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JUROR NONDISCLOSURE

Following an adverse jury verdict, it has become common for parties to investigate the background of jurors for the purpose of seeking a new trial based upon juror nondisclosure. How far a party had to go during voir dire in investigating a potential juror in order to later complain of juror misconduct and what actually constituted juror nondisclosure has been a fuzzy area until the recent decision of the Supreme Court in Roberts v Tejada, 27 F.L.W. S158 (Fla. 2002). That case was a wrongful death medical malpractice case which resulted in a verdict for the plaintiff. During the voir dire, both the Court and counsel asked prospective jurors whether they had ever been a party to a lawsuit. Three of the jurors who denied any prior litigation history were later found to have been involved in extensive litigation. The trial court granted the defendant a new trial and the Third District reversed and reinstated the verdict. The Third District based its opinion on the defendant's failure to give an argument as to why the litigation experience could form the basis of a challenge for cause and established a rule that in order to complain of a failure to disclose litigation, a party had to check the jurors' names against the Clerk's lawsuit index prior to the swearing of the jury.

The Supreme Court reversed the Third District based on its prior opinion in De La Rosa v Zequeira, 659 So.2d 239 (Fla. 1995). The De La Rosa case set forth the following test at Page 241:

In determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

In Roberts, the Supreme Court concluded that a nondisclosure is material if the information prevented the attorney from making an informed judgment regarding a peremptory challenge. The Court cautioned, however, that the litigation does not necessarily have to involve an action similar or identical to the one at issue. The Court refused to establish a "bright line" test for materiality. The sole question is whether the nondisclosure is important enough so that the attorney would have been influenced in making a decision concerning a peremptory challenge. Questions such as the remoteness or recency of the litigation and the extensiveness of the litigation are matters to be considered by the trial court in determining whether the undisclosed information is material.

What constitutes concealment on the part of a juror was also discussed by the Court. The Court made it clear that it is not necessary to show that the concealment was intentional.

The Court specifically rejected the Third District's holding that the De La Rosa requirement of due diligence on the part of trial counsel requires an investigation of the venire during trial. To the contrary, the Court reflected an understanding that trial counsel cannot be in two places at one time and that it is

impractical to assume that an after hour search of the Clerk's office could be carried on while counsel is in the middle of trial. Attorneys, on the other hand, need to ask the right questions in the right language. Merely asking jurors about "litigation" may be clear to an attorney but not a layperson. It is the responsibility of counsel to interrogate the jury concerning this matter in such a way that a juror of common intelligence could understand the information requested. The Supreme Court invests trial judges with broad discretion in this area.

Whether the concealed information is material involves consideration of many factors. There is no per se rule that involvement in any particular prior legal matter is or is not material. This is a decision that should primarily be made at the trial level because materiality is fact intensive, and it is there that the dynamics and context of the entire trial process can best be evaluated. There may certainly be instances where such determination may be made as a matter of law based upon the particular circumstances, but appellate review must recognize the field of operation for determinations involving factual elements.

Thus the Supreme Court has expanded and amplified its prior holdings regarding what constitutes juror misconduct and when that misconduct should result in the granting of a new trial.