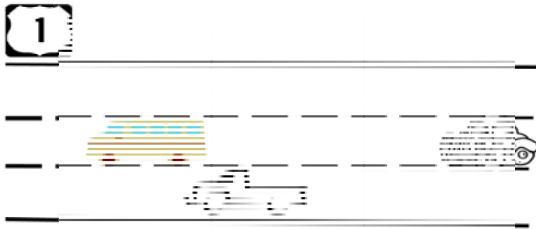


Harrah v. Perez & SunCruz



This matter arises out of an automobile accident that occurred in Brevard County, Florida at 9:10 a.m. on January 21, 2009. Plaintiff Victoria Harrah was a passenger in her boyfriend Lee Delvalle's white pickup truck and they were traveling North on US 1 in the left lane. David Perez was driving North on U.S. 1 in the center lane in a SunCruz shuttle bus with several passengers onboard. Harrah claims the bus driven by Mr. Perez struck the truck in which she was a passenger while Perez was attempting to change from the center lane to the left lane in which Harrah's vehicle was travelling. She claims injury to her right hand, low back and neck. She underwent an anterior cervical fusion with plates and screws.

DEFENSE CASE

Defense Witness – David Perez (Driver)

Mr. Perez testified that he saw Mr. Delvalle driving his white pickup truck very erratically and cutting in and out of lanes. Mr. Perez then lost sight of the pickup truck and continued driving for approximately 5-6 minutes. Mr. Perez was in the center of three lanes and decided to change into the left lane because he had to make a left turn several miles ahead. Mr. Perez said that he put his left turn signal on and he looked into his side view mirror and did not see any vehicles approaching.

Mr. Perez was approximately halfway into the left lane when he heard a horn and noticed that the white pickup truck was coming at a high rate of speed in the left lane behind him, and approaching the right rear of the bus. The driver of the white pickup truck then swerved into the center turn lane that divided the northbound and southbound part of the road. Mr. Perez testified that there was no impact.

Defense Witnesses – SunCruz Passengers

Four of the passengers onboard the SunCruz bus, Harold Mays, Shirley Mays, Leo Reynolds and Willadean Reynolds, were deposed and all testified that Mr. Perez was driving the speed limit and was operating the bus in a careful and safe manner. They all testified that the driver of the white pickup truck was driving erratically. They all stated that there was no impact between the two vehicles.

Defense Witnesses – Harold Mays & Shirley Mays (SunCruz passengers)

Mr. Harold Mays used to be an auto body mechanic and testified that after the accident he observed some marks to the right rear of the bus; however, they were old and not caused by a recent accident. He said that if the bus struck the white truck, the mirror would have "flown forward, not backwards." Mr. Mays had been on SunCruz busses before and Mr. Perez had previously been the driver and he always drove safe. Mrs. Mays testified that the white pick-up truck was driving erratically and that Mr. Perez did nothing wrong.

Defense Witnesses – Mr. & Mrs. Reynolds (SunCruz passengers)

Mr. Reynolds is a retired Navy Officer. He testified that he was sitting next to the window, three seats behind Mr. Perez. He remembered looking out of the window and seeing the Plaintiff smoking with the window rolled up. He said that he vividly remembered that because he used to be a smoker and he thought it was strange. Plaintiff had a cigarette in one hand and her cell phone in the other hand. Mr. Reynolds testified that the bus never struck the Plaintiff's truck. He stated, had there been an impact, he would have felt it. Mrs. Reynolds also said that Mr. Perez was a safe driver and had there been an impact, she would have felt it. Ms. Reynolds said, "in my opinion, this woman's just wanting some easy cash."

PLAINTIFF CASE (REVERSE SIDE →)

Plaintiff Witness – Keith Huff (witness 7-8 car lengths behind)

Keith Huff claims to have been driving 7-8 car lengths behind the SunCruz bus and stated that it was his belief the bus drifted into the left lane. At the same time the bus drifted, he saw a white pickup truck swerve into the center turn lane to avoid an impact. However, he could not testify if there was actually an impact between the bus and the pickup truck. Mr. Huff appeared at his deposition with a stained tank top and shorts, and flip flops. Mr. Huff has several prior arrests for robbery, felony littering, and driving under the influence. Mr. Huff currently runs a handyman business. Prior to that, he worked as a driver for a company that delivered linens to SunCruz. Mr. Huff sustained an injury and was out of work for some time. Right after coming back to work, his employer terminated him. It was clear that he was still bitter about being fired.

Plaintiff Witness – Lee DelValle (Driver)

On January 21, 2009, the day of the accident, Mr. DelValle said that he got out of bed around 6:30 a.m. It was his intent to go to the Jumping Flea Market with Victoria so they could work that day. They left Palm Shores RV Park and were in route to the flea market. He said traffic was very heavy that morning. He said that he was approximately 10 miles away from the flea market when he saw Mr. Perez driving a Sun Cruz bus in the center lane and when he looked up the next thing he remembers is seeing the bus veering into his lane and the back side rear tire right near his fender.

He claims that the bus struck the front passengers side fender and side view mirror of his pickup truck. He said that just as heard the crash he swerved into the center turning lane. He testified that “it felt like the air had just been taken away from me.” He said that his body shook back and forth.

He claims the bus smashed into his truck and that the side view passengers mirror slammed in against Victoria’s wrist. He claims that Victoria’s right wrist was red and swollen. He estimated that the bus was traveling approximately 50 mph at the time of impact.

Trial Skills: Voir Dire and Related Ethical Issues
October 11, 2011

I. RULES, STATUTES & CASE LAW

a. Federal Rule of Civil Procedure 47 – Selecting Jurors

(a) Examining Jurors. The court *may permit the parties or their attorneys to examine prospective jurors or may itself do so*. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause. [Emphasis added].

b. Florida Rule of Civil Procedure 1.431 – Trial Jury

(a) Questionnaire.

(1) The circuit court may direct the authority charged by law with the selection of prospective jurors to furnish each prospective juror with a questionnaire in the form approved by the supreme court from time to time to assist the authority in selecting prospective jurors. The questionnaire shall be used after the names of jurors have been selected as provided by law but before certification and the placing of the names of prospective jurors in the jury box. The questionnaire shall be used to determine those who are not qualified to serve as jurors under any statutory ground of disqualification.

(2) To assist in voir dire examination at trial, any court may direct the clerk to furnish prospective jurors selected for service with a questionnaire in the form approved by the supreme court from time to time. The prospective jurors shall be asked to complete and return the forms. Completed forms may be inspected in the clerk's office and copies shall be available in court during the voir dire examination for use by parties and the court.

(b) Examination by Parties. *The parties have the right to examine jurors orally on their voir dire*. The order in which the parties may examine each juror shall be determined by the court. The court may ask such questions of the jurors as it deems necessary, but the right of the parties to conduct a reasonable examination of each juror orally shall be preserved. [Emphasis added].

II. ADDRESSING JUROR MISCONDUCT

a. **Definition of “Juror Misconduct”**

Juror misconduct is the intentional or unintentional behavior by jurors in contravention of jury instructions, including (1) exchanging information about the case with persons or sources outside the courtroom or jury room, or (2) providing misinformation or disinformation during voir dire.

b. **Effect Of Juror Misconduct**

When juror misconduct is discovered, there may be the potential for a mistrial or new trial.

c. **Test to Determine New Trial**

There is a three-prong test the courts use to determine if a new trial is warranted. “[T]he complaining party must establish: 1) the information is relevant and material to jury service in the case; 2) the juror concealed the information during questioning; and 3) the failure to disclose the information was not attributable to the complaining party’s lack of diligence.” *De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995).

d. **Types of Juror Misconduct**

Baptist Hosp. v. Maler – Case involved statements made to counsel by two jurors after a medical malpractice trial that the jury was sympathetic to the plaintiff and believed an insurance company would pay the verdict, not the hospital itself. Inquiry into jurors’ verdict is allowed if there were overt prejudicial acts, but not if it is to elicit information about subjective impressions or opinions of jurors. The Florida Supreme Court held hospital failed to show that there was any type of agreement amongst the jurors to disregard their oaths and ignore the law, and evidence clearly showed that these statements were mere subjective impressions or opinions. Therefore, inquiry into jury’s verdict was not authorized. 579 So. 2d 97 (Fla. 1991).

Dery v. State – In a first-degree murder case, juror failed to disclose she took a forensic science course over the internet. She disclosed during the trial that she knew one of the witnesses as he was her former instructor. Because the State’s case relied heavily on forensic evidence, the juror’s education and knowledge on this topic was relevant and material. The Second District Court of Appeals reversed sentence and remanded case for new trial. 2010 WL 2836123 (Fla. 2d DCA July 21, 2010).

Gamsen v. State Farm Fire and Casualty Co. – Two jurors failed to disclose prior litigation history. Counsel failed to inquire further about these two jurors’ litigation background when their answers during voir dire indicated they may have additional relevant information about the topic. The Fourth District Court of Appeals found the three-

prong test established in *De La Rosa* was not met. "[T]he moving party must demonstrate . . . that the voir dire question was straightforward and not reasonably susceptible to misinterpretation." (citations omitted) Also, it will not be considered concealment when counsel does not inquire further into a juror's ambiguous response during voir dire. 2011 WL 3108437 (Fla. 4th DCA July 27, 2011).

Hicks v. Wipperfurth – Torts case involving improper lane change. Juror failed to disclose prior felony convictions and his involvement in several automobile accidents in the past, one of which occurred less than 2 years prior to the trial and resulted in finding that the juror was at fault for improperly changing lanes. There was no error in granting the plaintiff's motion for a new trial based, in part, on the juror's failure to disclose this information. 36 Fla. L. Weekly D2107b (Fla. 5th DCA Sept. 23, 2011).

e. **Other Types of Juror Misconduct**

1. Juror Googled defendant and informed other jurors about information found.
2. Juror posted progress of deliberations on the Internet.
3. Juror looked up defendant's prior convictions and published to the other jurors.
4. Jurors consulted an outside accountant during deliberations.
5. Jurors Googled lawyers and the parties, researched definitions and information on Wikipedia, and looked for evidence excluded from the case.

III. ETHICAL (AND NEAR ETHICAL) CONSIDERATIONS

a. **Communications and Questions in Voir Dire**

1. Communicating with Witness (when permissible and when not)

Governed by FRPC 4-3.5 (d). See section III.b below.

2. Impugning the Judiciary

Florida Bar v. Abramson – During voir dire, Defendant's counsel told the jurors: "Okay, so for all you know, the judge was the one that was completely disrespectful, lacking in respect, lacking in professionalism, and it was not me; you don't know that because you were not here earlier, correct?" Counsel also asked the jurors whether they thought the judge's conduct was appropriate. Counsel's conduct violated FRPC 4-3.5(a) (Impartiality and Decorum of the Tribunal – Influencing Decision Maker), 4-3.5(c) (Impartiality and Decorum of the Tribunal – Disruption of Tribunal), 4-8.2(a) (Judicial and Legal Officials – Impugning Qualifications and Integrity of Judges or Other Officers), and 4-8.4(d) (Misconduct prejudicial to the administration of justice). Counsel's ethical alternative was by writ or appeal. 3 So. 3d 964, 965-66 (Fla. 2009).

3. Impugning a Party or Witness

Ferere v. Shure – Plaintiff sued physician for negligence. During voir dire, plaintiff's counsel asks a potential juror: "Have you ever heard of the term 'doctoring of records?' Do you know what that means?" Plaintiff did not plead fraud or spoliation in the complaint. The question was improper because it left the jury with an improper impression, and resulted in a mistrial. 65 So. 3d 1141, 1143 (Fla. 4th DCA 2011).

Carroll v. Dodsworth – Plaintiff sued for damages sustained in automobile accident. During voir dire, defendant's counsel asked whether any of the jurors had "read any of the investigative reports about [Plaintiff's treating physician/principal expert witness]?" The question was improper because it "created a cloud over the credibility of a key witness for the plaintiffs." The trial court erred in refusing to declare a mistrial. 565 So. 2d 346, 347-49 (Fla. 1st DCA 1990).

4. Use of Hypothetical Questions (Facts of the case - not allowed)

Jackson v. State – Defendant was charged with armed robbery. During voir dire, the prosecutor asked a juror: "How would you feel if the numbers didn't add up, or say evidence didn't add up, okay, and at the end of the day, there's no science, DNA, fingerprints?" This question was improper because it "attempted to extract a commitment from the juror in advance on what the juror's decision would be if there were no scientific evidence, DNA, or fingerprints," and was especially objectionable because there was no such evidence in the case. 881 So. 2d 711, 714 (Fla. 3d DCA 2004).

5. Use of Hypothetical Questions (Law of the case - allowed)

Moore v. State – Prosecutor described hypothetical purse snatching to ask "whether the venire would be satisfied solely with testimony [as opposed to testimony and physical evidence] if the witness was credible and the testimony proved the case beyond a reasonable doubt." The court explained to the venire that no specific type of evidence and struck for cause the jurors who stated they could not convict without physical evidence. "Hypothetical questions 'designed to determine whether a the jurors could correctly apply the law, are permissible.'" The trial court did not err by permitting the hypothetical. 939 So. 2d 111, 1117-8 (Fla. 3d DCA 2006).

6. Normative Questions

Sackett v. State – Defendant charged with aggravated battery on pregnant woman. During voir dire, the prosecutor asked the jurors: "Do you think we need to have a real serious injury in order to be here, that we should wait for that to happen?" The prosecutor also asked a prospector juror who was a nurse: "Do you talk to other

nurses as well about the cycle of violence that they see?” Both were improper questions “because they clearly implied to the prospective jurors that if [the defendant] did not strike [the victim] this time he would do so in the future and the epidemic of domestic violence must be stopped.” 764 So. 2d 719, 721 (Fla. 2d DCA 2000).

7. Identifying Racial, Ethnic, or Gender Bias

Powell v. Allstate Ins. Co. – Overt acts of misconduct in the form of jurors openly expressing racial biases by the form of racial jokes and statements are “violative of the guarantees of both the federal and state constitutions which ensures all litigants a fair and impartial jury and equal protection of the law.” 652 So. 2d 354, 358 (Fla. 1995).

8. Discriminatory Use of Peremptory Challenges

Overstreet v. State – Method for identifying and eliminating discriminatory peremptory challenges:

[Step 1:] A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met . . . , the court must ask the proponent of the strike to explain the reason for the strike.

[Step 2]: At this point the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation.

[Step 3]: If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness.

(Citation omitted.) The nonexclusive factors that may identify discrimination based challenges include the following:

- (1) alleged group bias not shown to be shared by the juror in question;
- (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror,
- (3) singling the juror out for special questioning designed to evoke a certain response,

- (4) the prosecutor's reason is unrelated to the facts of the case, and
- (5) a challenge based on reasons equally applicable to jurors who were not challenged.

(Citation omitted.) 712 So.2d 1174, 1176-7 (Fla. 3d DCA 1998).

b. Florida Rules of Professional Conduct

1. Rule 4-3.5 Impartiality and Decorum of the Tribunal

(a) Influencing Decision Maker.

A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.

(d) Communication With Jurors.

A lawyer shall not:

- (1) before the trial of a case with which the lawyer is connected, communicate or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected
- (2) during the trial of a case with which the lawyer is connected, communicate or cause another to communicate with any member of the jury;
- (3) during the trial of a case with which the lawyer is not connected, communicate or cause another to communicate with a juror concerning the case;
- (4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.

2. Rule 4-8.2 Judicial and Legal Officials

(a) Impugning Qualifications and Integrity of Judges or Other Officers.

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

3. Rule 4-8.4 Misconduct

A lawyer shall not:

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic

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