No. 18-11636-EE

In the United States Court of Appeals for the Eleventh Circuit

LISA BOSTICK,

Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:16-cv-1400, Hon. Virginia M. Hernandez Covington

APPELLANT'S BRIEF OF LISA BOSTICK

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Barnett, Karen – Counsel for Defendant-Appellee;
2. Blanco, Alejandro D. – Counsel for Plaintiff-Appellant;
3. Bostick, James – Witness (husband of Plaintiff-Appellant);
4. Bostick, Lisa N. – Plaintiff-Appellant;
5. Brookins, Starr L. – Counsel for Defendant-Appellee;
6. Burns, P.A. – Appellate counsel for Plaintiff-Appellant;
7. Burns, Thomas A. – Appellate counsel for Plaintiff-Appellant;
8. Chistolini, Paul U. – Counsel for Defendant-Appellee;
9. Costa, Caitlin Elizabeth – Trial counsel for Plaintiff-Appellant;
10. Covington, Hon. Virginia M. Hernandez – United States District Judge;
11. Demps, Cornelius – Counsel for Defendant-Appellee;
12. Goker, Arda – Appellate counsel for Plaintiff-Appellant;
13. Grilli, Peter J. – Mediator;
14. Hansen, Mark – Representative for Defendant-Appellee;
15. Lancaster, Robert J. – Mediator;
16. Maddux, Michael P. – Trial counsel for Plaintiff-Appellant;
17. Michael P. Maddux, P.A. – Trial counsel for Plaintiff-Appellant;

18. Proulx, Aaron W. – Counsel for Defendant-Appellee;

19. Sansone, Amanda A. – United States Magistrate Judge;

20. Smoak, Chistolini & Barnett, PLLC – Counsel for Defendant-Appellee;

21. Smoak, William G.K. – Counsel for Defendant-Appellee;

22. State Farm Mutual Automobile Insurance Company – Defendant-Appellee.

No other publicly traded company or corporation has an interest in the outcome of this appeal.

December 17, 2018

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant, Lisa Bostick, requests oral argument. This appeal from a 10-day jury trial involves a somewhat extensive record that spans 2,121 pages of trial transcripts and over 200 docket entries. The issue involves the striking of a holdout juror for cause during the second day of deliberations because other jurors claimed he had used bad language and acted physically confrontational three days earlier during jury deliberations (instead of giving a modified *Allen* charge or declaring a mistrial). Oral argument will assist the Court.

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STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1332(a)(1). Bostick sued her insurer, State Farm, in Florida state court for refusing to pay its underinsured motorist coverage. Doc. 2. State Farm timely removed under 28 U.S.C. § 1441 and § 1446, claiming there was complete diversity of citizenship (because Bostick was a Florida citizen and State Farm was an Illinois citizen) and the amount in controversy exceeded $75,000. Doc. 1 at 2; *see also* Docs. 18; 19. Bostick moved to remand the action to state court (Doc. 11), and State Farm opposed (Doc. 14). The District Court ruled Bostick's lawsuit was not a "direct action" against an insurer within the meaning of 28 U.S.C. § 1332(c)(1), so State Farm was indeed a citizen of Illinois rather than a citizen of Florida (the state of citizenship of Bostick, its insured). Doc. 20 at 6-7.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. After a 10-day jury trial, the District Court entered judgment on October 31, 2017. Doc. 145. Bostick timely moved for a new trial 28 days later on November 28, 2017. Doc. 163; *see also* Doc. 166. The District Court entered its order denying a new trial on March 20, 2018. Doc. 176. Bostick timely appealed 30 days later on April 19, 2018. Doc. 182.

STATEMENT OF THE ISSUES

Did the District Court abuse its discretion when it struck a holdout juror for cause during the second day of jury deliberations on the basis that other jurors claimed he had used bad language and acted in a physically confrontational way three days earlier instead of giving a modified *Allen* charge or declaring a mistrial?

STATEMENT OF THE CASE

Nature of the case

This is an underinsured motorist lawsuit. *See* Doc. 2. Bostick, an accounting professor at the University of Tampa, sued State Farm, her insurance company, for refusing to pay its underinsured motorist coverage. *See* Doc. 2. She did not also name the negligent driver or that driver's insurer as defendants. *See* Doc. 2. Before trial, the litigants stipulated that the driver who rear-ended Bostick was negligent. *See* Doc. 140.

During trial, the primary issues that remained for the jury's determination were whether the accident was the cause of Bostick's injuries and whether those injuries were permanent. *See* Docs. 86; 140. During the second day of deliberations—and only 20 minutes after the District

Court had stricken a holdout juror for cause—the jury returned a $0 defense verdict. *See* Doc. 140. Bostick now appeals. *See* Doc. 182.

Course of proceedings

Bostick is a tenured accounting professor at the University of Tampa. Doc. 197 at 162-165. During the morning rush hour on the day of her birthday, a negligent driver rear-ended her. Doc. 197 at 174-183.

After settling with the negligent driver's insurance company for the policy limit, Bostick sued State Farm in Florida state court for failing to provide coverage under the underinsured motorist provision of her policy. Doc. 2. State Farm answered and asserted affirmative defenses. Doc. 3.

Thereafter, State Farm removed the case to the District Court. Doc. 1. Bostick moved to remand the case back to state court. Doc. 11; *see also* Docs. 18; 19; 19.1. State Farm opposed. Doc. 16. The motion to remand was denied. Doc. 20.

The case proceeded to a 10-day jury trial, which featured testimony and evidence from the negligent driver, treating physicians, compulsory medical examiners, forensic and biomedical engineers, family members, colleagues, and Bostick herself. Docs. 119; 120; 122; 123; 125; 129; 132; 133; 134; 136; 139. In broad overview, Bostick presented testimony and

evidence that, due to the car accident, she had suffered a mild traumatic brain injury and various other injuries to her jaw, neck, and knees, all of which were permanent, required medical treatment, and interfered with her ability to continue working as a tenured accounting professor at the University of Tampa. *See infra* Statement of the facts. In contrast, State Farm presented testimony and evidence that Bostick either was not permanently injured or had injuries (which required medical treatment) that were not caused by the car accident. *See infra* Statement of the facts.

After closing arguments and instructions, the first day of jury deliberations began at 3:46 p.m. on a Friday. Doc. 200 at 184. Due to counsels' ongoing redactions, the jury did not receive the paper evidence for approximately 45-60 minutes. Doc. 158 at 15. By 6:20 p.m., however, there had been some fuss about a holdout juror, Jonathan Samelton, allegedly using vulgar and racist language and behaving in a physically confrontational manner. Doc. 200 at 184-201. After discussing the issue with counsel, the District Court released the jury and directed them to reconvene deliberations after the weekend. Doc. 200 at 199-200.

The following Monday morning at 9:00 a.m., jury deliberations reconvened. *See* Doc. 201 at 3. But by 9:40 a.m., there again were

complaints about the holdout juror's conduct. *See* Doc. 201 at 3. The District Court heard from all the other jurors, who agreed that the holdout juror in question had stopped using vulgar and racist language or behaving in a physically confrontational manner; instead, he was now simply set in his viewpoint, reclining on a sofa, and refusing to deliberate any further. Doc. 201 at 3-5, 10-39. The District Court also heard from the holdout juror, who denied having used vulgar and racist language or having behaved in a physically confrontational manner the previous Friday. Doc. 201 at 41-46.

Over Bostick's objection, the District Court struck the holdout juror for cause. Doc. 201 at 49-53. Less than 20 minutes later, the jury returned a $0 defense verdict. Doc. 201 at 54-56. The special verdict form concluded that the auto accident was not "a legal cause of loss, injury, or damage" to Bostick. Doc. 140 at 1. Based on that verdict, the District Court entered judgment in State Farm's favor. Doc. 145.

After trial, Bostick's counsel filed a notice, which explained that the stricken juror had left two voicemails for him. Doc. 146. The notice requested a hearing and a juror interview. Doc. 146. State Farm did not oppose the request for a hearing, but did oppose the request for a juror

interview. Doc. 149. The District Court convened a preliminary hearing. Docs. 148; 151; 158. During that hearing, Bostick orally moved for a mistrial and to interview the juror. Docs. 152; 158 at 19-21. Both requests were denied. Docs. 154; 158 at 20.

A week later, Bostick moved to interview the entire petit jury panel. Doc. 157. State Farm opposed. Doc. 162. It was denied. Doc. 174.

Separately, Bostick filed a timely motion for new trial (Doc. 163), which she later supplemented (Doc. 166). State Farm opposed (Doc. 165) and moved to strike the supplement (Doc. 167). The District Court denied the motion for new trial. Doc. 176.

This timely appeal followed. Doc. 182.

Statement of facts

A. The trial

1. Bostick's case

Bostick presented before-and-after testimony from her family, her friend, the negligent driver, her colleagues, and herself. *See infra* Statement of Facts A.1.a. Bostick also presented testimony from a forensic engineer and her treating physicians regarding engineering and medical

causation. *See infra* Statement of Facts A.1.b. Lastly, Bostick presented damages testimony. *See infra* Statement of Facts A.1.c.

a. Before-and-after testimony

Kathryn Bostick, Bostick's daughter, and James W. Bostick, Bostick's husband, testified how Bostick reacted to and changed after the accident. Doc. 195 at 120-46; 196 at 150-67, 174-78, 180-81, 185-86. Patricia Daphne Ullman, Bostick's friend, testified about how Bostick now wore earplugs at loud events, no longer sailed, had become socially withdrawn, and was depressed and anxious. Doc. 203 at 55-73. Blair Skinner Alsup, the negligent driver, testified about the accident and Bostick's demeanor thereafter. Doc. 195 at 154-60, 165-67, 170-71.

Prof. Daniel A. Verrault, a professor at the University of Tampa who was the chair of the accounting department, and Prof. Robert L. Beekman, an economics professor at the University of Tampa who was both a colleague and a social acquaintance of Bostick, both testified that Bostick's speech became slurred and her thought processes became disjointed immediately after the accident, which prevented her from functioning at the level required for a university professor. Docs. 197 at 84-94, 96-98, 109-18; 194 at 150-60, 162-68, 172-73, 183-89. Prof. Cheri

Etling, a finance professor at the University of Tampa, testified that Bostick no longer acted like herself after the accident and had organizational and sequencing problems, which impeded her ability to continue as a professor. Doc. 197 at 129, 132-37, 152-53.

Finally, Bostick herself testified about the accident, her injuries, and her suicide attempts. Docs. 197 at 175-84, 194-207, 215-22, 227-31, 236-52; 203 at 6-11, 13-17, 20-25, 28-30, 42-51.

b. Forensic engineering and medical causation

Steven Koontz, a forensic engineer, testified that the forces involved in the accident were sufficient to cause Bostick's injuries. Docs. 195 at 174, 194, 205-10; 196 at 104-18.

Dr. Joseph Chiaramonte, a treating physician in internal medicine, testified that after the accident, Bostick was walking funny and had neurological problems. Doc. 198 at 164-67, 183-89. Dr. Randall Benson, a behavioral neurologist, testified that Bostick had a suffered a permanent traumatic brain injury. Doc. 198 at 52, 54, 57-59, 75-76, 80-84, 101-02, 127, 132-33. Dr. Gregory T. Flynn, a board-certified physician in emergency and anesthesiology who treated Bostick for pain, testified that Bostick's chronic pain symptoms did not begin until after the accident. Doc.

195 at 23-24, 27-28, 41-42, 92. Dr. Thomas J. Boland, a specialist in oral and maxillofacial surgery who treated Bostick, testified that a whiplash mechanism during the accident caused her jaw injury (dislocated cartilage); it was not caused by a chronic degenerative condition or clenching. Doc. 194 at 9-10, 15-18, 21-23, 26-29, 37, 41-42, 102. Dr. Eric Michael Williams, an osteopathic treating physician, testified that Bostick had temporary soft tissue injuries to her neck, back, knees, and wrists, along with permanent injuries to her jaw and brain (*i.e.*, a mild traumatic brain injury). Doc. 194 at 208-09, 214-17, 222, 241, 247.

c. Damages

Dr. Christopher M. Leber, a life care planner, testified about the life care plan Bostick would need to have for the rest of her life. Docs. 196 at 187-212; 197 at 7-76. Robert Johnson, a forensic economist, calculated the present value of Bostick's lost earning potential and life care expenses. Doc. 203 at 91-162; *see also* Doc. 203 at 117-18, 120.

2. State Farm's case

State Farm presented expert testimony regarding causation and her alleged injuries.

Dr. Nelson Castellano, an oral and maxillofacial surgeon, testified that Bostick did not have a jaw injury that was caused by the accident. Doc. 203 at 168, 190-91, 195-96, 206. Dr. Randy Vanderploeg, a neuropsychologist, testified that Bostick did not have a traumatic brain injury and that her stuttering was due to stress. Doc. 202 at 12-13, 46-48, 83-84, 100, 106-07. Ronald Fijalkowski, a biomechanical engineer, criticized Mr. Koontz's testimony and opined that the forces involved in the accident were insufficient to cause Bostick's injuries. Doc. 199 at 29, 31-36, 45-47, 52-53, 56-57, 60-64, 73-74, 81-82, 87-89, 118-19, 130-33.

B. The jury deliberations

1. Friday, the first day of deliberations

The first day of jury deliberations began at 3:46 p.m. on a Friday. Doc. 200 at 184. Due to counsels' ongoing redactions, the jury did not receive the paper evidence for approximately 45-60 minutes. Doc. 158 at 15. By 6:20 p.m., however, there had been some fuss about a holdout juror allegedly using vulgar and racist language and behaving in a physically confrontational manner. Doc. 200 at 184-201.

Specifically, the juror who became the holdout juror sent the District Court a note complaining about harassment. Docs. 144.56; 200 at

184. Initially, the District Court thought it was from a female juror complaining about a male juror being forceful. *See* Doc. 200 at 184-186. Off the record, the District Court spoke with two jurors about the situation. Doc. 200 at 188. Based on those conversations, the District Court concluded the jury was simply having "some disagreements" that were "along the lines of the way it's expressed as opposed to having a legitimate disagreement," which is "what you want juries to have" so they can "flush it out." Doc. 200 at 188.

The District Court suggested giving a modified *Allen* charge so a verdict could be returned that evening. Doc. 200 at 189. In that regard, the District Court repeatedly emphasized that the amount of money and time invested in the trial was "staggering," so it would be "horrible" if the jury could not return a verdict. Doc. 200 at 189-190. Due to the holdout juror's scheduling conflict with returning on Monday, State Farm suggested that he be dismissed for cause. Doc. 200 at 191. Bostick did not agree. Doc. 200 at 191. The District Court therefore decided to wait until 7:00 p.m. before taking any further action. Doc. 200 at 191-193.

At 6:45 p.m., the District Court spoke with another juror off the record. Doc. 200 at 193. This juror told the District Court that six of the

jurors had decided on the verdict, but the holdout juror was "not in agreement" and "almost threatened to fight them" by daring them "to swing at him." Doc. 200 at 194. Bostick asked the District Court to release the jury for the evening and direct them to reconvene after cooling off over the weekend on Monday morning. Doc. 200 at 195. The District Court asked whether it should strike the holdout juror. Doc. 200 at 195. State Farm asked the District Court to strike the holdout juror, but conceded that, based on the facts known at that point in time, there was no basis to strike the holdout juror for cause. Doc. 200 at 196. Bostick opposed the request to strike the holdout juror. Doc. 200 at 196-197.

When the jury returned to the courtroom, the District Court inquired whether they all could return to continue deliberations at 9:00 a.m. on Monday morning. Doc. 200 at 198-199. The holdout juror said he could not return until 11:00 a.m. on Monday morning (due to a rescheduled appointment with his electric company). Doc. 200 at 199. The District Court asked the rest of the jurors if they could return at 11:00 a.m., but they refused and preferred 9:00 a.m. Doc. 200 at 199. The District Court therefore directed the jury to reconvene at 9:00 a.m. on Monday and indicated it might strike any juror who did not appear at that time.

See Doc. 200 at 199-200. After the jury exited the courtroom, the District Court again spoke with the holdout juror off the record. Doc. 200 at 200-201. After that conversation, the proceedings adjourned at 7:04 p.m. Doc. 200 at 201.

2. Monday, the second day of deliberations

The following Monday morning at 9:00 a.m., jury deliberations reconvened. *See* Doc. 201 at 3. But by 9:40 a.m., there again were complaints about the holdout juror's conduct. *See* Doc. 201 at 3.

Specifically, according to the court security officer, two of the female jurors said that on Friday, the holdout juror had gotten "chest to chest" with one of the male jurors and "threatened to punch him out." Doc. 201 at 4-5. State Farm inquired whether that was juror misconduct that required the holdout juror to be stricken for cause. Doc. 201 at 7. The District Court responded, "maybe," depending on what the other jurors had to say. Doc. 201 at 7. The District Court also reported that one of the jurors with whom she had spoken on Friday had explained that morning that the holdout juror had used "racist" language. Doc. 201 at 8. Before hearing from the individual jurors, the District Court reminded counsel to be careful not to inquire about the jury's deliberations. Doc. 201 at 9.

The jury foreman, William Moffitt, explained that, on Friday, the holdout juror had acted in a physically confrontational manner and used profanities and racial slurs. Doc. 201 at 11-13. When Bostick inquired further, the foreman clarified that the "aggressive" and "threatening" behavior had stopped since Friday. Doc. 201 at 13. Instead, the holdout juror was merely set in his view of the case. Doc. 201 at 13. When State Farm asked if the other jurors were still feeling unsafe to be in a room with the holdout juror, the jury foreman responded, "we are all comfortable just sitting there in silence and having chitchat," but "the deliberative process has stopped" because "we know where he's going to go with it." Doc. 201 at 14.

A second juror, Thomas Barone, explained that the holdout juror's language had gotten out of control on Friday. Doc. 201 at 16. In that regard, Mr. Barone explained the holdout juror was upset about not being elected the foreman and the rest of the jury refusing to reschedule the time trial started each day. Doc. 201 at 16-18. But Mr. Barone explained that his behavior had changed that morning; instead of acting physically confrontational or using inappropriate language, the holdout juror was just "laying on the couch in there" with his "eyes shut" and "just won't

talk." Doc. 201 at 18-19. In response to Bostick, Mr. Barone further clarified that the threats had stopped that morning. Doc. 201 at 20.

A third juror, Marlene Peterson, complained that the holdout juror would not explain the "reasoning behind" his view of the case. Doc. 201 at 23-24. Ms. Peterson explained her belief that the holdout juror did not understand the meaning of the word "negligence" in the first question of the special verdict form. Doc. 201 at 23. She also complained that the holdout juror "doesn't want to follow the [jury] instructions." Doc. 201 at 24. Lastly, she also described the "yelling" and "profanity" that transpired on Friday, which got "a little bit out of hand." Doc. 201 at 23. When Bostick inquired, Ms. Peterson explained that the jury could "finish the deliberations in 15 minutes" if the holdout juror was removed. Doc. 201 at 25. State Farm inquired whether the holdout juror was "refusing to follow the Court's instructions," and Ms. Peterson said, "Yes, that's what I'm saying." Doc. 201 at 26.

A fourth juror, Deborah Engert, complained that the holdout juror had called the other jurors "white asses," "the B-word," and "F-U." Doc. 201 at 28. Ms. Engert also complained that when one of the *other* jurors exclaimed "he was going to hit someone," the holdout juror responded, "if

that's what you need to do, go ahead" because "I've been in jail before, so it doesn't matter." Doc. 201 at 28. Nevertheless, in response to Bostick, Ms. Engert conceded that the threats and profanities had stopped since Friday. Doc. 201 at 29. State Farm again inquired whether the holdout juror was "not looking at the jury instructions" and "not prepared to follow the law and the Court's instructions in this case," and Ms. Engert confirmed that was the situation. Doc. 201 at 30.

A fifth juror, Minh Le, explained that the holdout juror had refused to discuss the case as a group; instead, he said, "This is what I want, and either you guys accept it or it's going to be a mistrial." Doc. 201 at 31. In other words, Mr. Le explained that the holdout juror was refusing to discuss the case with the rest of the jury and was firm in his view of it. Doc. 201 at 31-32. State Farm inquired whether the holdout juror had "no interest in following the law" and was "refusing to even look at the law to have a discussion about it." Doc. 201 at 32. Mr. Le responded, "Yes. So basically he refused to follow the instructions that were given to us. He just wants to do it his way." Doc. 201 at 32-33.

A sixth juror, Bruce MacFarlane, explained that the holdout juror was set in his view of the case. Doc. 201 at 37-39. State Farm inquired if

the holdout juror was "intentionally" refusing to follow the jury instructions because he was mad about not being elected foreman, and Mr. MacFarlane said, "Yes." Doc. 201 at 38.

Finally, the District Court also heard from the holdout juror. Doc. 201 at 41-46. The holdout juror explained that further deliberations would be fruitless, although he had a "cooperative" relationship with the other jurors. Doc. 201 at 45-46.

After the holdout juror left the courtroom, the District Court told counsel that there were "two options": strike the holdout juror or give a modified *Allen* charge. Doc. 201 at 47. Bostick objected to striking the holdout juror. Doc. 201 at 48-50. Relying on an unpublished district court order, State Farm asked the District Court to strike the holdout juror for cause. Doc. 201 at 50.

Over Bostick's objection, the District Court struck the holdout juror for cause. Doc. 201 at 3-54. The District Court explained his continued presence on the jury would make it "hard to get a verdict that's a cohesive verdict from everybody." Doc. 201 at 51. Additionally, the District Court explained, "I can't have women be called an ugly term that we don't use and no one ever should use it." Doc. 201 at 51. Indeed, the District Court

explained that the holdout juror's language was "really what is a deciding factor for me." Doc. 201 at 52. The holdout juror denied having used vulgar and racist language or behaved in a physically confrontational manner the previous Friday. Doc. 201 at 52-53.

Less than 20 minutes later, the jury returned a $0 defense verdict. Doc. 201 at 54-56. The special verdict form concluded that the auto accident was not "a legal cause of loss, injury, or damage" to Bostick. Doc. 140 at 1. Based on that verdict, the District Court entered judgment in State Farm's favor. Doc. 145.

C. The requests to interview the jurors and motions for mistrial

After trial, the holdout juror left two voicemails for Bostick's counsel. *See* Doc. 146 at 1. After conferring with State Farm's counsel, and without contacting the holdout juror, Bostick notified the District Court of this juror contact. Doc. 146 at 2. With State Farm's consent, Bostick requested a hearing. Doc. 146 at 2. As part of that request, Bostick further requested leave to interview the holdout juror. Doc. 146 at 3. State Farm did not oppose the request for a hearing, but it did oppose the request for a juror interview. Doc. 149 at 1-2.

The District Court convened a hearing. Doc. 148. After the hearing, the District Court entered an endorsed order denying Bostick's request for a juror interview. Doc. 153. At the hearing, the District Court heard argument regarding the juror contact. Doc. 158. Comparing the jury room to a workplace, the District Court bemoaned the language the holdout juror had allegedly used. Doc. 158 at 4-6. Ultimately, the District Court identified three problems it had with the holdout juror: (1) the "inappropriate way that he referred to women" (by calling them "the B name"); (2) the arguable racial slur he used; and (3) and his refusal to follow the jury instructions. Doc. 158 at 9, 13. (Later in the hearing, the District Court expressed its heightened sensitivity to sexist language directed to women given its 20-year experience as a federal prosecutor. Doc. 158 at 25.) The District Court was also concerned that the holdout juror's conduct was "payback" for his embarrassment over the other jurors' refusal to change the trial times or to elect him foreperson. Doc. 158 at 9-11.

Perhaps anticipating arguments with respect to the composition of the petit jury, the District noted that the petit jury had five men and two women, of which four were Caucasian, one was African-American (*i.e.*, the holdout juror), one was Asian-American, and one was Hispanic. Doc.

158 at 11. In the District Court's view, "[t]hat, by Tampa standards, [wa]s a pretty diverse jury." Doc. 158 at 11.

Bostick argued the holdout juror was simply holding his ground, as he was entitled to do. Doc. 158 at 18; *see also* Doc. 158 at 30 ("I'm not defending what he said, but it can't be denied that this transcript holds the potential that he melted down with inappropriate language when they tried to pressure him as the one guy"). In response to Bostick's inquiry why a modified *Allen* charge was not given, the District Court responded, "Because I couldn't subject those people to that. I was afraid they were going to come to blows, Mr. Maddux. I was afraid that there was going to be a fight in there." Doc. 158 at 16. The District Court also speculated that if someone had said something racially insensitive to the holdout juror, it would have heard about it on Friday when it spoke privately with the holdout juror. Doc. 158 at 16-17.

After discussing their differing interpretations of the transcript, Bostick argued that, if no modified *Allen* charge were given, a mistrial should have been declared. Doc. 158 at 19-20. The District Court responded, "No." Doc. 158 at 20. Bostick also argued that the jury was also

improperly deliberating before the deliberations formally began. Doc. 158 at 20-21, 31.

Toward the end of the hearing, the District Court explained its belief that "there is nothing worse than trying a case only to have to retry it." Doc. 158 at 26. After further discussion, the District Court denied leave to interview the holdout juror and denied the motion for mistrial. Docs. 153; 158 at 33.

A week later, raising similar arguments, Bostick moved to interview the entire petit jury panel. Doc. 157. Again, for similar reasons, State Farm opposed. Doc. 162. The motion was denied. Doc. 174.

D. The motion for new trial

Separately, Bostick filed a timely motion for new trial (Doc. 163), which she later supplemented (Doc. 166). In relevant part, based on the same arguments already raised, the motion argued the District Court should have declared a mistrial instead of striking the holdout juror. Doc. 163 at 3-4. State Farm opposed. Doc. 165 at 3-4. It was denied. Doc. 176 at 6-12, 15-17. In denying the motion, the District Court specifically denied having stricken the holdout juror because he was a holdout. Doc. 176 at 17. Instead, without citing any case law, the District Court explained

it struck the holdout juror because he used bad language, made physical threats, and refused to follow jury instructions. Doc. 176 at 16-17.

Standard of review

The decision to strike a juror for cause during jury deliberations instead of giving a modified *Allen* charge or declaring a mistrial is reviewed for abuse of discretion.[1] *United States* v. *Godwin*, 765 F.3d 1306, 1316 (11th Cir. 2014) (whether to strike juror for cause during deliberations); *United States* v. *Woodard*, 531 F.3d 1352, 1364 (11th Cir. 2008) (whether to give modified *Allen* charge); *United States* v. *Thompson*, 422

[1] The abuse-of-discretion standard is "deferential" and "allow[s] a range of choice for the district court, as long as that choice does not constitute a clear error of judgment." *Fernandez* v. *Bailey*, 909 F.3d 353, 363 (11th Cir. 2018) (quoting *United States* v. *Kelly*, 888 F.2d 732, 745 (11th Cir. 1989)). "Nevertheless, discretion is not boundless." *Id.* "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination," "makes findings of fact that are clearly erroneous," or "appl[ies] the law in an unreasonable or incorrect manner." *Klay* v. *Utd. Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004); *accord United States* v. *Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc) ("A district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors."). Put otherwise, a district court "can commit a clear error of judgment, and thereby abuse its discretion, if it 'considers the proper factors but balances them unreasonably.'" *Fernandez*, 909 F.3d at 363 (quoting *Irey*, 612 F.3d at 1189 (11th Cir. 2010)).

F.3d 1285, 1297 (11th Cir. 2005) (whether to declare mistrial). The findings of fact in support of such a decision are reviewed for clear error.[2] *See, e.g.*, *United States* v. *Abbell*, 271 F.3d 1286, 1302-03 (11th Cir. 2001) ("whether a juror is purposely not following the law is a finding of fact that we will review for clear error").

SUMMARY OF THE ARGUMENT

The District Court abused its discretion when it struck a holdout juror for cause during deliberations. That is because it failed to apply the appropriate legal standard in doing so. Specifically, the District Court needed to determine that there existed "no substantial possibility" that the holdout juror's words and actions were based on his view of the evidence. It did not apply that standard (*i.e.*, the only correct legal standard) before excusing the juror, which is by definition an abuse of discretion.

The appellate remedy could take two firms. First, this Court could apply the "no substantial possibility" test in the first instance.

[2] "Review for clear error does not mean no review." *United States* v. *Crawford*, 407 F.3d 1174, 1177 (11th Cir. 2005). Rather, clear error exists when this Court is "'left with a definite and firm conviction that a mistake has been committed.'" *United States* v. *Devegter*, 439 F.3d 1299, 1303 (11th Cir. 2006).

Alternatively, this Court could vacate the judgment and remand for the District Court to apply the correct standard in the first instance.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court abused its discretion when it struck a holdout juror for cause during deliberations

It was an abuse of discretion to strike a holdout juror for cause during deliberations. Instead, the District Court should have given a modified *Allen* charge or declared a mistrial.

A. During deliberations, a juror cannot be excused for cause unless "no substantial possibility" exists that he was basing his decision on his view of the evidence

A district court can excuse a juror for good cause even after deliberations have begun. But once deliberations have begun, that juror cannot be excused for cause unless "no substantial possibility" exists that his decision (*i.e.*, his conduct and words) was based on his view of the evidence. That standard is so tough it is basically a beyond-reasonable-doubt standard.

1. Federal Rule of Civil Procedure 47(c) allows district courts to excuse jurors for good cause during deliberations

"During trial or deliberation, the court may excuse a juror for good cause." Fed. R. Civ. P. 47(c). Subdivision (c) "makes it clear that the court

may in appropriate circumstances excuse a juror during the jury deliberations without causing a mistrial." *Id.* cmt. (1991 amendment).

"It is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict." *Id.* Indeed, even without Rule 47(c), "[t]hat a juror may not be removed because he or she disagrees with the other jurors as to the merits of a case requires no citation." *United States* v. *Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988).

Some "examples of appropriate grounds for excusing a juror" include "[s]ickness, family emergency or juror misconduct that might occasion a mistrial." Fed. R. Civ. P. 47 cmt. (1991 amendment). These examples, however, are "not exhaustive." *Saint-Jean* v. *Emigrant Mortg. Co.*, 2018 WL 4158307, at *12 (E.D.N.Y. Aug. 30, 2018).

2. Nevertheless, the removal of a holdout juror during deliberations is at the heart of the trial process and must be meticulously scrutinized

Removal of a "sole holdout" juror "is an issue at the heart of the trial process and must be meticulously scrutinized." *Hernandez*, 862 F.2d at 23. When a record on appeal "seems to reflect that the cause of the removal was as much to avoid a mistrial because of a hung jury as to excuse an incompetent juror," however, that meticulous scrutiny requires the

judgment to be vacated.[3] *Id.* Among other things, "the rapidity with which [a] jury return[s] its verdict following [a juror's dismissal tends to support [the] theory that [the dismissed juror] was the lone hold-out or her dismissal sufficiently discouraged other jurors from not joining in the verdict." *Harris* v. *Folk Const. Co.*, 138 F.3d 365, 372 (8th Cir. 1998).

3. To conduct that meticulous scrutiny, a district court must determine there is no substantial possibility that a holdout juror's words and actions were based on his view of the evidence

"Once deliberations have begun, a district court may excuse a juror for good cause, which includes that juror's refusal to apply the law or to follow the court's instructions." *Godwin*, 765 F.3d at 1316. "But because

[3] Ordinarily, when a judge "fail[s] to make a record of the *ex parte* proceedings" with jurors, appellate courts are often "unable to determine the propriety of the decision to dismiss" a juror. *Harris* v. *Folk Const. Co.*, 138 F.3d 365, 371 (8th Cir. 1998); *see also Remmer* v. *United States*, 347 U.S. 227, 229-30 (1954) (vacating conviction because district courts "should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate"). "A complete record of an *ex parte* juror communication is especially important where it concerns the potentially prejudicial effects of dismissing a lone hold-out juror." *Harris*, 138 F.3d at 372.

Here, the *ex parte* proceedings took place with the litigants' express consent. *See* Doc. 200 at 188, 193, 200-01. But the District Court did not adequately explain that there would be no court reporter present to record the *ex parte* proceedings. *See* Doc. 200 at 188, 193, 200-01.

of 'the danger that a dissenting juror might be excused under the mistaken view that the juror is engaging in impermissible nullification,' a district court should excuse a juror during deliberations 'only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence.'" *Id.* (citation omitted); *see also United States* v. *Brown*, 823 F.2d 591, 596-97 (D.C. Cir. 1987) (vacating convictions after improper dismissal of juror).

This is "basically a 'beyond reasonable doubt' standard." *United States* v. *Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001). Without this "tough legal standard," there would remain the risk that other jurors might engage in dishonest or cynical gamesmanship to seek the dismissal of a holdout juror. *See id.* ("judges must be careful not to dismiss jurors too lightly, even in the face of complaints from a majority of the jury"). As such, it matters for the inquiry whether the other jurors provide *objective* testimony that a holdout juror expressly "*said*" he would not apply the law, as opposed to the other jurors merely stating their *subjective belief* that the holdout juror would not apply the law. *See id.* at 1303 n.18.

"So long as the district court applies the 'substantial possibility' standard, we will review a factual finding that a juror is refusing to follow

the law only for clear error, bearing in mind that 'the district court is uniquely situated to make the credibility determinations that must be made' whenever 'a juror's motivations and intentions are at issue.'" *Id.* (citation omitted).

B. Before excusing the holdout juror, the District Court did not apply the "no substantial possibility" test

In excusing the holdout juror, the District Court never applied the "no substantial possibility" test. Even under the abuse-of-discretion standard, this failure to apply the correct legal standard was an error of law to which no deference is owed. *See United States* v. *Barner*, 441 F.3d 1310, 1315 n.5 (11th Cir. 2006) ("even under an abuse of discretion standard, errors of law receive no deference").

1. Instead, the District Court obsessed over the time and expense of conducting a retrial and the use of derogatory words for women

Instead of applying the appropriate legal standard required by *Abbell*, the District Court repeatedly expressed its obsession with the time and expense of declaring a mistrial and conducting a retrial. *E.g.*, Docs. 200 at 190 ("The money is staggering, the amount of money is staggering—It's a lot of money."); 201 at 26 (explaining trial was "unbelievably

expensive" and involved "monumental" numbers and stating "there is nothing worse than trying a case only to have to retry it").

The District Court also repeatedly expressed its heightened sensitivity to the holdout juror's alleged use of derogative language toward women. *E.g.*, Docs. 158 at 4 ("what bothered me the most about anything at all is using a derogatory word toward women"), 5 ("[h]e had both of those women in tears"), 13 ("Let me tell you, [if] somebody called me the B name, I wouldn't be crying. I would have done something else. I would have immediately walked out of that room and reported him."), 19 ("You want me to throw somebody back into that? Particularly a woman who said [she was] crying? Two women were crying on Friday."), 25 (explaining 20 years of workplace training as a federal prosecutor), 27 ("the worst thing is using that kind of language to a woman"), 32 ("Had I known about him using that kind of language [to the women], he would have been out of here on Friday."), 33 ("I felt I had no choice given the language that he used," etc.); 201 at 47 ("what really troubles me are the words that the women say were used"), 51-52 (calling "women an ugly term that we don't use and no one ever should use" "is really what is a deciding factor for me").

2. Additionally, the District Court never considered that the holdout juror's alleged abusive language and physically confrontational behavior had stopped three days earlier on Friday

Bostick repeatedly argued that the holdout juror's alleged abusive language and physically confrontational behavior had stopped three days earlier on Friday. *E.g.*, Doc. 158 at 14, 17-18. Indeed, the District Court had already been aware on Friday that the holdout juror had implicitly threatened physical violence by daring another juror to punch him and was using disrespectful language. Doc. 201 at 194 ("For them to swing at him."). The only significant new fact revealed on Monday about what had transpired on Friday was the precise language he used, such as "the B word" and "white asses." Doc. 158 at 14 ("I could already sense there were serious issues, just not that this kind of phraseology was used").

Nevertheless, the District Court did not weigh in the balance that fact that the jurors agreed that the holdout juror's language and behavior had stopped. *See supra* Statement of the case B.2. Specifically, on Monday, the other jurors agreed the holdout juror was merely reclining on a sofa, closing his eyes, and saying nothing at all. *E.g.*, Doc. 201 at 14 (Mr. Moffitt), 18-20 (Mr. Barone), 29 (Ms. Engert). But the District Court resorted to its entrenched belief that, notwithstanding that testimony, it

was still afraid on Monday that the jury was somehow "going to come to blows." Doc. 158 at 16. That finding of fact was clearly erroneous; the danger, if any, had passed.

Moreover, the holdout juror had never threatened to initiate violence against the other jurors in the first place. Instead, he merely implied that if the other jurors used violence against him (in an effort to persuade him to adopt their view of the case), it would accomplish nothing, and he would remain steadfast in his assessment of the case. For that reason also the finding of fact was clearly erroneous.

3. In refusing to give a modified *Allen* instruction or declared a mistrial, the District Court failed to recognize that mistrials for hung juries are a feature, not a bug, of the adversarial trial process

Instead of excusing the holdout juror, the District Court had at least two other tools at its disposal. First, it could have given a modified *Allen* charge. Second, it could have declared a mistrial. The District Court rejected those options because, given its view of the expense and duration of the trial, it did not want increase the chance that it would have to retry the case. In viewing its options through that lens, the District Court may have considered some proper factors, but it balanced them unreasonably.

See Fernandez, 909 F.3d at 363. That is because mistrials for hung juries are a feature, not a bug, of the adversarial trial process.

For instance, the very existence of modified *Allen* charges presupposes that a hung jury is a failure of the jury trial system. *See United States* v. *Rey*, 811 F.2d 1453, 1459 (11th Cir. 1987). This is not so. *Id.* To the contrary, jury unanimity is "[o]ne of the safeguards against" unjust verdicts. *Id.* For that reason, "the continued persistence of *Allen* charges" is "a choice, conscious or unwitting, to prefer quantity in jury verdicts over quality." Samantha P. Bateman, *Blast It All: Allen Charges and the Dangers of Playing with Dynamite*, 32 HAWAII L. REV. 323, 324 (2010).[4]

Put otherwise, in practice, *Allen* charges are little more than "blunt instruments that may help decrease the costs of some litigation, blasting out more final verdicts with marginally less expenditure of time and resources." *Id.* Their coercive effect is historically unsurprising, because previous judicial solutions to avoid deadlocks included loading jurors into oxcarts and hauling them from town to town while the judge rode circuit

[4] *See also* Vicki L. Smith & Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 LAW & HUM. BEHAV. 625 (1993); Saul M. Kassin *et. al.*, *The Dynamite Charge: Effects of the Perceptions and Deliberation Behavior of Mock Jurors*, 14 LAW & HUM. BEHAV. 537 (1990).

"until a decision was finally 'bounced out' of them," denying jurors food or drink until they reached a decision, and subjecting jurors to strictly rationed diets of bread and water or purposely turning off the heat until they reached a consensus. *Id.* Furthermore, the additional costs and resources associated with a retrial are often overblown, because a declaration of mistrial from a hung jury will often result in litigants settling, narrowing, or reframing the litigation. *See Rey*, 811 F.2d at 1460.

The point is that the District Court was incorrect in its belief that, after a time-consuming and expensive trial, "there is nothing worse than" declaring a mistrial. Instead, the point is to conduct a fair trial that arrives at a *reliable* verdict. That did not happen here.

To the contrary, in light of the juror interviews and timeline, there was at least a reasonable possibility that the other jurors had conspired to get the holdout juror kicked off the petit jury. And part of the reason why that possibility is reasonable is because the jurors themselves repeatedly stated that, without the holdout juror, they could return a verdict within 15 minutes. And they did in fact return a verdict 20 minutes after the holdout juror was removed. Additionally, the other jurors never stated that the holdout juror objectively *said* he was refusing to follow

the instructions; instead, the other jurors merely stated their *subjective beliefs* that he was refusing to follow them.

C. The error was harmful and requires appellate relief

When the District Court excused the juror, it committed a harmful error that requires this Court to fashion an appellate remedy. *See supra* Argument I.A & I.B. That remedy would either be to remand for the District Court to perform the necessary analysis in the first instance or for this Court to perform the analysis itself.

1. The removal of the holdout juror was harmful

The District Court's abuse of discretion in dismissing the holdout juror was harmful. *See* Fed. R. Civ. P. 61 ("Unless justice requires otherwise, no error … is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order [unless it] affects any party's substantial rights."); *see also Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943) ("He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.").

In this 10-day jury trial, the litigants presented significant evidence on both sides of the injury and causation issues from numerous before-

and-after witnesses, treating physicians, and medical, engineering, and economics experts. *See supra* Statement of the facts A.1 & A.2. As such, there would have been sufficient evidence to support a plaintiff verdict or a defense verdict.[5] Moreover, virtually every juror the District Court interviewed explained his or her prediction that the holdout juror would have hung the jury and therefore necessitated the declaration of a mistrial. *See supra* Statement of the case B.

As such, given the significant evidence on both sides and the virtual certainty that the jury either already was or was about to be deadlocked, Bostick has carried her burden of demonstrating harmfulness. That is because the holdout juror's view of the evidence was, at minimum, reasonable, and it is a virtual certainty that, had the District Court not removed the holdout juror from the jury during deliberations (instead of

[5] This Court should not conflate an inquiry regarding the sufficiency of evidence with an inquiry regarding its weight or credibility. "Harmless error review, unlike a determination of the sufficiency of the evidence, does not require us to view witnesses' credibility in the light most favorable to the [prevailing party]." *United States* v. *Hands*, 184 F.3d 1322, 1330 n.23 (11th Cir. 1999). For that reason, the fact that evidence was otherwise sufficient to support the defense verdict does not mean the ruling challenged on appeal was harmless.

declaring a mistrial or giving a modified *Allen* charge), a mistrial would have resulted (because the jury would have hung in any case).

2. The appellate remedy is for this Court either to perform the "no substantial possibility" analysis itself or to remand for the District Court to perform that analysis in the first instance

If this Court concludes the District Court abused its discretion and committed a prejudicial error in dismissing the holdout juror, the appellate remedy could take one of two forms.

First, this Court could conduct the "no substantial possibility" analysis in the first instance and determine, based on the existing paper record, whether there was any chance that the holdout juror's actions and words were based on his view of the evidence. *See, e.g.*, *Roofing & Sheet Metal Services, Inc.* v. *La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982) (considering argument not addressed by district court at summary judgment instead of remanding for district court to address it in the first instance); *Hulsey* v. *Pride Restaurants, LLC*, 367 F.3d 1238, 1244 (11th Cir. 2004) ("We could simply vacate the district court's order and send the case back for clarification of the reasoning, but that would only delay the inevitable conclusion.").

Alternatively, this Court could vacate the judgment and remand for the District Court to perform the "no substantial possibility" analysis in the first instance.[6] Indeed, there is nothing unusual about a limited remand to permit a district court to apply a legal standard it did not apply the first time around. *E.g.*, *Turner* v. *Burnside*, 541 F.3d 1077, 1086 (11th Cir. 2008) ("we would prefer for the district court in the first instance to apply the standard to the facts it finds in this case").

Ordinarily, however, an appellate court is "'a court of review, not of first view.'" *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Because the District

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[6] *See, e.g.*, *Sierra Club* v. *Van Antwerp*, 526 F.3d 1353, 1363 n.8 (11th Cir. 2008) ("we think the better course is to vacate the judgment and remand for the district court to address the issues … in the first instance"); *Byars* v. *Coca-Cola Co.*, 517 F.3d 1256, 1267-68 (11th Cir. 2008) ("we refuse to consider the merits of this issue" because the "summary judgment opinion did not discuss" it); *Sierra Club, Inc.* v. *Leavitt*, 488 F.3d 904, 918 (11th Cir. 2007) ("[w]e believe that the district court should consider the question in the first instance, particularly in light of the factual matters that it raises"); *Wilkerson* v. *Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001) ("[w]e decline to consider whether summary judgment is otherwise appropriate on Wilkerson's Title VII claim" and therefore "vacate summary judgment and remand the case so the district court may consider [that question] in the first instance"); *Beavers* v. *Am. Cast Iron Pipe Co.*, 975 F.2d 792, 800 (11th Cir. 1992) (vacating and remanding summary judgment because "district court's opinion did not explicitly address this issue").

Court did not apply the appropriate legal standard, perhaps the latter approach would be more appropriate in this case. But it would be a judgment call for this Court to make when fashioning an appellate remedy.

CONCLUSION

The Court should vacate the judgment and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 7,969 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

December 17, 2018

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 17th day of December, 2018, to:

David J. Smith, Clerk of Court
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 17th day of December, 2018, to:

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