NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

VANDERBILT INN ON THE GULF d/b/a VANDERBILT-BEACH ASSOCIATES LIMITED PARTNERSHIP, TIMEMED LABELING SYSTEMS, JERRY NERAD and VAN-DEV, INC.,	)	
Appellants,	)	
v.	)	Case No. 2D01-1097
SHERRI PFENNINGER,	)	
Appellee.	)	

Opinion filed February 8, 2002.

Appeal from the Circuit Court for Collier County; Hugh D. Hayes, Judge.

Angela C. Flowers of Kubicki Draper, Miami, for Appellants.

Michael R.N. McDonnell of McDonnell Green Trial Lawyers, Naples, for Appellee.

COVINGTON, Judge.

The appellants, Vanderbilt Inn on the Gulf d/b/a Vanderbilt-Beach Associates Limited Partnership, Timemed Labeling Systems, Jerry Nerad and Van-Dev, Inc. (the defendants in the trial court), seek reversal of an order granting a new trial in favor of the appellee, Sherri Pfenninger (the plaintiff in the trial court). A new trial was

granted based upon Juror John Allen's failure to disclose his past involvement in litigation. We reverse.

This case arises from an accident that occurred at the Vanderbilt Inn, where Pfenninger fell through a broken chair near the appellants' outdoor bar. As a result, she brought a premises liability action. Pfenninger alleged damages for injuries resulting from the appellants' failure to correct a dangerous condition. A trial of the case was conducted in October and November 2000.

During voir dire, Pfenninger asked the venire, "Have any of you ever had any prior litigation that you have been involved in, any lawsuits of any sort?" Four prospective jurors stated that they had, while Juror Allen failed to so indicate.

After the conclusion of the trial, on November 1, 2000, the jury returned a verdict in the appellants' favor. On November 13, 2000, Pfenninger moved for a new trial on the basis of, inter alia, juror misconduct. As grounds for the motion, Pfenninger asserted that after the verdict, "a records check was performed regarding Juror Allen." According to that check, Juror Allen was a defendant in two lawsuits and might have been involved in numerous other lawsuits.

Approximately two months later, Pfenninger filed a supplemental motion. In that motion, she asserted that she had discovered seven other undisclosed instances of litigation involving Juror Allen and/or his wife. Two of the lawsuits involved only Juror Allen's wife. In two of the other five proceedings, both Juror Allen and his wife were defendants. One such case was a civil action filed in 1993 involving a contract dispute for $1157, and another was a 1997 civil suit involving $3000. It was also revealed that, in 1993, both Juror Allen and his wife filed for bankruptcy. Juror Allen, alone, was a party in a 1995 domestic relations action in Pennsylvania, as well as a contempt of

court proceeding concerning child support enforcement. On April 10, 2000, an order entered in that cause was registered in Collier County, Florida.

In De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995), the Florida Supreme Court explained:

> 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 information was not attributable to the complaining party's lack of diligence.

De La Rosa, 659 So. 2d at 241 (citations omitted).

In the instant case, it is unnecessary to address the first two prongs of De La Rosa. As to the due diligence prong, however, we note that the eight-day trial in this case took place in Collier County. This cause was thus tried in the very same county where the aforementioned Pennsylvania order pertaining to Juror Allen was registered. During the two-week period in which the instant trial took place, Pfenninger easily could have checked the public records of Collier County and been alerted to the Pennsylvania litigation involving Juror Allen. Armed with that information, Pfenninger could have addressed the issue of juror misconduct with the trial court before deliberations were held and, if necessary, had an alternate juror seated. Rather, Pfenninger waited for the jury to return its unfavorable verdict before investigating and/or raising the issue.

As quite articulately stated in Birch v. Albert, 761 So. 2d 355, 359 (Fla. 3d DCA 2000) (Sorondo, J., concurring), "The issue of jury non-disclosure has become the losing litigant's trump card to be played immediately after the return of a trial jury's adverse verdict." Here, Pfenninger had ample opportunity to check the Collier County

public records before the jury rendered its verdict; yet, she failed to do so. Thus, because she has failed to meet the due diligence requirement of De La Rosa, she cannot now attempt to set aside an unfavorable verdict. See also Tejada v. Roberts, 760 So. 2d 960, 966 (Fla. 3d DCA), review granted, 786 So. 2d 1188 (Fla. 2000) (holding that "the time to check the jurors' names against the clerk's lawsuit index is at the conclusion of jury selection"); Silva v. Lazar, 766 So. 2d 341, 343 (Fla. 4th DCA 2000) (finding that "[f]ailure to make such a timely search [of the clerk's lawsuit index] where it would have uncovered the offending information, rather than waiting to do so after the verdict, may be at least some evidence of a lack of diligence"); Bornemann v. Ure, 778 So. 2d 1077, 1079 (Fla. 4th DCA 2001) (finding no abuse of discretion in court's denial of a motion for new trial where "trial lasted over two weeks, and the lawsuit index at the courthouse could have been checked in a matter of minutes").

For the reasons stated herein, we reverse the order granting Pfenninger a new trial and remand with directions to reinstate the jury verdict.

Reversed and remanded.

WHATLEY and SILBERMAN, JJ., Concur.