and reserved ruling on the Plaintiff's motion for mistrial. (T. 51). During the course of the trial, the judge later observed that he did not give the jury a cautionary instruction at the time of opening because "[I] decided ... not to compound it by bringing it to their attention again, in terms of the gauntlet that was laid down during opening statement." (T. 640). The court further explained that, "**if I brought it up and told them to disregard it, that would only highlight it** at this point, so I decided not to do anything else." (T. 640, emphasis added).

Following a defense verdict, the trial court granted plaintiff's motion for new trial, expressly finding as fact that "the remarks of defense counsel during opening argument were improper, prejudicial and ... the prejudice could not be cured by instruction." In light of its ruling, the trial court did not address the balance of plaintiff's new trial motion. (R. 1265).

Dr. Loyola appealed the new trial order. On appeal, the

Fourth District reversed for reinstatement of the jury's verdict, and the entry of a defense judgment. Ricks v. Loyola, 777 So. 2d 423 (Fla. 4th DCA 2000). Noting that this Court's Ed Ricke decision gave the trial court discretion to reserve ruling on motions for mistrial, the District Court nevertheless held that the trial court abused its discretion because the offending remarks were made "the very first day of trial prior to any witnesses testifying." Ricks v. Loyola, 777 So. 2d at 425. Thus, according to the District Court, application of Ed Ricke was contrary to the interests of "judicial economy." Id. at 425.

Recognizing that the trial court has broad discretion to grant a new trial, and that a stronger showing of abuse is required to overturn a new trial order, the District Court concluded nonetheless that such a showing was made. It reasoned that the offending remarks were **not** comments on a prior settlement, that the jury was unaware that Dr. Wengler and the hospital were originally in the lawsuit, and that the remarks were "isolated" and therefore "harmless." Id. Ms. Ricks now seeks further review.

JURISDICTION

This Court has jurisdiction by virtue of Fla. Const. art. V, §3(b)(3); Fla. R. App. Proc. 9.030 (a)(2)(A)(iv) and the Fourth District's misapplication of this Court's decision in Ed Ricke & Sons, Inc. v. Green, 468 So. 2d 908 (Fla. 1985). See Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000); Arab Termite &

Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039, 1041 (Fla. 1982) (decisional conflict may be created by the misapplication of a specific holding previously announced by this Court); see also Rosen v. Florida Ins. Guar. Ass'n, 2001 WL 1095308, 26 Fla. L. Wkly S611 (Fla. 2001).

Both factually and procedurally, the Fourth District's decision expressly and directly conflicts with Ed Ricke. Because it hold other ramifications which transcend the instant case, further review is warranted.

SUMMARY OF THE ARGUMENT

Commentators agree on the importance of opening statement on the conduct of a trial: it can win a case before the first witness is ever presented. Opening statement is not immune from impropriety, and that impropriety was patent here. During opening, the defense threw down the gauntlet, challenging the Plaintiff and her counsel to explain why settling parties were not in the courtroom. The obvious reasons these parties were not in the courtroom was their pretrial settlement, a fact the Plaintiff could not explain. By its challenge, the defense created an incurable impression in the jury's mind that Plaintiff was hiding relevant evidence, while simultaneously portraying Dr. Loyola as the good guy who alone would give the jury the full story. The remark set the tone for the entire trial – a trial during which the defense continued to accuse Ricks' lawyer and her expert of manufacturing

evidence.

In a landmark ruling in 1985, this Court approved the practice of coupling a motion for mistrial with a request to take it under advisement until the conclusion of the case. Ed Ricke and Sons, Inc. v. Green, 468 So.2d 908 (Fla. 1985). Ricks followed that procedure here, and the trial court, who was in the best position to see the impact of the offending remarks, ultimately agreed that they were improper, prejudicial and incurable. In other words, the trial was **unfair**.

In the sixteen years since Ed Ricke was decided, the District Court's decision here is the first to set aside a new trial order for "judicial economy." According to the District Court, the trial court was required to grant a mistrial immediately. This "remedy" rewards the offending party, to the detriment of the innocent recipient of improper remarks. A party who is denied a continuance or dislikes the jury can mistry the case at the outset and get precisely the relief it was initially denied – a delay and/or a different jury. In contrast, the recipient is penalized by a delay of her day in court and the certain knowledge that it could happen again. The same logic that allows the trial court to take an Ed Ricke motion under advisement at the end of the trial should apply to all stages of the proceedings.

Judicial economy, i.e., we've done it before and therefore need not do it again, should never supercede basic fairness.

Moreover, "judicial economy" surely cannot supplant the trial court's ultimate decision, as a matter of fact, that a trial was unjust. Since reasonable persons could differ as to the conclusion reached by the trial court, its decision to grant a new trial was within its sound discretion.

The District Court simply did not apply the reasonable person test at all. The rule it **did** apply is not susceptible to easy application. It turns on when, in the course of proceedings, offending remarks are made. It gives an offending party "one free shot" as long as those remarks are made before the closing argument. This foments, rather than deters improper conduct. So too, law has become substantially more complex since Ed Ricke was decided. Statutorily mandated apportionment of fault has created greater opportunity for unfair trial tactics. There is a commensurate need for procedural certainty in this area and the safeguards to combat such tactics.

The Ed Ricke procedure should be applicable during the course of the entire trial and remain available to the trial court as a check on trial misconduct. And, in the end analysis, "judicial economy" must give way to the trial court's vast discretion to ensure that the trial is fair.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN GRANTING A NEW TRIAL FOR CONDUCT VIRTUALLY IDENTICAL TO THAT DISAPPROVED IN ED RICKE & SONS, INC. V. GREEN.

A. The History of Ed Ricke & Sons.

In Green v. Ed Ricke & Sons, Inc., 438 So. 2d 25 (Fla. 3d DCA 1983), a three year old child brought suit against Metropolitan Dade County and Florida Gas Company for injuries received when he fell into a puddle of boiling water discharged from a faulty water heater. The case was settled, and thereafter, an action was instituted against general contractor Ed Ricke and its insurer. Prior to trial, the court granted Plaintiff's motion in limine to prohibit any reference to the prior settlement. The trial lasted five days, and during it, the defense made several statements it later defended as "innocuous." The last of these occurred during closing argument, prompting Plaintiff's motion for mistrial, coupled with a request that the court take the motion under advisement. It included the comment:

> Now, there's going to be some other person responsible. **I would like for you to ask them some questions. I would like for you to ask him [w]hy Dade County is not a Defendant in this litigation.** Id. at 26.

The trial court denied the motion for mistrial, holding that it was a proper "empty chair" argument. In a split decision, the Third District reversed and remanded the case for a new trial.

Both the majority and the dissent **agreed** that the defendant's closing argument was improper. However, in dissent, Chief Judge Schwartz concluded that the issue was not preserved because plaintiff's mistrial motion was a legal fiction. He wrote that:

> [N]o matter what it was called, a "motion for mistrial" coupled with a request that the ruling be postponed until after the verdict so that counsel can tell if he won or lost [footnote omitted], is not a motion for mistrial, which requires that the trial be stopped **before** verdict and begun again, at all; it is a contingent announcement that, if it turns out that the jury finds against him, counsel will move for a new trial on the asserted ground – which is what he did. In turn, the trial judge's disposition of that non-existent "motion" was simply an advisory statement that if the jury so finds and Plaintiff's counsel so moves, he would deny the motion – which is what he did, too. Id. at 28.

On further review, this Court "agree[d] with both the majority and dissent below that defense counsel's closing argument was highly prejudicial and improper." Ed Ricke and Sons, Inc. v. Green, 468 So. 2d 907, 909 (Fla. 1985). This Court concluded that the Ed Ricke closing was not simply a traditional "empty chair" argument, but had emphasized a prior suit against the empty chair. Ed Ricke & Sons, Inc. v. Green, 468 So. 2d at 909. The similarity of the comments made in Ed Ricke and here are striking and the two are thus juxtaposed:

> Now, there's going to be some other person responsible. I would like for you to ask them some questions. I would like for you to ask him [w]hy Dade County is not a Defendant in

this litigation.

Ed Ricke, 468 So. 2d at 909.

In contrast, Dr. Loyola's counsel told the jury in opening that the absence of other health care providers here:

> [W]ill not be something that you need to consider as to why they aren't in the courtroom, **although you might want to ask yourself that question. I assure you though that Miss Ricks and her attorney aren't going to tell you why they aren't here.** 777 So. 2d at 424 (emphasis added).[3]

In Ed Ricke, this Court approved the procedure that the plaintiff employed and "explicitly h[e]ld that the trial court has the power to wait until the jury returns its verdict before ruling on a motion for mistrial." Id. at 910. It consigned this procedure to the trial court's "sound discretion" as part of its arsenal of weapons to combat trial misconduct, observing that:

> The power of a trial court judge to reserve ruling on a motion for a mistrial will not only conserve judicial resources but may also operate to prohibit a wrongdoer from profiting from his intentional misconduct. Unfortunately, it is common practice for some trial attorneys to make prejudicial remarks during closing argument when the posture of his case is doubtful. In these instances, the opposing counsel is forced to make a motion for a mistrial. The trial judge will then

[3] Thus, substantively, the Fourth District's decision here is in conflict with Ed Ricke. See Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960) (cases are conflicting for further review where the application of a rule of law produces a result in a case involving substantially the same controlling facts as a prior case disposed of by this Court). Procedurally, however, the two cases are at odds as well.

> order a new trial. **Thus, the offending counsel has a second opportunity to try the case and the aggrieved party has little solace but the afforded remedy of beginning all over again. Now that it is clear that a trial judge may wait until after the jury deliberates before ruling on a motion for a mistrial, the incentive to intentionally make prejudicial remarks during closing argument will be minimized.** (Id. at 910, emphasis added).

While Ed Ricke involved prejudicial closing argument, by its own terms it was not so limited. It imbued the trial court with broad discretion to reserve on mistrial motions subject only to the *caveat* that such discretion "must be exercised in accordance with precepts of judicial economy." Id. at 910. These "precepts" were left undefined.

The Ed Ricke procedure is now firmly embedded in our jurisprudence. See e.g. Lower Investment Corp v. Clemente, 685 So. 2d 84 (Fla. 2d DCA 1996) (counsel could have preserved improper cross-examination about settlement by coupling motion for mistrial with request to reserve, but waived issue by failure to do so), rev. denied, 694 So. 2d 738 (Fla. 1997); Bellsouth Human Resources Administration, Inc. v. Colatarci, 641 So. 2d 427 (Fla. 4th DCA 1994) (recommending procedure when counsel engages in misconduct so prejudicial as to warrant a mistrial); Nigro v. Brady, 731 So. 2d 54 (Fla. 4th DCA 1999) (reminding bench and bar of Ed Ricke procedure and its "salutary effect.")

In Murphy v. International Robotics, Inc., 710 So. 2d 587

(Fla. 4th DCA 1998), the Fourth District relied heavily on Ed Ricke in "all but clos[ing] the door" in precluding improper, but unpreserved argument, from being raised as an issue on appeal. Writing for a unanimous court, Judge Klein observed that:

> Prior to 1985, the reluctance of counsel to move for mistrial, because of the delay and expense which result from the granting of the motion, was understandable. **In 1985, however, the Florida Supreme Court, in Ed Ricke eliminated this problem. The court held that the trial court can withhold ruling on a timely motion for mistrial until after the jury has a returned a verdict. The trial court does not, accordingly, have to rule right when the motion is made, as it did before Ed Ricke.** Now those who are on the receiving end of improper argument can have their cake and eat it, too. 710 So. 2d at 589 (emphasis added).

This Court approved the Fourth District's decision. Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000).

Commentators agree on the importance of "opening statement" on the conduct of a trial. See e.g. W. Masterson, Civil Trial Practice at 115 (PLI 1986); ("[t]he opening statement can win over the jury before any witness ever mounts the witness stand."); Fred Lane, Goldstein Trial Techniques, §10.01 (3rd ed. 1994); James R. Lucas, "Opening Statement," 13 U. Hawaii L. Rev. 349 (1991); D. Vinson, Jury Trial: The Psychology of Winning Strategy at 171 (1986):

> The beginning of the trial is the occasion when jurors are most attentive to the judge, lawyers, and courtroom events. They have not

> become conditioned to their new role, and the experience of being jurors is still novel and stimulating. As we have seen in previous chapters of this book, this is also the time when jurors possess the tendency to focus on and remember a great deal more of what is presented to them than at any other time during the trial. All of this, then, points to the great strategic importance of the lawyer's initial presentation of his case to the jury. **In terms of helping shape the ultimate verdict, the opening statement is the most critical address an attorney will deliver during the trial. In fact, research on the impact of the opening statement consistently reveals that as many as 80 to 90 percent of all jurors have reached their ultimate verdict during or immediately after opening statements. Everything in the trial which follows will be selectively perceived to reinforce decisions which have already been made.**

See generally Testa v. Village of Mundelein, Ill., 89 F.3d 443, 446 (7th Cir. 1996) ("Because of the widespread belief juries typically make up their minds about a case after the opening statements, attorneys often find it tempting to convert their statements into improper opening argument."). But see Hydrite Chemical Corp. v. Calumet Lubricants Co., 47 F.3d 887, 891-92 (7th Cir. 1995) (re: opposing view and overemphasis on importance of opening statement at trial).

Opening statement is not immune from trial misconduct. See e.g. White v. Consolidated Freightways Corp. of Delaware, 766 So. 2d 1228 (Fla. 1st DCA 2000) (reference to witness statements protected by investigative report privilege during opening

statement preserved by timely motion for mistrial, and required new trial); State Farm Fire & Cas. Co. v. Higgins, 788 So. 2d 992 (Fla. 4th DCA 2001) (en banc)(where insurer's counsel made reference during opening to insured's settlement with third party, who had "gone away," there was no abuse of the trial court's discretion in granting a new trial), pet for rev. granted, 794 So. 2d 604 (Fla. 2001) (table, S.Ct. 01-291, 01-292).

In the instant case, Ricks followed the Ed Ricke procedure by coupling her motion for mistrial with a request that the trial court reserve ruling. In the sixteen years since Ed Ricke was decided, the District court's decision here is the **first** to set aside a new trial order for "judicial economy." Loyola v. Ricks, 777 So. 2d at 425.

B. Changes in our Tort System

Since 1985, when Ed Ricke was decided, our tort system has significantly changed. See §768.81, Fla. Stats.; Tort Reform and Insurance Act of 1986, chapter 86-160, Laws of Florida.[4] The pertinent provision of the statute, in effect in 1997, provided:

> (3) Apportionment of Damages. – In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with

[4] Subsequent to Plaintiff's injuries here, our tort system has undergone legislative revisions yet again. See Laws 1999, chapter 99-225, §27, eff. October 1, 1999. The apportionment of fault provision has been substantially revised, but remains.

> respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Complex personal injury litigation, particularly medical malpractice, now involves retention of a battery of experts with the sands ever shifting, a plaintiff's expert on liability against a particular defendant, may become another defendant's expert on a Fabre apportionment defense.[5] This creates even greater opportunity for unfair trial tactics, exemplified by what occurred in Bogosian v. State Farm Mutual Auto Ins. Co., 2000 WL 691646, 25 Fla. L. Wkly D1306 (Fla. 3d DCA 2000).

Bogosian sued both DOT and his uninsured motorist carrier State Farm for injuries in an auto accident. Prior to trial, he settled with DOT, leaving State Farm the sole defendant. On the morning of trial, State Farm informed the Plaintiff, for the first time, that it would defend the case by urging that the accident was attributable to the negligence of DOT. State Farm also advised that it had subpoenaed Plaintiff's expert against the DOT, Ken Bynum, to testify on its new apportionment defense. Bogosian objected on the basis that State Farm had never pled that the accident was attributable to DOT, that State Farm's late notice left it with no ability to respond, and that State Farm had never

[5] Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

listed Bynum as its expert. The trial court overruled Plaintiff's objections and the case was tried in this posture.

In closing argument, State Farm then expounded at length on the fact that Bynum had been hired by Plaintiff on the issue of the DOT's negligence, but had failed to call him as a witness, thus leaving it to State Farm to give "the whole story" to the jury. The Third District agreed that "State Farm made an improper closing argument in which it accused Plaintiff of hiding facts from the jury because Plaintiff did not call Mr. Bynum as a witness and that "this was an unfounded charge of trickery."

While reversing on other grounds,[6] the Third District felt compelled to observe that:

> Plaintiff was left in an impossible situation. There was, of course, a perfectly good reason why plaintiff did not present Mr. Bynum to the jury as an expert: plaintiff had settled his claim against D.O.T. State Farm was still allowed to ask the jury to attribute part of the responsibility to D.O.T. as a nonparty Fabre defendant, (footnote omitted) but in that situation, it became the burden of State Farm, not plaintiff, to present expert testimony that D.O.T. had been negligent. See Nash, 678 So. 2d at 1264. **Explaining these procedural nuances to the jury would be hopelessly confusing and would probably disclose the D.O.T. settlement. Plaintiff was left with no effective way to respond to State Farm's argument that plaintiff had engaged in some sort of coverup.** (Emphasis added).

[6] The grounds were the surprise apportionment defense and the admission of evidence that Bynum was originally the "Plaintiff's expert." Id.

In the instant case, Ricks was left in a similar "impossible situation." Id. By special interrogatory served six months prior to trial, she asked Dr. Loyola to identify any third parties he deemed to be at fault. Dr. Loyola identified no one. See Best Union, Inc. v. Crespo, 752 So. 2d 75 (Fla. 3d DCA 2000) (excluding apportionment defense where defendant answered interrogatory similarly). Ricks settled with Loyola's co-defendants in July. However, Dr. Loyola waited until September 16, 1999, just ten days prior to the trial, to amend his answer to assert the "settlement" and name Dr. Wengler, his P.A., and the hospital as Fabre defendants. (R. 479-86).

The defense opening statement was a full fledged assault on the care Plaintiff received at the hands of these third parties, which defense counsel alternately described as "outrageous," (T. 42) "incredible" (T. 44) and "incomprehensible." (T. 43). This opening statement culminated with an exhortation to the jury that it "might want to ask yourself" (sic) why these persons "weren't present in the courtroom," and assured the jury that "Miss Ricks and her attorney's aren't going to tell you why they aren't here." (T. 49). As in Bogosian, plaintiff was placed in an "impossible position." The **only** explanation for these parties' absence from the courtroom was that they had settled with the Plaintiff and had been dismissed as parties – facts totally inadmissible as evidence. Moreover, the defense opening gave the jury the immutable

impression that Ricks and her counsel were hiding evidence, and they should look to Dr. Loyola for the truth.

C. The Opening Statement was Clearly Impermissible.

A party is ordinarily precluded by law from adducing evidence, arguing, or inferring, that: (1) a witness was once a party; (2) any prior party settled with the Plaintiff; or (3) any party was dismissed from the case. See Builder's Square, Inc. v. Shaw, 755 So. 2d 721, 725 (Fla. 4th DCA 1999) ("We agree with the Third District that the disclosure to a jury of a settlement with another tortfeasor should be deemed prejudicial."), rev. denied, 751 So. 2d 1250 (Fla. 2000); Hernandez v. State Farm Fire & Casualty Co., 700 So. 2d 451, 453 (Fla. 4th DCA 1997) (admission of evidence that Plaintiff in suit against insurer, had been sued by her passenger constituted reversible error); Henry v. Beacon Ambulance Services, Inc., 424 So. 2d 914 (Fla. 4th DCA 1982), rev. den., 436 So. 2d 97 (Fla. 1983) (disclosure of fact of settlement in closing required new trial); see also Ellis v. Weisbrot, 550 So. 2d 15 (Fla. 3d DCA 1989), rev. den., 562 So. 2d 348 (Fla. 1990) (admission of testimony that witness was previously a defendant was reversible error, even if evidence was used to impeach witness' testimony); Ashby Division of Consolidated Aluminum Corp. v. Dobkin, 458 So. 2d 335 (Fla. 3d DCA 1984) (where defendant referred to former defendants as an "independent eyewitness," it was nevertheless reversible error for the plaintiff to bring to the jury's attention

that witness was previously a defendant); Webb v. Priest, 413 So. 2d 43 (Fla. 3d DCA 1982) (reversible error for defendant in medical malpractice suit to bring to jury's attention the fact that Jackson Hospital and its employees were previously defendants); see also City of Coral Gables v. Jordan, 186 So. 2d 60 (Fla. 3d DCA), aff'd, 191 So. 2d 38 (Fla. 1966); State Farm Fire & Casualty Co. v. Higgins, 788 So. 2d at 1005-07 (affirming new trial order based upon opening statement because of comment on settlement and fact that third party had "gone away"); Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 256 (Fla. 1st DCA 1996) (questioning venire about potential settlement with third parties was patently prejudicial and required new trial, even absent contemporaneous motion for mistrial or to strike the venire).

It is equally prejudicial to accuse a party's counsel and his witnesses of misconduct, including keeping evidence from the jury. See Johnnides v. Amoco Oil Co., 778 So. 2d 443 (Fla. 3d DCA 2001) (accusing counsel of conspiring with expert to commit fraud on the jury); Lewis v. State, 780 So. 2d 125 (Fla. 3d DCA 2001) (accusing defense counsel of a well "scripted" production); Wolcott v. State, 774 So. 2d 954 (Fla. 5th DCA 2001) (argument that the state "tried to ask the officer" what the victim said, but defense counsel "didn't want to let her say that ..."); Owens-Corning Fiberglass Corp. v. Crane, 683 So. 2d 552, 554 & n.2 (Fla. 3d DCA 1996) (accusing opposing counsel of fabricating evidence in a speaking

objection); Cohen v. Pollack, 674 So. 2d 805, 806 n.1 (Fla. 3d DCA 1996) (argument that counsel and his witnesses "will say anything" because "he had to create a defense" and misrepresented to the jury); Owens-Corning Fiberglass Corp. v. Morse, 653 So. 2d 409, 410 (Fla. 3d DCA), rev. den., 662 So. 2d 932 (Fla. 1995) (accusing counsel of "trickery" and "hiding the ball" and "prodding" the plaintiff into giving answers); see also Venning v. Roe, 616 So. 2d 604, 605 (Fla. 2d DCA 1993) (accusing counsel and witness of committing fraud on the court). It is **never** acceptable for an attorney to effectively impugn the integrity or credibility of opposing counsel before the jury in the process. See Owens-Corning Fiberglass Corp. v. Crane, 683 So. 2d at 552.

Dr. Loyola's opening statements were pernicious, in both respects. Dr. Loyola's counsel clearly knew that his co-defendants had settled with Plaintiff, and, in opening statement, attempted to shift all fault for the Plaintiff's injury onto the settling parties. The only conceivable reference the defense could be making in opening to these non-parties' absence was to their absence **as parties**, since Dr. Wengler and employees from the hospital were listed as witnesses, and they were expected to be present in the courtroom in that capacity.

Indeed, during the course of the proceedings, the defense indicated its intent to read the deposition of a nursing expert

retained by Plaintiffs, and to name her as such.[7] The trial court acknowledged that this would create a problem "unless we tell [the jury] that there has been a settlement, which we're not allowed to do." (T. 695). The defense responded that there was no need to explain anything because:

> "[I] think the jury can speculate, as **I'm sure they're speculating why Dr. Wengler and the nurses are not in this courtroom. It is no further speculation that was considering suing them. That speculation is happening in the jury.** The introduction of this deposition doesn't add anything – (T. 695, emphasis added).

Moreover, Dr. Loyola's entire opening was rife with accusations of misconduct. His counsel told the jury first that "I filed a motion with the court to have their case thrown out. And guess what? [plaintiff's expert] changed his opinion ...., and I'm sure we'll have to concede that he changed his opinion so that she has her day in court...". (T. 47; see also T. 48). It concluded with the **assurance** that "Miss Ricks and her attorney" weren't going to tell the jury why Dr. Wengler and the nurses weren't in the courtroom, prompting Plaintiff's motion for mistrial. (T. 50). This defense theme of misconduct continued against Ricks' counsel and her expert during trial. (T. 468-69; 471-72; 1158-64).

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[7] Precisely one of the errors cited by the Third District, in Bogosian v. State Farm, supra. Here, the trial court sustained the Plaintiff's objection, allowed the deposition to be read, without any reference to who retained the witness. (R. 695-97).

In sum, after Dr. Loyola's counsel laid the gauntlet down, Ricks faced the Hobson's choice of trying to explain that she had settled, inadmissible evidence coupled with an adverse inference that she had already been paid enough, or leaving the jury with the incurable impression that she was hiding something. Neither option was acceptable.

D. The Standard for New Trial

A trial judge has broad discretion in granting a motion for new trial. Brown v. Estate of Stuckey, 749 So. 2d 490 (Fla. 1999). "The role of the trial judge is not to substitute his or her own verdict for that of the jury, but to avoid what, in the judge's trained and experienced judgment, is an unjust verdict." Id. at 495. When reviewing a new trial order, an appellate court is required to recognize the trial court's broad authority and apply the "reasonableness test" to determine whether it abused its discretion. Id at 498. If an appellate court determines that reasonable persons could differ as to the propriety of the trial court's action there can be necessarily no **abuse** of discretion. Id.; see also Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990) ("discretion is abused only where no reasonable [person] would take the view adopted by the trial court"). In addition, a stronger showing is required to reverse an order granting a new trial, than to reverse an order denying one. See Castlewood International Corp. v. La Fleur, 322 So. 2d 520, 522 (Fla. 1975); Allstate Ins.

Co. v. Manasse, 707 So. 2d 1110, 1111 (Fla. 1998).

In the instant case, the trial court was in the superior vantage point to determine the propriety of a new trial because of his observation of the participants and his ability to comprehend this particular fact-finding process. This trial judge concluded that the defense remarks in opening were improper, prejudicial and **incurable**. On appeal, the Fourth District reached its own conclusion that the comments made were "harmless." It did not apply the reasonableness test at all. Because reasonable persons could differ over the propriety of the trial court's action, the new trial order should be reinstated.

The District Court's decision essentially announces a *per se* rule that Ed Ricke is inapplicable to improprieties in opening statement for reasons of "judicial economy." It divests the trial court of its "broad discretion" in determining whether a new trial is required, in favor of a bright line rule based on the timing of a particular remark. Moreover, this rule is not susceptible to easy application. Query: May Ed Ricke motions for mistrial now be taken under advisement after the first witness testifies, in the middle of a heated trial, or only at the end, during closing argument? Petitioner submits that the "precepts of judicial economy" mentioned by this Court in Ed Ricke, were not intended to supplant the trial court's sound discretion to ensure a trial's ultimate fairness. See Brown v. Estate of Stuckey, 749 So. 2d 490

(Fla. 1999); Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000).

The ramifications of the District Court's decision are further not confined to the present case. If a party does not like the jury, is denied a continuance or simply wishes to delay the trial, the court's decision appears to give it one "free shot" so long as that shot is taken prior to closing argument. This serves to actually encourage the inappropriate conduct Ed Ricke was intended to deter. While "judicial economy" may be one factor for the trial court to consider, that factor must – in the end analysis – give way to the trial court's first hand determination of the trial's fairness.

CONCLUSION

For all of the foregoing reasons, the District Court's decision should be quashed, and the case remanded for a new trial.

Respectfully submitted,

Mark Vieth, Esq.
Tilghman & Vieth, P.A.
One Biscayne Tower, Suite 2410
2 South Biscayne Boulevard
Miami, Florida 33131

-and-

Lauri Waldman Ross, Esq.
Lauri Waldman Ross, P.A.
Two Datran Center, Suite 1612
9130 S. Dadeland Boulevard
Miami, Florida 33156
(305) 670-8010

By: _____
Lauri Waldman Ross, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this _____ day of June, 2002 to:

William T. Viergever, Esq.
Sonneborn Rutter Cooney & Klingensmith, P.A.
1545 Centrepark Drive North
P.O. Box 024486
West Palm Beach, Florida 33402-4486

By: _____
Lauri Waldman Ross, Esq.

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the size and style of type used in this brief is 12 pt. Courier New.

By: _____
Lauri Waldman Ross, Esq.