IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE No.: 4D14-4830

L.T. CASE NO.: 502012CA004186XXXXMB

MICHELE L. MURPHY,

Appellant,

v.

MICHAEL B. ROTH,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, Michelle L. Murphy, was the Plaintiff in the trial proceedings and will hereinafter be referred to as Plaintiff. Michael B. Roth was the Defendant in the trial court and will hereinafter be refer to as Defendant or Mr. Roth.

This is an appeal from a Final Judgment in the Fifteenth Judicial Circuit. The jury apportioned liability and awarded damages to the Plaintiff, however, Plaintiff contends she is entitled to a new trial on liability and damages. The following designations will be used:

[IB]- Plaintiff's Initial Brief, followed by the appropriate page number.

[R] – Record on Appeal, followed by the appropriate page number.

[T] - Trial Transcript, followed by the Volume number and appropriate page number.

[SR] - Supplemental Record-on-Appeal, followed by the appropriate page number.

STATEMENT OF CASE AND FACTS

Accident and lawsuit

This case arises out of a car accident that occurred on October 27, 2011. [R. V. I. 1-3] The Plaintiff and Mr. Roth presented conflicting testimony about the facts of the accident. Mr. Roth testified Plaintiff struck his car on the rear passenger side, skewing his car right. [T. VI. 687-884] She then hit the front right side of his car, sending his car spinning off the road. [T. VI. 687-884] Plaintiff claimed that she was hit from behind, causing her to swerve and lose control. [T. V. 585, 591] She never saw the car that hit her from behind. [T. VI. 665] She was then hit in the front and forced off of the road. [T. V. 591]

At the time of the accident Plaintiff was 65 years old. [T.VI. 565] Plaintiff was not in her own car, but was driving a car that belonged to her sister. [T V. 573] She was on her way home from the cardiologist's office after "a really long, drawn out test." [T VI. 676] It was her first time to this doctor's office and she did not know how far she was from Okeechobee where she needed to make her turn. [T. VI. 664] Plaintiff admitted she was not very good with directions. [T. V. 585] Additionally, she has blurred vision, and bad vision in one eye. [T. VI. 659]

Mr. Roth was very familiar with the area of the accident, as he has lived in Palm Beach County since 1986, and travels it frequently. He was not in any rush at the time of the accident. [T. VI. 683.]

There was also conflicting testimony in regards to the extent of Plaintiff's injuries. Plaintiff did not go to the hospital from the scene. [T. V. 592] A week later she went to a chiropractor with complaints of neck and back pain. [T. V. 601-602] The defense presented expert testimony that Plaintiff may have had some sprains from the accident, but that significant pain was caused by degenerative back disease, which existed before the accident. [T. VI. 724, 727-29, 731-32]

Plaintiff testified that two weeks before this accident she fell in her condo and landed on her shoulder causing "excruciating pain". [T V. 578] She complained of neck and shoulder pain with pain radiating into her fingers. [T. II. 327] She had been treating with an orthopedic surgeon for her neck and back pain prior to this accident. [T II. 327] Plaintiff also has a history of diabetes, high blood pressure, and depression.

After the accident, Plaintiff continued to spend her days going shopping and to lunch, just as she did before the accident. [T. II. 243] She also continued to spend her summers in Connecticut. [T. II. 244] Since the accident Plaintiff has gone on a cruise vacation with her friends. [T. II. 243]

The jury determined that Plaintiff was 60% at fault for the subject accident and that Defendant was 40% at fault. The jury awarded Plaintiff $13,000 in past medical expenses and $26,000 in future medical expenses for a total judgment of $39,000 against the Defendant. The amount awarded to Plaintiff was proper,

adequate, and based on the facts, circumstances, and evidence presented to the jury during trial.

Voir Dire

Voir Dire was held on May 12, 2014. [T. V. I. 9] At the beginning of voir dire, the trial court explained to the prospective jurors that this case was about injuries received in an automobile accident. [T. V. I. 9] The court explained that Plaintiff claimed that Mr. Roth caused the accident that resulted in certain injuries. [T. V. I. 9-10] The court further explained that Mr. Roth denies those claims, and claims Plaintiff caused the accident and the injuries were not as extensive as Plaintiff claims. [T. V. I. 10]

Shortly thereafter, the trial court asked the prospective jurors:

> "You have heard me give you a brief description of what this case is about. … Is there anyone here personally or has had a close relative or a very close friend involved in a situation that sounds similar in any way to this case, whether or not it resulted in a lawsuit or not?" [T. V. I. 21]

In response, several prospective jurors discussed injuries and lawsuits arising out of car accidents, and other accidents, that they or family members had been involved in. [T. V. I. 21-30] No one mentioned any minor car accidents or other accidents that did not involve both injuries and lawsuits. Mr. Garrido did not respond.

Plaintiff's counsel questioned the prospective jurors who had mentioned lawsuits, about their involvement in the lawsuit. [T. V. I. 56-58] His questioning focused on the lawsuits, not on the accident. Neither the judge, nor Plaintiff's counsel, ever affirmatively asked the prospective jurors if anyone had ever been involved in an *accident.*

At one point during voir dire, Plaintiff's counsel asked if anyone had a family member or friend who has had a cervical fusion. [T. V. I. 125-28] Mr. Garrido spoke up and stated that his step-mother was in a car accident and had some plates in her neck. [T. V. I. 128] Plaintiff's counsel asked him a few questions about his step-mother's recovery after surgery. [T. V. I. 128-29] Plaintiff's counsel did not inquire further with Mr. Garrido about this accident, any other injuries, or whether a lawsuit arose.

During Plaintiff's counsel's voir dire, he specifically asked the prospective jurors about their feelings towards lawsuits. Mr. Garrido responded:

> "I'm kind of like indifferent about it. Like, I really don't—it's necessary. Some people, sure they need it. ***But I feel like some people also do it just for the money. . ."***
>
> "I wouldn't say 80%. I can't put a number on it. ***But I feel like, sure, a good amount of people sue for dumb reasons."***
>
> [T. V. I. 95]

Mr. Garrido went on to say that he believes there are a more frivolous lawsuits than there should be. [T. V. I. 96]

In its initial instructions at the beginning of voir dire, the court told the prospective jurors:

> "You must not communicate with anyone, including friends and family members, about this case, the people and places involved, or your jury service. You must not disclose your thoughts about this case or ask for advice on how to decide this case."
>
> "I want to stress that this rule means you must not use electronic devices or computers to communicate about this case, including tweeting, texting, blogging, emails, posting information on a website or chat room, or any other means at all. Do not send or accept any messages to and from anyone about this case or your jury service."
>
> [T.V. I. 13]

Plaintiff's Motion for Juror Interview and New Trial

After the jury verdict, Plaintiff filed a Motion for Juror Interview [R. V. III, 457-81] Plaintiff alleged that Juror Garrido disobeyed the trial court's orders, during voir dire not to post anything about the case on social media. [R. V. III, 457-81] Plaintiff argued that her right to a fair and impartial jury was compromised by Juror Garrido. [R. V. III. 458] Plaintiff also filed a Motion for New Trial, arguing that Juror Garrido's misconduct necessitated a new trial. [R. V. III. 484-95]

The trial court held two separate hearings on the Motion for Juror Interview, giving careful consideration to evidence of Juror Garrido's social posts. The trial court granted the Motion for Juror Interview. [R. V. III. 578-79]

Interview of Juror Garrido

Before the interview of Mr. Garrido, the parties submitted lists of proposed questions to be asked of Mr. Garrido at the interview [R. V. III. 499, 594-96, 597-99] At the interview, Mr. Garrido affirmed that the Twitter account in question was his [R. IV. 605]. Mr. Garrido admitted that he posted all of the specific tweets addressed by Plaintiff in the Motion for Juror Interview [R. IV. 606-07]

The trial court asked Mr. Garrido what he thought the instructions about not communicating about the case or his service meant [R. IV. 608] He responded that he thought he could not talk about the case. [R. IV. 608] He testified that he did not use any social media while sitting in the courtroom during trial. [R. IV. 608]. Mr. Garrido testified that he did not intentionally or deliberately disobey the court's order regarding the use of social media during trial. [R. IV. 608-09]

The court reminded Mr. Garrido that at the beginning of the case he took an oath to answer all questions truthfully and completely and remaining silent when you have information to disclose is a violation. [R. IV. 609] The court then asked Mr. Garrido about his tweet that he "half assed" his answers. [R. IV. 609] Mr. Garrido responded that he was confused by what Mr. Kuvin was saying, got nervous, didn't know what to say, and "muble jumbled." [R. IV. 609-10] Mr. Garrido testified that he answered all the questions posed during voir dire as fully and completely as he could. [R. IV. 610]

The court asked Mr. Garrido if he was referring to the trial when he tweeted "Everyone is so money hungry that they will do anything for it" [R. IV. 610] He responded:

> "No, ma'am, I was not. I was actually tweeting about the fact that we got into an accident, me and my father, **May 2**, and then my dad got the court order during the trial case, and that's when I woke up after my nap he told me about it." [R. IV. 610]

Mr. Garrido did not provide any further details regarding this "accident" or "court order."

Plaintiff's counsel did not seek to have Mr. Garrido questioned further about this statement, in order to obtain more information. Plaintiff's counsel did not ask if there were any injuries from the accident or if there was a claim or lawsuit. Plaintiff failed to seek any information.

Mr. Garrido did not tell anyone else his views on this specific case before beginning jury deliberations. [R. IV. 610-11] Mr. Garrido testified that none of the other jurors knew his Twitter name or email, therefore they couldn't have found his tweets. [R. IV. 619]

Hearing on Motion for New Trial

After the interview, a hearing was held on Plaintiff's Motion for New Trial. At the hearing, Plaintiff argued that a new trial was warranted because Mr. Garrido violated the court's warnings not to discuss his jury service on social media. [SR. V. I. 652] He also argued that Mr. Garrido was dishonest during voir dire by

"hiding evidence" of a car accident that he had with his father, where "someone is now making a claim like" his client. [SR. V. I. 660-62] Again, the Plaintiff failed to provide any evidence that Garrido's accident resulted in a claim or lawsuit.

Plaintiff did not present any actual evidence to support her argument of non-disclosure. Additionally, this argument was never raised by Plaintiff in her Motion for New trial, and was presented for the first time at the hearing.

At the hearing, defense counsel argued that the question posed by the trial judge in voir dire was very broad, and it would require great speculation to say that Mr. Garrido concealed this accident. [SR. V. I. 670-71] Additionally, he argued that the parties had an opportunity to inquire further on the issue of prior accidents during voir dire, but chose not to. [SR. V. I. 671]

After four separate post-trial hearings, the trial court denied Plaintiff's Motion for New Trial. [R. IV. 626] A Final judgment was entered in favor of Plaintiff pursuant to the jury's verdict. [R. IV. 639] Plaintiff then initiated this appeal.

STANDARD OF REVIEW

Review of a motion for new trial based on juror concealment of information is for abuse of discretion. *Taylor v. Magana,* 911 So.2d 1263, 1267 (Fla. 4th DCA 2005). "A trial court abuses its discretion 'only where no reasonable man would

take the view adopted by the trial court.'" See *Sims v. State*, 869 So.2d 45 (Fla. 5th DCA 2004), *rev. granted*, 926 So.2d 1270 (Fla.2006).

"If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." See *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). In a "close call" case appellate courts should defer to the trial judge who was in the courtroom and observed the demeanor of jurors. *McCauslin v. O'Conner*, 985 So. 2d 558, 564 (Fla. 5th DCA 2008).

ARGUMENT

I. PLAINTIFF FAILED TO DEMONSTRATE THAT THE JUROR'S NON-DISCLOSURE OF INFORMATION DURING VOIRE DIRE WARRANTS A NEW TRIAL

The Supreme Court has established a three-prong test to be utilized in determining whether a juror's nondisclosure of information during voir dire warrants a new trial: (1) complaining party must establish that information is relevant and material to jury service in the case; (2) that the juror concealed information during questioning; and lastly, (3) that the juror's failure to disclose information was not attributable to complaining party's lack of diligence. *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995).

In the case at hand, Plaintiff failed to establish the three-prongs outlined in the *De La Rosa* test had been met. Therefore, the trial court was correct in its determination that a new trial was not warranted in this case.

A. The concealment prong and due diligence prong of the De La Rosa test were not met.

The facts of this case do not establish the concealment prong and the due diligence prong of the three-factor *De La Rosa* test. Contrary to Plaintiff's assertion, the trial court did not specifically question the panel about whether they, or family members, had been in a car accident [IB22] Rather, the Court asked whether anyone had been involved in a "situation that sounds similar…" The situation was an accident with injuries [T.1:21]

"The key to establishment of a prejudicial concealment of information sufficient to invoke *De La Rosa*, is a clear, direct question requiring a response by the venire member." *Hood. V. Valle*, 979 So. 2d 961, 964 (Fla. 3d DCA 2008).

In *Hood*, the Estate of Mirna Valle brought a wrongful death action against Hood arising out of a motor vehicle accident in which Hood was intoxicated and had pled guilty of DUI manslaughter. *Id.* at 962. After the jury was discharged, the judge authorized the jurors to speak with the attorneys. The foreperson volunteered for the first time, the fact that his father had been an alcoholic during his youth, and that "his perception of the evidence in the case had been influenced by that fact." *Id.* at 963.

The trial court denied Hood's motion for new-trial based on the alleged non-disclosure of material information by a juror during voir dire, and Hood appealed. *Id.* at 962. On appeal, Hood argued that the venire member should have disclosed the fact that his father was an alcoholic. *Id.* at 963.

The Third DCA disagreed, finding that the jury panel was not asked whether a parent was or had been an alcoholic. *Id.* at 963-964. Since there was no clear direct question posed, requiring a response by the venire member, there was no indication that the juror in question concealed information during that questioning. *Id.* at 964.

In order to establish concealment, the moving party must demonstrate that the *voir dire* question propounded was straightforward and not reasonably susceptible to misinterpretation. *Mitchell v. State*, 458 So.2d 819 (Fla. 1st DCA 1984). Information is generally considered concealed for purposes of the three part test when the information is "squarely asked for" and not provided. *McCauslin v. O'Conner*, 985 So. 2d 558, 562 (Fla. 5th DCA 2008) The context in which the question is asked, and the answers provided, also plays a role in the analysis. *Id.*

In *McCauslin*, Plaintiff brought a negligence action against Defendant for injuries sustained as a result of an automobile accident. *Id.* After the jury returned a verdict in favor of Plaintiff, Defendant filed a motion for new trial on a number of

grounds, including error by the court in granting Plaintiff's multiple challenges for cause. *Id.*

Defendant also filed a motion for jury interview claiming five of the six jurors concealed information during voire dire. *Id.* The motion alleged that subsequent to trial, Defendant discovered information that some of the jurors or their family members had been involved in automobile accidents with injuries. *Id.* Defendant attached the accident reports to the motion. *Id.*

The trial court granted the motion for jury interview, in part. Since Plaintiff's counsel had only questioned the venire on whether any of them had been "*injured*" in any kind of accident, the court limited the post- trial interviews to the only two jurors whose accident reports documented injuries- juror Rivers and juror Mitchell. *Id.*

Juror Rivers' interview revealed that he was injured in an accident in 1991, and as a result he received physical therapy for about six months. *Id.* at 559. Juror Mitchell's interview revealed that he was slightly injured in an accident in 1996. *Id.* The trial court granted a new trial, finding that the jurors did not disclose in voir dire that they had been injured in accidents. *Id.* Plaintiff filed an appeal, arguing that the trial court abused its discretion in granting the motion for new trial. *Id.* at 560.

The question that was asked to the jury panel was, "Have any of you ever been injured in any way, whether it be a car accident, a collision, a slip and fall?" *Id. at 562.* This broad question was asked by Plaintiff's counsel, in response to a prospective juror's comment that he and his wife were seriously injured in an auto accident. *Id.*

The Fifth DCA found that the jury panel may have assumed, based on the context in which the question was asked, that the question was geared towards serious injuries that might affect a juror's impartiality. *Id.* This is further evidenced by the fact that the only two other jurors who provided responses, discussed the severity of their prior injuries. *Id.* Jurors' Rivers and Mitchell did not have severe injuries as a result of their prior accidents. The Fifth DCA found that the jurors did not so much conceal their prior accidents as fail to appreciate that disclosure was required. *Id.*

As for the third prong of the *De La Rosa* test, the due diligence test, counsel is required to have sufficiently inquired about information that the potential jurors are being asked to disclose. *Id.* There must be a determination as to whether the explanations provided by the judge and counsel regarding the kinds of responses which were sought would reasonably have been understood by the jurors to encompass the undisclosed information. *Id.* A failure to make sufficient inquiries

about the lawsuits or claims which the juror was being asked to disclose may constitute a lack of due diligence. *Id.*

The defense voir dire by Defendant's counsel was brief and did not mention prior accidents or injuries. *Id.* The Fifth DCA found that it was a "close question" as to whether defense counsel should have followed up with more questions or more targeted questions if, in fact, prior injuries, regardless of severity, was material to their jury selection. *Id.*

The Fifth DCA reversed the trial court's order granting new trial, finding that "the record does not suggest deliberate concealment, and that prudent probing by defense counsel in light of the way voir dire unfolded, might well have resolved the problem entirely." *Id.* at 563.

The facts of this case are similar to *Hood* and *McCauslin*, because the record does not support finding concealment or due diligence on the part of Plaintiff's counsel. In regards to the concealment prong, Plaintiff incorrectly asserts that the trial court specifically asked the panel about whether they or family members had been in a car accident. [IB 22] At the beginning of voir dire, the trial judge stated to the jury panel, "This case is about injuries received in an automobile accident." [T.V 1, p. 9] She later asked:

> "Is there anyone here personally, or has had a close relative or a very close friend involved in a situation that sounds similar in any way to this case, whether or not it resulted in a lawsuit or not?
>
> [T. V. I, p. 21]

This question can easily be interpreted as asking about whether anyone personally, or a close relative has ever received injuries in an automobile accident. Each juror who did respond to the judge's question, spoke only of accidents involving injuries and lawsuits. No juror spoke of any minor accident that did not result in some sort of injury, claim or lawsuit. Thus a reasonable interpretation of "situation" was an accident resulting in injuries.

The question asked by the judge was not straightforward, and it was reasonable for juror's to believe that this question did not seek information about injury-free accidents.

Furthermore, the juror interview of Mr. Garrido did not reveal that he had any injuries arising out his accident. The juror interview did not reveal that any lawsuit arose out of this accident. Although Mr. Garrido mentioned that his father received a "court order" during the trial of this case, he did not state that this "court order" was for a lawsuit. Additionally, this "court order" was received after jury selection had been completed. Therefore, Mr. Garrido could not have known about it at the time he was questioned in voir dire.

Based on the context in which the question was asked, and the responses by other jurors, Mr. Garrido could fairly assume that the question was geared towards accidents that resulted in injury, claim, or lawsuit. It cannot be said that this question could have reasonably been understood by Mr. Garrido as encompassing an accident that did not involve any injuries.[1]

In regards to the third prong, Plaintiff's counsel failed to diligently discover the information about Mr. Garrido's prior accident. Similar to defense counsel in *McCauslin* , Plaintiff's counsel's voir dire did not ask any questions squarely about the potential juror's involvement in any prior *accidents*. Instead, Plaintiff's counsel's questioning focused mainly on the potential juror's involvement, experiences, and opinions on lawsuits. Additionally, Plaintiff's counsel focused on the potential jurors experience with medical professionals and with certain injuries.

Mr. Garrido actively participated in jury selection. When Plaintiff's counsel asked the panel if they knew anyone that had cervical fusion surgery, Mr. Garrido spoke up. He indicated that his stepmother was in a car accident and had some sort of surgery. Plaintiff's counsel had ample opportunity, at that time, to question Mr. Garrido further about his stepmother's accident, or any other accidents he may have been involved in. Plaintiff's counsel failed to do so.

[1] In McCauslin, supra, the trial court denied O'Conner's motion for jury interview as to jurors whose accident reports showed no injuries, since counsel had only questioned the venire on whether any of them had been injured in any kind of accident. McCauslin at 559.

Additionally, during Plaintiff's voir dire, Plaintiff's counsel specifically asked Mr. Garrido about his opinions on lawsuits. Mr. Garrido stated he thought a good amount of people sue for dumb reasons. He went on to say that he thought there were more frivolous lawsuits than there should be. Therefore, Plaintiff's counsel was well aware of his opinions on lawsuits. If Plaintiff's counsel was interested in whether Mr. Garrido had any personal experiences that led to these opinions, then he should have inquired further during questioning. "Counsel who are concerned about jury service by unqualified jurors should thoroughly examine the prospective jurors during voire dire about their qualifications to serve." *Companioni v. City of Tampa*, 958 So. 2d 404,417 (Fla. 2nd DCA 2007).

Based on the above, it is clear that any failure of Mr. Garrido to disclose a prior accident was due to the Plaintiff's lack of due diligence and thus cannot constitute active concealment on the part of the juror.

Plaintiff relies on *Pereda v. Parajon*, 957 So. 2d 1194 (Fla. 3rd DCA 2007) in support of her position that a new trial is warranted due to juror non-disclosure. The facts in *Pereda* are nothing like the facts in this case.

In *Pereda*, the Plaintiff filed suit arising out of personal injuries sustained as a result of a car accident. The defendant moved for juror interview and a new trial due to a juror's non-disclosure of her past personal-injury suit. *Id.* at 1196.

During voire dire, Defense counsel had asked the following questions of the jury panel:

> "Is there anybody sitting on this panel now that has ever been under the care of a physician for personal injuries, whether you had a lawsuit or not?"
>
> "In other words, you may not have had any sort of lawsuit, but you slipped and fell, you got hurt, there is no claim brought, but you were under the care of a physician for personal injuries? Anybody?"
>
> "Anybody on the panel that is involved-not necessarily that has been-that has accidents-have you had any accidents?"

Id.

A juror, who was a lawyer, did not disclose that she had been involved in prior personal injury litigation in response to these questions. *Id.* The record evidence demonstrated that other prospective jurors, none of whom were lawyers, clearly understood the type of information defense counsel was asking them to disclose. *Id.* at 1198.

The juror interview revealed that this juror had been in an automobile accident three years prior, was transported by an ambulance from the scene, and sustained injuries as a result of the accident. *Id.* at 1196. She further admitted that she had sought treatment with an orthopedic surgeon as a result of these injuries. *Id.*

The Third DCA found that the juror's personal injury litigation history was material, counsel had exercised due diligence in attempting to obtain information, and it was clear from the record that the juror had concealed this information, . *Id.* at 1197.

The facts in this case are completely different than the facts in *Pereda*. First, in the case at hand, Mr. Garrido was never asked a clear direct question, requiring him to disclose involvement in any prior accident. The trial court stated to the jury panel that this case involved ***injuries*** received in an automobile accident. Later on, the judge asked the broad question of whether anyone personally, or has had a close relative or a very close friend, involved in a situation that sounded similar to this case, whether or not it resulted in a lawsuit. Neither the trial judge, nor plaintiff or defense counsel, ever asked the jury panel if anyone had ever been involved in a *car accident* regardless of whether there were injuries or claims. Therefore, Mr. Garrido cannot be said to have concealed information about a prior accident.

B. Plaintiff failed to establish that the omitted information was relevant and material to jury service in this case

Additionally, the juror interview did not reveal any information that Mr. Garrido was involved in a lawsuit, car accident, or sustained any injuries. Plaintiff counsel has only speculated that there was a lawsuit, claim, and/or injuries. Mr. Garrido made no statements of the sort. Without any information about this

"accident," Plaintiff's counsel cannot possibly establish that disclosure of it was material.

Juror nondisclosure is considered material, as grounds for a new trial, if it is substantial and important so that if the facts were known, the challenging party may have been influenced to peremptorily challenge the juror from the jury. *Palm Beach Cnty. Health Dep't v. Wilson*, 944 So. 2d 428 (Fla. 4th DCA 2006).

There is no "bright line" test for determining whether information that a venire member fails to disclose during voir dire is material, so as to constitute ground for new trial. *Garnett v. McClellan*, 767 So. 2d 1229 (Fla. 5th DCA 2000). Materiality must be based on the facts and circumstances of each case. *Id.*

In *Garnett,* Garnett filed suit against McClellan for injuries he sustained when his automobile was rear-ended by McCllelan's automobile. *Id.* at 1230. During jury selection the judge briefly described the case to the prospective jurors. *Id.* Then, Plaintiff's counsel discussed accidents and injuries suffered by the prospective jurors. *Id.* Lastly, defense counsel questioned the jury panel about any accidents in which they had been involved. *Id.*

Many jurors stated they had been involved in prior auto accidents. *Id.* Mr. Sweeny, a prospective juror, did not mention any involvement in any auto accident. *Id.* Mr. Sweeny was picked for the jury.

After conclusion of the trial, the jury returned a verdict in favor of Garnett for $20,426.52. *Id*. McClellan filed a motion for new trial on several grounds, including possible juror misconduct. *Id.* He then filed a motion to interview juror Sweeny, alleging that he may have been involved in an accident which he did not disclose during jury selection. *Id.*

At the jury interview, Sweeny admitted he was involved in an accident in 1998, however, there were no injuries and his insurance company took care of it. *Id*. He stated that his accident played no part in his decision in the case. *Id*. The trial court granted a new trial based on Mr. Sweeny's failure to disclose that he had been involved in an accident. *Id.*

On appeal, the Fifth DCA found that although Mr. Sweeny's accident experience was relevant, there was nothing in his interview to suggest that the omitted information was material in the sense that it would have caused him to be biased or sympathetic towards the plaintiff. *Id*. at 1232. Additionally, there was nothing to suggest that defense counsel would have used a peremptory challenge against him, even if he had disclosed the information. *Id*. The Fifth DCA reversed the trial court's decision, finding that the trial court abused its discretion in granting McClellan a new trial.

In the case at hand, just like in *Garnett*, there is nothing in Mr. Garrido's juror interview to suggest that he was biased against the Plaintiff because of a prior

accident. Any claim that Mr. Garrido was prejudiced against the Plaintiff could only be based on mere speculation. Mere speculation is insufficient to support such a claim. *State v. McGough*, 536 So. 2d 1187, 1189 (Fla. 2nd DCA 1989)

Additionally, there is no evidence to suggest that Plaintiff's counsel would have used a preemptory challenge to exclude Mr. Garrido from the jury, even if he had disclosed that he was in an accident.

Plaintiff claims that had Mr. Garrido expressed his opinion that, "Everyone is so money hungry they will do anything for it," she would have stricken him from the jury, because this statement evidences bias towards Plaintiff. However, Mr. Garrido already expressed such an opinion in jury selection, and Plaintiff did not exercise a strike against him.

The following exchange took place during jury selection:

> *Mr. Kuvin*: Mr. Garrido, tell me what your thoughts are on this topic that we've been discussing here for a little while – lawsuits. What do you think.
> *Mr. Garrido*: I'm kind of like indifferent about it. Like, I really don't – it's necessary. Some people, sure they need it. **But I feel like some people also do it for the money.** [T. I. 95]

Mr. Garrido went on to express his opinion regarding the frivolity of some lawsuits when the following interaction occurred:

> *Mr. Kuvin*: A little bit more like there's probably more frivolous lawsuits than should be in there?
>
> *Mr. Garrido*: Correct [T. I. 96]

Therefore, during jury selection, Plaintiff was well aware of Mr. Garrido's opinion that people just sue for money. Despite this fact, Plaintiff kept him on the jury. Plaintiff cannot now claim that Mr. Garrido's opinions are prejudicial to the point where she would have exercised a strike against him.

Furthermore, the only information that was revealed during the juror interview, was that Mr. Garrido was involved in some sort of accident. Plaintiff did not question Mr. Garrido about the accident. This left many questions unanswered, such as:

- Were there any injuries?
- Is there a pending claim or lawsuit?
- What were the damages?
- Who was at fault?
- Was this accident a car accident?
- Did this affect his impartiality in this case?

Without the answers to these questions, Plaintiff cannot show that she would have been likely to strike Mr. Garrido. See *State Farm Fire & Cas. Co. v. Levine*, 875 So. 2d 663, 666 (Fla. 3rd DCA 2004) (Due to State Farm's failure to develop the record by not questioning the juror, the trial court was not able to address the materiality prong of the *De La Rosa* test; without the information that would have

been elicited from interviewing the juror, State Farm could not show that it would have been likely to strike her.)

Since Plaintiff cannot not show that she would have been likely to strike Mr. Garrido had the accident been disclosed, she cannot not prove the materiality prong of the *De La Rosa* test.

Furthermore, a new trial is not warranted unless the Plaintiff presents evidence of actual bias or prejudice or that the Plaintiff did not receive a fair and impartial trial. *Companioni v. City of Tampa* at 414.

In *Companioni,* the Second DCA found that the City was not entitled to a new trial in a personal injury action after it discovered that two jurors, who had prior felony convictions, concealed their convictions and served on the jury, when there was no showing of bias, prejudice, or that city did not receive a fair and impartial trial. *Id.* at 404. The City never sought to interview the jurors, nor did it call any witnesses at the hearing on the motion for new trial. *Id*. at 416. The City did not present any information on the circumstances of the non-disclosure, or what impact, if any, the prior convictions had on their jury service. *Id.*

In the case at hand, Plaintiff did not obtain any information during the juror interview regarding the facts and circumstances surrounding Mr. Garrido's prior accident. Plaintiff did not present any testimony at the hearing on the motion for new trial about the circumstances surrounding this prior "accident." Instead,

Plaintiff chose to make her own presumptions. Thus, we know nothing about the circumstances of this accident or what impact, if any, it had on Mr. Garrido's jury service.

Plaintiff failed to present any evidence at the hearing on motion for new trial tending to establish that Mr. Garrido was biased against her, or that she did not receive a fair and impartial trial.

II. PLAINTIFF FAILED TO PRESERVE FOR APPEAL HER ARGUMENT OF JUROR NON-DISCLOSURE BY NOT RAISING IT IN HER MOTION FOR NEW TRIAL

The Plaintiff did not raise the argument of juror non-disclosure in her Motion for New Trial, therefore, the issue was not properly preserved for appeal, and should not be considered by this Court.

In *Saintiler v. State*, 109 So. 3d 303, 304 (Fla. 4th DCA 2013), Saintiler appealed a criminal conviction and sentence for robbery with a weapon, two orders revoking probation, and the denial of his Motion to Withdraw his pleas to those charges.

In Saintiler's Motion to Withdraw plea, the only ground alleged was that the plea "was not voluntarily entered into as appellant was not fully advised of his rights, and the consequences of his actions on that particular day." *Id.* On appeal, Saintiler made several arguments, including: 1) the trial court should have *sua sponte* ordered a competency evaluation after his counsel informed the court that

he had problems understanding and retaining information and prior competency issues, and 2) that he was misinformed about the maximum sentence. *Id*. at 305.

The Fourth DCA found that since neither of these issues were raised in Saintiler's Motion to Withdraw Plea, they were not preserved for appellate review. *Id.*

Similar to *Saintiler*, the Plaintiff in this case failed to preserve the argument of juror non-disclosure for appeal, by failing to raise it in her Motion for New Trial. Since the Judge did not issue a written opinion, it is unclear whether the Judge considered the merits of this issue in denying Plaintiff's Motion for New Trial.

Plaintiff's Motion for New Trial alleged four grounds: 1) juror misconduct created a manifest injustice; 2) The court erred by allowing defendant to present evidence of permanency; 3) the verdict is against the manifest weight of the evidence; and 4) additur.

Plaintiff's Motion for New Trial alleged juror misconduct on the part of Juror Garrido, due to his failure to comply with the court's Order to not post anything about jury service on social media. At no time did the Plaintiff file an Amended Motion for New Trial to add the non-disclosure issue even though there was more than a month from the time of the juror interview until the hearing on the motion for new trial.

Plaintiff's argument in this appeal, that she is entitled to a new trial based on Juror Garrido's failure to disclose information about a prior car accident during voir dire, was not raised in the Motion for New Trial, therefore, it is not preserved for appellate review. See *Mackey v. State*, 55 So. 3d 606, 610 (Fla. 4th DCA 2011)(Argument of prosecutorial misconduct was not properly preserved for review when Defendant's Motion for new trial did not allege prosecutorial misconduct, but only alleged newly discovered evidence).

III. JUROR GARRIDO'S TWEETS DO NOT AMOUNT TO PREJUDICIAL MISCONDUCT

Not all misconduct will vitiate a verdict even if it is improper. *Naugle v. Philip Morris USA, Inc*., 133 So. 3d 1235, 1238 (Fla. 4th DCA 2014). It is necessary to show that prejudice resulted or that the misconduct was of such character as to raise a presumption of prejudice. *Id.* The question is essentially a factual one, and the trial court is in the best position to determine the credibility of the witnesses and any prejudicial effect of the alleged misconduct because it hears the evidence regarding the alleged misconduct. *J.T. ex rel. Taylor v. Anbari,* 442 S.W.3d 49, 59 (Mo. Ct. App. 2014), *reh'g and/or transfer denied* (Feb. 13, 2014).

In *Taylor,* the Taylor's brought a wrongful death action against the Defendant's alleging the Defendant's negligence caused their mother's death. *Id.* at 49. The jury returned a verdict in favor of the Defendants. The Taylor's filed a

motion for new trial based on juror misconduct. The trial court denied the motion and the Taylor's appealed. *Id.*

The motion for new trial alleged that a juror had committed juror misconduct by posting on Facebook during the trial. Id. at 57. The pertinent portion of the actual instruction used at trial stated:

> "You are not permitted to communicate, use a cell phone, record, photograph, video, e-mail, blog, tweet, text, or post anything *about this trial or your thoughts or opinions about any issue in this case* to any other person or to the Internet, "facebook", "myspace", "twitter", or any other personal or public web site during the course of this trial or at any time before the formal acceptance of your verdict by me at the end of the case." (emphasis added)
> *Id.*

During the juror's interview, he testified that he remembered the trial judge instructing not to post on Facebook about the case. He admitted posting items in the evening after court recessed. *Id*. at 57. The juror testified that he did not post any details regarding the trial, and his posts were more of a way of "letting people know why they couldn't get in touch with him." *Id.* at 57-58.

Most of the juror's Facebook posts related to information on where he ate lunch and dinner. As the trial continued he also posted:

- "Begins day 6 of jury duty."
- "Back in the box for day 7."
- "Starting day 8 of jury duty."

Id. at 58.

The trial court found that the juror's posts did not reveal any details about the case, and "any appearance of impropriety was not more prejudicial to any party over the other." *Id.*

The Missouri Court of Appeals agreed, finding "that the remarks did not violate the court's instructions not to post on Facebook *about this case*." *Id*. at 59. The Court of Appeals went on to state:

> "We now live in an age of ubiquitous electronic communications. To say the comments in this case, which simply informed people Doennig was serving jury duty, were improper simply because they were posted on Facebook would be to ignore the reality of society's current relationship with communication technology."
>
> *Id*. at 59-60.

The Court of Appeals affirmed the trial court's denial of the motion for new trial.

Similar to *Taylor,* in case at hand, Mr. Garrido's tweets did not reveal any details about the case. Mr. Garrido testified in his juror interview that he did not post anything about the case. Additionally, he testified that he did not post from the court room.

Plaintiff's argument that Mr. Garrido's tweet, "Everyone is so money hungry they will do anything for it," evidences bias against Plaintiff and pre-judgment of her case, is without merit. [IB 18,20]. Mr. Garrido testified that this statement had nothing to do with this case. Mr. Garrido did not make any

statements during his juror interview to indicate bias against Plaintiff, or that he prejudged the case. He testified that he answered all of the questions posed to him in jury selection as fully and completely as he could.

Any appearance of impropriety, on the part of Mr. Garrido, was not more prejudicial to one party over the other. Therefore, the trial court did not abuse its discretion in denying Plaintiff's motion for new trial.

Plaintiff cites to *Dimas-Martinez v. State,* 2011 Ark. 515, 385 S.W.3d 238 (2011), a Supreme Court case out of Arkansas, to support her position that Mr. Garrido's act of tweeting should form the basis for a new trial. The facts of this case are distinguishable from the facts in *Dimas-Martinez.*

In *Dimas-Martinez,* Dimas-Martinez appealed an order convicting him of capital murder and aggravated battery and sentencing him to death and life imprisonment, respectively. *Id.* at 240. One of the arguments on appeal was that the trial court erred in refusing to dismiss a juror who had disregarded the court's orders by tweeting about the trial.

At the close of evidence, it was discovered that juror 2 had tweeted about the trial. Juror 2 was interviewed, and admitted that his tweet, in part, pertained to the case at hand. *Id.* at 247. The court refused to strike juror 2, and he remained on the panel. *Id.*

After the juror interview, and being informed that this conduct was impermissible, juror 2 continued to tweet about the case. *Id.* At two different times during juror deliberations, juror 2 posted a tweet. *Id.* Once counsel for Appellant learned of this, they moved for a new trial. *Id.* The trial court denied the motion for new trial, finding that Appellant was not prejudiced by the tweets. *Id.*

On appeal, the Supreme Court of Arkansas noted that not only did juror 2 admit that he disregarded the court's instruction not to tweet about the case, but even after he was questioned, he continued to tweet, specifically during sentencing deliberations. *Id.* The Supreme Court reversed, finding that the trial court's failure to acknowledge juror 2's inability to follow the court's directions was an abuse of discretion. *Id.* at 248.

This case is distinguishable from *Dimas-Martinez*. In *Dimas-Martinez*, juror 2 admitted (during trial) to disregarding the court's instructions not to tweet about the case. He then continued to disregard those instructions after being informed the conduct was impressible. Mr. Garrido was not given the opportunity to correct his behavior during trial, so his act of tweeting does not show the same defiance of the court's instructions.

Additionally, unlike juror 2 in *Dimas-Martinez*, Mr. Garrido did not admittedly disregard the court's order. Mr. Garrido did not believe that he did disregard the court's order. During Mr. Garrido's juror interview, he stated:

> "Well, I'm kind of confused as to why the whole thing is an issue because I personally didn't think I did anything wrong because I didn't talk about the case and that's what I took from your instructions. . ." [T.V. 612-13]
>
> "If I knew that, I wouldn't have done it to be honest with you." [T.V. 614]

Therefore, Mr. Garrido did not demonstrate an inability to follow the court's instructions.

Some of Mr. Garrido's comments are offensive to those of us who work in the system. However, they do not reveal a bias for one party against another. Rather, Mr. Garrido's comments reveal the emotional journey most first time jurors travel. He's concerned about the process and it is an interruption to his life. However, the longer he serves the more he realizes it is a worthwhile process and he actually enjoys working with the fellow jurors.

The trial judge devoted a significant amount of time to this issue; four separate hearings. She was in the best position to determine if the Plaintiff was prejudiced in this case. She followed the law on the issues and her decision should not be reversed.

CONCLUSION

For the reasons discussed above, the trial court's denial of Plaintiff's Motion for New trial was not an abuse of discretion. Therefore, this Court should affirm the trial court's order denying Plaintiff's Motion for New Trial.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Initial Brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman and is not in excess of the page limitation set forth in Rule 9.210(2) Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by email to Nichole J. Segal, Esq. (njs@FLAppellateLaw.com; jew@FLAppellateLaw.com), mailing address Burlington & Rockenbach, P.A., 444 West Railroad Avenue, Suite 350, West Palm Beach, FL 33401 and Spencer T. Kuvin, Esq., (skuvin@800goldlaw.com; service@800goldlaw.com) mailing address, Law Offices of Craig Goldenfarb, P.A., 1800 S. Australian Ave., Suite 400, West Palm Beach, FL 33409 this 8th day of January, 2016.

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