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

REPLY 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. Any addition(s) appear(s) in italicized text.

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, Hon. 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;

23. Tamberino, Mary – Listed but not otherwise identified in the certificate of interested persons attached to State Farm's answer brief.

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

June 24, 2019

/s/ Thomas Burns
Thomas A. Burns

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ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court abused its discretion when it struck a holdout juror for cause during deliberations instead of giving a modified *Allen* charge or declaring a mistrial

The purpose of any jury trial—whether civil or criminal—is, through the adversarial process and within the appropriate rules of law, to present the facts to an impartial jury of the litigants' peers. *Colgrove* v. *Battin*, 413 U.S. 149, 157 (1973) ("[it is] the purpose of the jury trial in criminal cases to prevent government oppression, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues" (citation omitted)); *see also Woods* v. *Dugger*, 923 F.2d 1454, 1460 (11th Cir. 1991) ("It is the purpose of the Sixth Amendment to guarantee the defendant a fair trial in which the jury reaches its verdict based only on the evidence subjected to the crucible of the adversarial process.").

To that end, in her appellant's brief, Bostick argued the District Court abused its discretion when it struck a holdout juror for cause during deliberations instead of giving a modified *Allen* charge or declaring a mistrial. Bostick Br. 23-37. In support, Bostick relied on this Court's decision in *United States* v. *Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001). *Abbell* acknowledged that a district court may strike a juror for cause

during deliberations, but specified that it must first meticulously scrutinize whether no substantial possibility exists that the juror is basing his decision on the sufficiency of the evidence. *Id.* at 1302. Otherwise, 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.*

In response, State Farm primarily contends *Abbell* is inapplicable because that was a criminal case, whereas Bostick's lawsuit is a civil case. State Farm Br. 18-20. Other than misunderstanding the different standards of proof that can apply in civil and criminal cases, *see infra* Argument I.F, however, State Farm does not identify any pertinent constitutional, statutory, or procedural difference between civil and criminal juries. *See* State Farm Br. 19. And State Farm also does not specify precisely what evidentiary burden lighter than beyond reasonable doubt—*e.g.*, preponderance, clear-and-convincing evidence, substantial evidence, probable cause, reasonable suspicion, or credible evidence—courts should apply in the civil context instead. State Farm Br. 18-19.

This Court should apply *Abbell* in the civil context. No pertinent distinctions between civil and criminal cases would justify a different test. And under *Abbell*'s test, this Court should vacate the judgment.

A. This appeal has one issue, not three

Making this appeal appear more complicated than it actually is, State Farm posits three issues on appeal. *See* State Farm Br. 1. But splitting the District Court's ruling into three parts strips the case of context and provides no additional analytical clarity. To the contrary, this appeal has only one issue: whether it was an abuse of discretion to strike a holdout juror for cause during deliberations instead of giving a modified *Allen* charge or declaring a mistrial. *See* Bostick Br. 1.

B. State Farm inaccurately describes the case law regarding the standard of review

State Farm cites the First Circuit's decision in *Williams* v. *Drake*, 146 F.3d 44, 50 (1st Cir. 1998), for the proposition that "[o]ther circuits review the decision to excuse a juror under Rule 47(c) for cause *during deliberations* under the abuse of discretion standard." State Farm Br. 10 (emphasis added). But *Williams* does not stand for that proposition, because (unlike here) it did not involve a juror stricken during deliberations. Rather, that district court *denied* a motion to strike, and the motion to strike was made promptly after the juror's strange comment was revealed during "the first day of trial"—*i.e.*, the ruling denying the motion to strike occurred *before* deliberations. *Williams*, 146 F.3d at 49.

C. State Farm's passing reference that Bostick did not preserve her argument that a mistrial should have been declared is both abandoned and factually wrong

In its summary of argument, State Farm makes passing reference to a putative argument that Bostick failed to preserve her argument that a mistrial should have been granted because she did not move for a mistrial. State Farm Br. 11. As an initial matter, State Farm's argument is not properly before this Court because State Farm made it only in its summary of argument and without any citations to authority. *Sapuppo* v. *Allstate Floridian Ins. Co.*, 739 F.3d 678, 680-81 (11th Cir. 2014) ("Abandonment of a claim or issue can also occur when the passing references to it are made in the 'statement of the case' or 'summary of the argument,' as occurred here."); *Hamilton* v. *Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) (appellee abandoned argument by failing to present it in its answer brief). But more importantly, State Farm's preservation argument is factually incorrect: Bostick did move for a mistrial. *See, e.g.*, Docs. 152; 154; 158 at 21, 28, 33.

D. State Farm falsely accuses Samelton of threatening physical violence

Throughout its brief, State Farm repeatedly contends Samelton threatened physical violence. State Farm Br. 1, 2, 11, 15. As Bostick

already explained, however, that assertion is untrue because Samelton never threatened to *initiate* violence; rather, Samelton merely implied that even if other jurors used violence against him, he would remain steadfast in his assessment of the case. *See* Bostick Br. 30.

E. Similarly, State Farm falsely claims Samelton refused to follow instructions and deliberate, whereas, in reality, there was no objective evidence he refused to follow instructions, and he had *finished* deliberating

Likewise, State Farm repeatedly claims Samelton refused to follow instructions and refused to deliberate. State Farm Br. 1, 2, 3, 5, 6, 11, 13, 14, 22. Those assertions are incorrect.

First, there was no *objective* evidence that Samelton stated he was refusing to follow the District Court's instructions. Rather, some of the other jurors merely stated their *subjective* beliefs that Samelton was refusing to follow the jury instructions. *See* Bostick Br. 12-16. That, however, is precisely the type of *subjective* evidence that *Abbell* derided as unreliable. 271 F.3d at 1303 n.18.

Second, no evidence indicated Samelton refused to deliberate. Rather, significant evidence showed Samelton had deliberated extensively on Friday and refused to deliberate any further on Monday morning once he had made up his mind about the case. *See* Bostick Br. 9-16.

F. This Court should apply the *Abbell* test because there is no relevant constitutional, statutory, or procedural difference between civil and criminal jury trials

Trying to dodge *Abbell*'s impact, State Farm argues its test has no application here because this was a civil trial, not a criminal trial. But this Court routinely relies on criminal cases when deciding juror issues in civil cases. *E.g.*, *Port Terminal & Warehousing Co.* v. *John S. James Co.*, 695 F.2d 1328, 1338 (11th Cir. 1983) (describing applicable civil and criminal procedural rules regarding removal of jurors for cause as "similar"). And State Farm repeatedly cites criminal cases for the same reason.

In fact, at trial, State Farm cited an unpublished district court order in a *criminal* case as the "premier" case interpreting Federal Rule of *Civil* Procedure 47(c) for the proposition that the District Court had discretion to strike a juror during deliberations. Doc. 201 at 50 (citing *United States* v. *Batiste*, 2009 WL 10668766, at *8 (S.D. Fla. Nov. 23, 2009), *aff'd sub nom. United States* v. *Augustin*, 661 F.3d 1105 (11th Cir. 2011)). And in its appellate brief, State Farm repeatedly relies on criminal cases for various propositions about handling jury issues. *See* State Farm Br. 10 (stating standard of review when deciding to give *Allen* charge), 13

(describing scope of juror misconduct), 14 (discussing when good cause to discharge a juror exists).

And this should be no surprise, because there is no textual indication in the Sixth and Seventh Amendments that a different test should govern the decision to discharge a juror for cause during deliberations in criminal cases than in civil cases. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI (emphasis added). Similarly, the Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of *trial by jury* shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII (emphasis added).

Nothing in the text of these amendments suggests that the decision to strike a juror for cause—whether made during voir dire, during trial, or during deliberations—is in any way procedurally or substantively

different depending on whether the case is criminal or civil. Indeed, on at least one occasion when the Supreme Court has been called on to compare the jury trial rights set forth in each amendment in another context, it has concluded there was no such difference. *E.g.*, *compare Colgrove*, 413 U.S. at 160 ("a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases"), *and* Fed. R. Civ. P. 48 cmt. ("the minimum size of a jury consistent with the Seventh Amendment is six"), *with Williams* v. *Florida*, 399 U.S. 78, 86 (1970) ("refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights"), *and Ballew* v. *Georgia*, 435 U.S. 223, 245 (1978) (conviction based on a jury of fewer than six violates due process).

Pointing to the different standards of proof that generally apply in criminal cases (*i.e.*, beyond reasonable doubt) and civil cases (*i.e.*, preponderance), State Farm suggests *Abbell*'s test rests upon an implicit but unstated constitutional difference between civil litigation and criminal litigation. *See* State Farm Br. 19 ("In other words, the courts determined that a criminal defendant, who benefits from the 'beyond a reasonable doubt' standard as to guilt, should also benefit from that same standard

as to the removal of a juror."). But this assertion is a factually incorrect oversimplification.

It is true that the burden of proof in civil litigation generally is by a preponderance of evidence, whereas the burden of proof in criminal litigation generally is beyond a reasonable doubt. *Compare Concrete Pipe & Products of California, Inc.* v. *Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 622 (1993) (preponderance is "the most common standard in the civil law"), *with In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). But that does not mean that *all* factual questions in a civil case must be resolved by a mere preponderance or that *all* factual questions in a criminal case must be resolved beyond a reasonable doubt.

Oftentimes, civil litigants must prove facts by clear-and-convincing evidence. *E.g.*, *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 545-46 & n.18 (5th Cir. 1981), *as corrected on denial of reh'g* (July 13, 1981), *aff'd in part, rev'd in part*, 459 U.S. 375 (1983) ("The traditional burden of proof imposed in cases involving allegations of civil fraud is the 'clear and

convincing' evidence standard."). Likewise, whenever a criminal defendant raises an affirmative defense (*e.g.*, self-defense, duress, entrapment, insanity, or necessity), he often bears a lighter burden of proof, such as production, preponderance, or clear-and-convincing evidence.[1]

This fairly obvious observation—*i.e.*, that both civil and criminal litigation do not employ monolithic standards of proof, but rather employ numerous standards of proof—makes a significant difference here, because it is quite possible (indeed, perhaps likely) that a holdout juror in

[1] By way of illustration, here are the burdens of proof for:

- self-defense, *United States* v. *Alvarez*, 755 F.2d 830, 842 (11th Cir. 1985) ("when a defendant presents evidence in support of a claim of self-defense, the absence of self-defense must be proven beyond a reasonable doubt by the government");
- duress, *Dixon* v. *United States*, 548 U.S. 1, 8 (2006) (jury instructions "did not run afoul of the Due Process Clause when they placed the burden on [a criminal defendant] to establish the existence of duress by a preponderance of the evidence");
- entrapment, *United States* v. *Brown*, 43 F.3d 618, 623 (11th Cir. 1995) (when asserting entrapment defense, a defendant "bears an initial burden of production to show government inducement," after which "the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime");
- insanity, 18 U.S.C. § 17(b) ("defendant has the burden of proving the defense of insanity by clear and convincing evidence"); and
- necessity, *United States* v. *Dicks*, 338 F.3d 1256, 1257 (11th Cir. 2003) ("The defense of necessity or justification is an affirmative defense to some criminal statutes, and, if available, the defendant bears the burden of proving it by a preponderance of the evidence.").

a civil case or criminal case might disagree with other jurors over a fact the proof for which is governed by any number of standards of proof. For that reason, when a court is deciding whether to discharge a juror during deliberations, it would make no sense to apply a different test in the criminal context than in the civil context.

In other words, *Abbell* did not choose the beyond-reasonable-doubt test because the issue arose in a criminal case. Rather, *Abbell* chose the beyond-reasonable-doubt test because all jury trials are so constitutionally sacrosanct that the removal of a sole holdout juror during deliberations is necessarily an issue at the heart of the trial process that must be meticulously scrutinized. *See* Bostick Br. 24-27.

Relatedly, there is no statutory difference that would justify a different test. That is because the same set of statutes govern the selection and disqualification of jurors in criminal cases and civil cases. *See* 18 U.S.C. §§ 1861-1878. And even if there were some statutory difference, State Farm abandoned that argument when its answer brief failed to raise it. *See Sapuppo*, 739 F.3d at 680-81; *Hamilton*, 680 F.3d at 1319.

Finally, there is no procedural difference that would justify a different test. In all relevant respects, Federal Rule of Civil Procedure 47 is

"similar" to Federal Rule of Criminal Procedure 23. *Port Terminal & Warehousing Co.*, 695 F.2d at 1338. They both permit courts to discharge jurors for cause—even during deliberations—and nothing in them suggests a different burden of proof when making the decision to do so. And, once again, even if there were some procedural difference, State Farm abandoned that argument when its answer brief failed to raise it. *See Sapuppo*, 739 F.3d at 680-81; *Hamilton*, 680 F.3d at 1319.

G. Ultimately, the District Court mistakenly obsessed over the time and expense of conducting a retrial and Samelton's use of derogatory words for women instead of applying the *Abbell* test

Instead of applying the *Abbell* test, the District Court obsessed over the time and expense of conducting a retrial[2] and repeatedly expressed its heightened sensitivity to the holdout juror's alleged use of derogatory language toward women.[3] But neither of those concerns would outweigh

[2] *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").

[3] *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

the constitutional concerns implicated by the striking of a holdout juror during deliberations. The point of jury trials is not to bounce out the greatest quantity of verdicts, but to produce *reliable* verdicts. That is, since the "olden days" when courts riding circuit would deprive deliberating jurors of food and water and even "haul" them by oxcart from town to town until a verdict "bounced out of the holdout jurors," courts "have come a long way" because they "now accept that some jury deliberations will end in deadlock." *Brewster* v. *Hetzel*, 913 F.3d 1042, 1046 (11th Cir. 2019) (citing *United States* v. *Rey*, 811 F.2d 1453, 1460 (11th Cir. 1987)).

Here, when the District Court struck Samelton, the holdout juror, during deliberations without first applying the *Abbell* test, it became impossible for the jury to return a reliable verdict. It was therefore an abuse of discretion to strike the juror in lieu of giving an *Allen* charge or declaring a mistrial.

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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").

As a backstop, however, State Farm contends the District Court complied with *Abbell*'s test because its order denying the motion for new trial "affirmatively stated that it *did not consider* whether Samelton was a holdout in making its decision." State Farm Br. 21. As an initial matter, that is an inaccurate description of the District Court's ruling. Instead, the order merely stated it "did not remove Mr. Samelton because he was a 'holdout juror,'" not that it did not consider that fact. Doc. 176 at 17. But more importantly, the District Court's statement does not indicate that it performed the analysis that *Abbell* requires. The test is not whether a juror was removed *because* he was a holdout. Rather, the test is whether there was any "substantial possibility" that the juror's conduct was based on his view of the sufficiency of the evidence. 271 F.3d at 1302. If such a substantial possibility exists, a juror should not be stricken—whether or not the reason for striking the juror is his mere status as a holdout juror (obviously and always impermissible) or something else (sometimes permissible, but only after applying the *Abbell* test).

Relatedly, and as an alternative basis for affirmance, State Farm contends there was "competent substantial evidence"[4] from which the District Court could have (but did not) determine Samelton was not actually a holdout juror. To state State Farm's assertion is to refute it: at best the District Court never expressly made any finding of fact whether Samelton was a holdout juror; and at worst, the District Court impliedly made a finding of fact that Samelton was a holdout juror, but his status as a holdout juror was not why it struck him. *See* Doc. 176 at 17. Either way, this Court cannot affirm on the alternative *speculation* that the District Court somehow could have, but did not, make a finding of fact that Samelton was not a holdout juror.

Lastly, State Farm contends the District Court did not need to consider the fact that Samelton's alleged abusive language and physically confrontational behavior had stopped three days earlier on Friday. *See* State Farm Br. 29. Selectively quoting Bostick's motion for new trial,

[4] Although State Farm repeatedly uses the phrase "competent, substantial evidence" (*see* State Farm Br. 12, 21), that is not a federal standard. Rather, it is a standard that applies when Florida state appellate courts review findings of fact. *See, e.g.*, *De Groot* v. *Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (describing standard). Presumably, State Farm meant to say "sufficient evidence," which is a federal standard.

State Farm mischaracterizes her argument as contending a mistrial should have been declared because a physical altercation "was imminent" on Monday. State Farm Br. 22.

To the contrary, Bostick's motion for new trial contended, in part, that a mistrial should have been declared *on Friday* as soon as a physical altercation "*had occurred* or was imminent" because, by that point, "the deliberative process had soured." Doc. 163 at 3 (emphasis added). *By Monday*, however, after the jurors had a weekend to cool off, the danger of any physical altercation had passed. All the other jurors conceded that Samelton was calmly reclining on a sofa with his eyes closed. On Monday morning, therefore, the choices then were either to give the jury an *Allen* charge to break the jurors' impasse or to declare a mistrial because the jury was hung. Instead, the District Court broke the impasse by removing the holdout juror. But one of the express justifications the District Court used for removing Samelton for cause—*i.e.*, that there remained a danger of physical violence or abusive language (Doc. 156 at 16)—was pure

fantasy. There remained no such danger, and any such finding of fact was clear error.[5]

CONCLUSION

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

Respectfully submitted,

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[5] State Farm asserts that Bostick's argument that a mistrial should have been declared is "nonsensical" because Samelton "was the only juror whose misconduct was at issue." State Farm Br. 16. But the evidence was far from clear that only Samelton was the instigator for any or all of the outbursts. For instance, Ms. Engert testified it was one of the *other* male jurors—not Samelton—who first exclaimed "he was going to hit someone." Doc. 201 at 28. Samelton's comments were made in response to that other juror's threat. Doc. 201 at 28.

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 3,015 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.

June 24, 2019

/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 24th day of June, 2019, to:

David J. Smith, Clerk of Court
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56 Forsyth Street N.W.
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 24th day of June, 2019, to:

State Farm Mut. Auto. Ins. Co.	**Lisa Bostick**
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June 24, 2019

/s/ Thomas Burns
Thomas A. Burns