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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 4D14-4830

MICHELE L. MURPHY,

Appellant,

v.

MICHAEL B. ROTH,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

On appeal from the Fifteenth Judicial Circuit in and for Palm Beach County

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POINT-ON-APPEAL

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL WHERE IT WAS ESTABLISHED THAT A MEMBER OF THE JURY FAILED TO DISCLOSE MATERIAL INFORMATION DURING VOIR DIRE AND BECAUSE THAT SAME JUROR HELD AN EXPRESS BIAS AGAINST PLAINTIFF.

In his Answer Brief, Defendant attempts to avoid the true nature of this appeal and the true harm to the Plaintiff by making this a case primarily about juror nondisclosure. Although the juror in question, Sebastian Garrido ("Garrido"), did fail to disclose material information during voir dire which Plaintiff contends entitles her to a new trial, the primary issue here is juror bias. A juror who was unmistakably prejudiced against personal injury plaintiffs, including the Plaintiff here, decided Plaintiff's case. As such, Plaintiff's right to a fair and impartial jury was violated.

Defendant argues that a new trial is not warranted because Plaintiff was not prejudiced by Garrido's bias or misconduct (AB 28-33). This argument completely disregards the fact that there is an inherent prejudice to the Plaintiff when a biased juror sits on a jury.

Defendant relies on Taylor v. Anbari, 442 S.W.3d 49, 52 (Mo. Ct. App. 2014), to support his position. However, that case is distinguishable; in fact, the distinctions between Taylor and the instant case make clear that in a case such as this, a new trial is warranted. In Taylor, the jurors had been directed not to communicate with others about the trial and a juror tweeted generic tweets about his jury service, essentially informing his followers that he was serving on a jury and checking in each day with a tweet that he was back for another day of jury service. As noted by the trial court in denying the plaintiff's motion for new trial, the juror "did not reveal any details about the case and 'any appearance of impropriety was not more prejudicial to any party over the other.'" Id. at 58.

In Taylor, on appeal of the denial of the motion for new trial, the Missouri intermediate appellate court analyzed the alleged juror misconduct as being in violation of the prohibition against jurors receiving information about the case that is not part of the evidence in the record. Id. The court held that the juror had not violated its instructions because the messages in question did not reveal information about the case and that none of the responses to his messages provided him with extrinsic evidentiary facts pertinent to the case being tried. Thus, a new trial was not warranted.

This case is distinguishable for several reasons. First, and most importantly, the messages in question here expressed a bias against the Plaintiff. Whether the tweet that "[e]veryone is so money hungry that they'll do anything for it," was specifically a reference to the plaintiff in this case or was made in response to information he received during trial regarding an undisclosed accident he had been involved in, the prejudice to Plaintiff is the same: Garrido was biased against Plaintiff. Second, it is undisputed here that Garrido did violate the trial court's order in tweeting about his jury service. Even if you accept that the specific tweet mentioned above was not a specific reference to the Plaintiff in this case, Garrido tweeted at least a dozen tweets specifically about his jury service, in violation of the trial court's order not to do so.

Defendant argues that Garrido's tweet that "[e]veryone is so money hungry that they'll do anything for it," does not evidence bias against Plaintiff because he testified that his statement "had nothing to do with this case" (AB 30-31). This argument is mindboggling. This statement, publicly expressing antipathy towards a personal injury plaintiff, made while Garrido was serving on a jury in a personal injury case, has *everything* to do with this case. Even if you assume that Garrido was telling the truth when he told the trial court that this statement was not about this case and was a reaction to receiving a "court order" regarding an undisclosed

accident he had been involved in days before jury selection, it still evidences a bias towards Plaintiff here.

Defendant also argues that the statement "was not more prejudicial to one party over the other" (AB 31, 33). This argument is simply bewildering. To think that the tweet in question could possibly be read to evidence a prejudice against the *Defendant*, as opposed to the *Plaintiff* is inconceivable. Garrido's own explanation for the tweet made clear that his tweet was directed at personal injury plaintiffs/claimants. Notably, the Defendant relies on the "appearance of impropriety" threshold expressed in Taylor, 442 S.W.3d at 58 (emphasis added). The juror's tweet here went well beyond that threshold.

Defendant attempts to distinguish Dimas-Martinez v. State, 385 S.W.3d 238, 248 (Ark. 2011), relied upon by Plaintiff in her Initial Brief (IB 18-20), by highlighting the factual distinctions between the two cases (AB 31-32). Defendant's argument is misplaced. As explained in the Initial Brief, the relevance of Dimas-Martinez is the conclusion there that a juror's online communications during trial can form the basis for a new trial where the online postings establish *bias* or the inability to follow the court's instructions. In Dimas-Martinez, the juror, after having been warned not to tweet about the case or his jury service, continued to do so. The court determined that the juror's tweets after being warned evidenced

his inability to follow the court's instructions, thereby entitling the defendant to a new trial. Here, Garrido's tweets evidenced his inability to follow the court's instructions and, more importantly, his bias against Plaintiff, thereby entitling her to a new trial.

In addition to establishing bias on his part, Garrido's tweets, and subsequent juror interview, established another act of misconduct on his part: nondisclosure during voir dire. Defendant argues that because Plaintiff did not raise the juror nondisclosure issue in her Motion for New Trial, the issue was not preserved for appeal (AB 26-28). This argument is misplaced.

For an issue to be preserved for appeal, it must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation. Holland v. Cheney Bros., Inc., 22 So.3d 648, 649-50 (Fla. 1st DCA 2009). Here, Plaintiff raised this argument at the hearing held after the juror interview of Garrido (SR1:658-61). This sufficiently preserved the issue for appeal.

The nondisclosure here was discovered at the juror interview of Garrido, which was held after the Motion for New Trial was filed; thus, it could not have been included in the motion. Defendant implies that Plaintiff should have amended the Motion for New Trial after the juror interview (AB 27). However, there is no

requirement, and Defendant cites none, that such an argument be made in a written motion for new trial. As mentioned above, all that is required to preserve an issue is that the issue is presented to the trial court. Here, the issue was presented to the trial court at the hearing on this matter, after the juror's interview. That is all that was required.

The cases Defendant relies upon are inapplicable here because in those cases, the issue raised in the appeal was not presented to the trial court at all. See Saintiler v. State, 109 So.3d 303, 305 (Fla. 4th DCA 2013); Mackey v. State, 55 So.3d 606, 610 (Fla. 4th DCA 2011). That was not the case here.

As to the merits of the issue, Defendant argues that a new trial is not justified based on Garrido's nondisclosure because Plaintiff did not establish the three prongs of the De La Rosa test (AB 10-26). To the contrary, as discussed in the Initial Brief (IB 22-26), all three prongs of the test were met here.

First, Defendant argues that the concealment prong was not met because the question from the trial court as to whether any of the prospective jurors had been involved in a situation similar to this case could be assumed to be geared towards accidents that resulted in injury, claim, or lawsuit (AB 17). This argument is misplaced.

At the outset of voir dire, the trial court explained that this case involved a claim by Plaintiff that she was injured in a car accident with Defendant (T.I:9). Later, the court asked the prospective jurors whether any of them, or a close relative or friend, had been personally involved in a "situation that sounds similar **in any way** to this case, whether or not it resulted in a lawsuit or not?" (T.I.:21)(emphasis added). Thus, contrary to Defendant's assertion, the trial court expressly phrased the question to elicit responses regardless of whether a lawsuit was filed. Furthermore, by asking whether anyone had been involved in a situation that was similar "in any way" to the situation involved in this case left the question open enough that it should have elicited a response from Garrido regarding his recent car accident. Because the information regarding car accidents was squarely asked for here, the concealment prong was met. See, e.g., Pembroke Lakes Mall Ltd. v. McGruder, 137 So.3d 418, 429 (Fla. 4th DCA 2014), reh'g denied (Apr. 11, 2014).

Defendant argues that the responses from other jurors support his position. However, the responses of other jurors addressing accidents that were minor and serious and some discussing injuries while others did not only solidify that Garrido should have disclosed his recent accident in response to the trial court's questioning. Specifically, one juror mentioned being in a minor rear-end car

accident; the juror did not mention any injuries (T.I:22). Another juror mentioned that his grandmother had been involved in a "small fender bender" and that although she had not been sued, she had received a letter from a lawyer representing the other party (T.I:25-26, 58-59). The juror believed that the minor accident could not have caused the alleged injuries (T.I:25-26, 59). Another juror stated that he had been involved in a car accident, where a lawsuit had not been filed, but he had to pay some medical bill related to the accident (T.I.:28-29). Thus, the prospective juror's responses ran the gambit, but not all accidents mentioned resulted in lawsuits and not all jurors mentioned injuries resulting from the accidents. These responses from other jurors support the position that Garrido should have disclosed the accident he was involved in with his grandfather just days before jury selection.

Defendant relies on Hood v. Valle, 979 So.2d 961, 963 (Fla. 3d DCA 2008). That case is distinguishable. In Hood, it was discovered post-trial that a juror's father was an alcoholic. The defendant argued in a motion for new trial based upon juror nondisclosure that the juror should have disclosed this information during voir dire because the case involved a claim of drunk driving by the defendant. The Third District affirmed the denial of new trial on the basis that the jurors had not been asked during jury selection whether a parent was an alcoholic. Further,

although other prospective jurors had been asked whether they had strong feelings about people who drink, the juror in question was not asked that question. Id. at 964.

Here, as opposed to in Hood, the *entire* panel was asked whether they had been involved in a situation similar "in any way" to the accident that occurred here. Other jurors understood this to mean any accident, whether minor or significant. Although some discussed injuries resulting from the accident, some did not. The question here was sufficient to invoke a response from Garrido about his accident just before the trial.

Defendant also argues that Plaintiff did not establish the due diligence prong of the De La Rosa test because his counsel did not ask any questions "squarely about the potential juror's involvement in any prior accidents" (AB 17). To the contrary, Plaintiff's counsel did question the jurors who stated they had been involved in accidents further about the incidents, and their feeling about personal injury cases as a result (T.I:56-60). Furthermore, as Plaintiff's counsel explained in the hearing after the jury interview when this argument was addressed (SR1:659-60), he did not question *Garrido* about any accident he had been involved in because Garrido did not disclose the accident in response to the trial court's questioning. While parties have a duty to question jurors on subjects which are

relevant to the case, there is no duty to *re-ask* questions which have already been asked by the trial court or by opposing counsel. Likewise, there is no requirement for parties to formulate multiple variations of questions in the hopes of eliciting a response from a juror that should have been elicited by a question already asked. Such a requirement would be a waste of the jurors' time, the parties and the court.

Defendant cites McCauslin v. O'Conner, 985 So.2d 558 (Fla. 5th DCA 2008), to support his position as to the concealment and the due diligence issues. In McCauslin, the defendant sought a new trial based upon jurors' failure to reveal during voir dire that they had been injured in auto accidents. In that case, the potential jurors were asked broadly whether they had been injured in accidents. The Fifth District reversed an order granting new trial, concluding that taken in context, the venire may have assumed that the question was geared only toward *serious* injuries because the question was asked in response to a potential juror's discussion of serious injuries he had suffered. As to the due diligence prong, the Fifth District noted that the defense voir dire was "very brief and did not mention the subject of prior accidents or injuries." Id. at 563. The court ultimately found that it was unclear whether this prong was met. Id.

This case is distinguishable from McCauslin. As discussed above, the question here was clear and there was no context which would exclude Garrido's

disclosure of his accident. The only context here was the responses of the other jurors who disclosed accidents, both minor and serious and who discussed injuries or did not mention injuries at all.

Finally, Defendant argues that Plaintiff did not establish materiality of the undisclosed information (AB 20-26). Defendant relies upon the fact that Garrido expressed during voir dire that he thought some people bring lawsuits just for the money and Plaintiff did not strike him based upon that (AB 23). While Garrido did express in his interview that he thought some lawsuits might be frivolous, he also made clear that he thought there are plaintiffs with righteous claims (T.I:95-96). His statements were not nearly as definitive as his tweet during trial that "**Everyone** is so money hungry that they'll do anything for it" (emphasis added). Had that statement been disclosed in voir dire, Garrido would have been excluded for ***cause***.

Defendant also argues that Plaintiff should have questioned Garrido further about the accident at the juror interview if she wanted to establish materiality (AB 24). This argument is misplaced. The trial court questioned Garrido utilizing questions that had been submitted in advance by the parties. The court was very clear that the interview was not meant to be a "fishing expedition" and that the questions to Garrido were to be limited. The issue of the accident which arose

during the interview lacked any particular relevance other than as an explanation for the tweet, because Plaintiff had not reviewed the voir dire transcript at that point to determine that Garrido had not disclosed the accident in question. Any attempt to question Garrido further at the time, when the nondisclosure issue had not yet been revealed, surely would have been objected to by Defendant and most likely sustained by the trial court.

More importantly, no further information was needed in order to determine that Garrido should not have been sitting on the jury. As noted above and discussed in the Initial Brief (IB 24-25), had Garrido expressed the definitive sentiment that "**Everyone** is so money hungry that they'll do anything for it" during voir dire based upon his experience with a car accident *days earlier*, Plaintiff would have moved to strike him for cause and the trial court would have almost certainly granted the request. If the trial court had not stricken Garrido for cause, Plaintiff would in all likelihood – if not certainly – have used a peremptory challenge upon him. No plaintiff in their right mind would ever want a juror with this viewpoint sitting on a personal injury lawsuit.

Plaintiff had a right to a fair and impartial jury and she did not receive that here. Garrido disregarded the trial court's orders not to discuss his jury service during trial or to prejudge the case and then, during trial, publicly expressed

antipathy to personal injury plaintiffs, having very recently been in an undisclosed car accident. Garrido's dual acts of dishonesty in becoming a juror and then sitting as a juror denied the Plaintiff the right to a fair trial. The trial court's refusal to grant a new trial under these circumstances was an abuse of discretion.

CONCLUSION

For the reasons discussed above and in the Initial Brief, the Final Judgment must be reversed and the case remanded for a new trial on all issues.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished to CARRI S. LEININGER, ESQ., and JAMES O. WILLIAMS, ESQ. (eservice@wlclaw.com), 11300 U.S. Highway One, Ste. 300, North Palm Beach, FL 33408, by email on March 14, 2016.

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CERTIFICATE OF TYPE SIZE & STYLE

Appellant hereby certifies that the type size and style of the Reply Brief of Appellant is Times New Roman 14pt.

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