IN THE SUPREME COURT OF FLORIDA

JAMES TERKEURST and CECILIA TERKEURST,

Petitioners,

vs.

MIAMI ELEVATOR COMPANY and CENTAUR INSURANCE COMPANY,

Respondents.

CASE NO. 65,731

RESPONDENTS' ANSWER BRIEF

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INTRODUCTION

In its Answer Brief, Respondents, MIAMI ELEVATOR COMPANY and CENTAUR INSURANCE COMPANY, will be referred to as "Respondents" and "Defendants". Petitioners, JAMES TERKEURST and CECILIA TERKEURST, will be referred to as "Petitioners" and "Plaintiffs". References to the record are designated by the symbol "R." The Opinion of the Third District Court of Appeal, attached hereto in the Appendix, will be referred to by the designation "App."

STATEMENT OF THE CASE

The Plaintiffs, JAMES TERKEURST and CECILIA TERKEURST, husband and wife, filed a Complaint against MIAMI ELEVATOR COMPANY and CENTAUR INSURANCE COMPANY in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, on July 6, 1983. (R. 1-4). The suit was based on negligence arising out of an incident where JAMES TERKEURST was allegedly injured by the closing of an elevator door. The case was heard in a jury trial and a verdict was returned in favor of the Defendants, MIAMI ELEVATOR COMPANY and CENTAUR INSURANCE COMPANY. (R. 117-118).

The Plaintiffs filed a Motion for New Trial which was denied. (R. 119, 144). Plaintiffs appealed to the Third District Court of Appeal. (R. 146). In a Per Curiam Order filed July 31, 1984, the Third District Court of Appeal affirmed the judgment below and certified the following question to the Supreme Court of Florida:

> May a trial court require the parties to exercise all of their peremptory challenges simultaneously in writing where the original panel has been thoroughly examined and challenges for cause exercised, and there remain sufficient members to comprise a jury after all peremptory challenges have been exhausted?

(App.) Judge Baskin wrote a dissenting opinion. (App.)

STATEMENT OF THE FACTS

Before the prospective jurors were brought in on December 12, 1983, the first day in the trial of a negligence action brought by JAMES TERKEURST and CECILIA TERKEURST against MIAMI ELEVATOR COMPANY and CENTAUR INSURANCE COMPANY, counsel met with the Judge, the Honorable Fredricka Smith. (R. 149-154). At that time, Judge Smith explained the jury selection process:

> THE COURT: Okay. We are going to have eighteen prospective jurors and what we will do is this: We are going to have them seated as follows, one through six in the front of the jurybox and seven through twelve in the back of the jurybox and the remaining six just on the bench or in those extra chairs over there.
>
> You are going to have the opportunity to question all of the prospective jurors at one time.
>
> MR. MAGUIRE: We only have three challenges apiece.
>
> THE COURT: Yes, I know. This is to allow for excuses for cause, because what we are going to do is you are going to have a chance to question all of them and you are going to have one opportunity to exercise your strikes by writing them down on a piece of yellow paper and that will be the only time you are going to be able to exercise any challenges and you each have three.
>
> We will see which are the six remaining jurors and take them in that order.
>
> MR. GODFREY: In other words, there is no back striking?
>
> THE COURT: There is no traditionally called back striking, but this particular procedure was approved specifically by the Third District recently and, in effect, you have the same advantage that you have in back striking because you have an opportunity to see the whole panel and decide which of the group you do not wish to include.
>
> So, in effect, you get the same benefits, but this will be the only time that you will have a chance to exercise your challenges and if you do not use all three of them, you will waive them.

> Before I ask you to exercise those challenges, I would ask if you wish to challenge anyone for cause and I will take care of that at the bench. So, you will know who is left. Do you understand?
>
> MR. MAGUIRE: I was just going to suggest perhaps we limit it to the first twelve jurors and if there is any for cause, one of them could move over, saving everyone a lot of time.
>
> THE COURT: If you want to do it that way, fine. That will be fine.
>
> What I will do if, initially, if anyone has any problems understanding English, and there are usually one or two, we will see how many there are, if there are some people I will just excuse them before you begin your questioning.

(R.150-152).

In fact, sixteen prospective jurors were seated. (R.155). The Court welcomed them and introduced court personnel and counsel. (R.154-161). At that time, Mr. Maguire, counsel for the Plaintiffs, began his voir dire of the sixteen potential jury members. He questioned every one of the possible jurors without interference from Mr. Godfrey, counsel for the Defendants. (R.161-186). Then Mr. Godfrey conducted his voir dire of the prospective jurors. (R.186-203). At that time, the Court called the attorneys to the bench and asked for motions to excuse jurors for cause. (R 203). Mr. Maguire moved that juror number two, Mr. Hernandez, be excused. Mr. Godfrey had no objection; Mr. Hernandez was excused by the Court, and the Court asked counsel for their peremptory challenges. (R.203).

> THE COURT: Yes. All the challenges. This is going to be the only chance to exercise your challenges. What you have to do is look through the panel and write down the number of the juror and the name and put plaintiff on the top or defendant on the top of your sheet.
>
> MR. MAGUIRE: Your Honor, we go through it just once?

> THE COURT: That is correct. This procedure was specifically approved by the Third District recently in the case of Eastern Airlines v. Gellert or Gellert v. Eastern Airlines.
>
> MR. MAGUIRE: I will object to this and ask that we can strike one at a time and take--
>
> THE COURT: We are going to do it this way.
>
> MR. GODFREY: What if we both strike the same one?
>
> THE COURT: It will be charged to each of you. You can have a few minutes.
>
> Let me see what the challenges are.
>
> Plaintiff has challenged number four, Leverich; number five, Brown; and number 10, Goldman.
>
> The defendant has challenged number one, Romero; number six, Lopez; number ten, Goldman.

(R. 204).

It was the Court's request for the simultaneous exercise of peremptory challenges by both the Plaintiffs and the Defendants that was the subject of the appeal brought by the Plaintiff/Appellant before the Third District Court of Appeal and which is the subject of this certified question before the Supreme Court of Florida. (App.)

ISSUE FOR REVIEW

WHETHER A TRIAL COURT MAY REQUIRE THE PARTIES TO EXERCISE ALL OF THEIR PEREMPTORY CHALLENGES SIMULTANEOUSLY IN WRITING WHERE THE ORIGINAL PANEL HAS BEEN THOROUGHLY EXAMINED AND CHALLENGES FOR CAUSE EXERCISED, AND THERE REMAIN SUFFICIENT MEMBERS TO COMPRISE A JURY AFTER ALL PEREMPTORY CHALLENGES HAVE BEEN EXHAUSTED?

ARGUMENT

A TRIAL COURT MAY REQUIRE THE PARTIES TO EXERCISE ALL OF THEIR PEREMPTORY CHALLENGES SIMULTANEOUSLY IN WRITING WHERE THE ORIGINAL PANEL HAS BEEN THOROUGHLY EXAMINED AND CHALLENGES FOR CAUSE EXERCISED, AND THERE REMAIN SUFFICIENT MEMBERS TO COMPRISE A JURY AFTER ALL PEREMPTORY CHALLENGES HAVE BEEN EXHAUSTED.

The question certified by the Third District Court of Appeal goes to the very core of the system of justice in Florida, indeed, the United States: trial by jury. The jury system is older than our country. We inherited it from the British; it came to American shores with the first group of English settlers. R. J. Simon, The Jury System in America, (1975). Three of the first ten amendments to the constitution refer to it. Under the doctrine of federalism, though, the administration of state jury trials has become the responsibility of the individual states. In consideration of the goals of expediency and fairness, the states, through legislation, have added to the common law system of trial by jury.

The individual states' legislative enactment of the peremptory challenge system insures parties the ultimate in fairness.

The rules limiting those challenges and prescribing their use insure expediency. It is within the domain of each state legislature to enact the rules governing the management of state trials. Almost all states dictate the number of challenges each party to a civil or criminal trial may exercise. The standard number of peremptory challenges approved by the American Bar Association House of Delegates in February, 1983, is three (3) challenges per party. A.B.A. Standards Relating to Juror Use and Management, (1983). Many states, like Florida, in accordance with the A.B.A. standard, allow three (3) peremptory challenges while other states permit each party in civil lawsuits to exercise as few as two (2) to as many as eight (8).[1]

Florida Rule of Civil Procedure 1.431 provides for an oral examination of jurors through voir dire but it makes no specific mention as to the administration of the peremptory challenges:

> Rule 1.431. Trial Jury. (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.
>
> (d) Peremptory Challenges. Each party is entitled to three peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of three peremptory

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[1] North Carolina allows eight peremptory challenges per party. N.C.Gen.Stat. §9-19 (1981). Oregon and Minnesota allow two peremptory challenges per party, Or.Rev.Stat. §46-190 (1983); Minn.Stat. §546.10 (1984).

> challenges to each party on the side with the greater number or parties. The additional peremptory challenges accruing to multiple parties on the opposing side shall be divided equally among them. Any additional peremptory challenges not capable of equal division shall be exercised separately or jointly as determined by the court.

Florida case law has endorsed the wide discretion allowed a court in the administration of those challenges. Eastern Airlines v. Gellert, 438 So.2d 923 (Fla. 3d DCA 1983). In Gellert, the trial court directed the parties to question, on voir dire, a panel of twelve (12) potential jurors. Four (4) of those jurors were dismissed for cause, leaving only eight (8) jurors in the box. At that time, the parties were directed to exercise all of their peremptory challenges, simultaneously. The Third District Court of Appeal found error with the application of that method because after the exercise of the peremptory challenges, only three (3) jurors remained; other prospective jurors then had to be called in, and impanelled, after the parties had used all of their peremptory challenges. The Third District, though challenging the application of the peremptory challenges, affirmed the manner of their exercise:

> By this opinion, we do not condemn the general procedures which the court contemplated using at the outset of the case, that is, to select twelve prospective jurors, numbered one to twelve respectively, who, after a reasonable opportunity for voir dire examination by the parties, would become the panel from which the jury was selected, those with the six lowest numbers after the exercise of peremptory challenges becoming the jury. The system chosen ran into difficulty only because some prospective jurors were excused for cause.

Id. at 931.

Some other states' peremptory challenge statutes leave less discretion to the judge. One such statute can be found in the State of Arkansas. Though the statute explicitly governs the administration of peremptory challenges, the method is very much like the one used in the trial of the case here. Arkansas Statute Section 39-229 reads:

> 39-229. Peremptory Challenges--Panel Drawn Upon Request--Right to Strike Names.--Each party shall have three (3) peremptory challenges which may be made orally--but if either party shall desire a panel, the court shall cause the names of twenty-four (24) competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of eighteen (18) shall be drawn and entered on a list in the order in which they were drawn, and numbered. Each party shall be furnished with a copy of said list, from which each may strike the names of three (3) jurors and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve (12) names remaining on said original list shall constitute the jury.

Ark.Stat.Ann. §39-229.

That very statute met with the judicial approval of the Arkansas Supreme Court in Arkansas State Highway Comm. v. Dalrymple, 252 Ark. 771, 480 S.W. 2d 955 (Ark. 1972). The court there held the simultaneous exercise of all peremptory challenges to be fair.

The Petitioner's brief in the case presently before this Court is filled with one hypothesis after another of ways possible to achieve winning juror combinations. But it is lacking in two vital areas. First, the Petitioner does not even allege that any of his rights were violated at the trial below, nor does he demonstrate a single instance of unfairness in the method of simultaneous challenges. Second, the Petitioner misinterprets the

very theory behind the peremptory challenge rule: with a stated objective of fairness, the parties are given the right to reject three potential jurors; parties are not given the right to select their ideal jury.

The Respondents concede that there exists a wealth of literature, including that cited by the Petitioner in his brief, on the psycho-sociological issues of jury selection, and acknowledges the fact that many advocates try to apply those theories in voir dire and the exercise of peremptory challenges. However, Petitioner's brief is nothing more than a litany of "what ifs"--caricatures and diatribes of a frustrated game player whose elaborate strategy for the winning move was foiled by the enforcement of a rule of fairness, imposed on all in the name of the integrity of the game. James TerKeurst's rights were not violated here. Although his attorney's grandiose numbers strategems were rendered moot, the game was fair and just.

The policy behind the peremptory challenge statute is stated matter-of-factly by the Arkansas Supreme Court in Arkansas State Highway Comm. v. Dalrymple.

> ...(T)he right of peremptory challenges is conferred as a means to reject jurors--not to select jurors, and until such time as a party is forced to take an objectionable juror without the privilege of exercising a peremptory challenge, he has shown no prejudice.

Arkansas State Highway Comm. v. Dalrymple, at 956 [Emphasis added]. See also Ark.Stat.Ann. §39-229.

Nowhere in this appeal, or in the appeal before the Third District Court of Appeal, did the Petitioner allege that he was forced to take an objectional juror. Nowhere does he

allege that the Defendants below, the Respondents here, would not have prevailed in the trial if other jurors had been selected. The Petitioner has not demonstrated any unfairness in this particular case.

The remedy the Petitioner here seeks is purely personal. Wider, general application would, in fact, hamper state courts in their constant struggle to balance the fairness and the expediency of the trial by jury process. Discretion must remain with the trial courts, especially courts with dockets as crowded as those in Dade County. A reversal of this case by the Florida Supreme Court would necessitate the enactment of an immutable and cumbersome rule which could reduce the trial by jury process into nothing more than a process of mass production.

None of the cases cited by Petitioner deal with the real issue here--the simultaneous exercising of peremptory challenges by both parties. Jones v. State, 332 So.2d 615 (Fla. 1976), was a criminal case; the issue was: may the accused challenge a prospective juror up to the time the jury is sworn--not just after the questioning of that juror? Petitioner there argued that the accused has a better chance for justice if he is able to view the panel as a potential jury rather than making the decision on each individual venireman. The reasoning in that case is not helpful to Petitioner's cause here. In fact, it weighs against Petitioner because in the instant case, both parties were able to view the whole panel as a potential jury before exercising their peremptory challenges. Florida Rock Industries v. United Building Systems,

408 So.2d 630 (Fla. 5th DCA 1982), is another case cited by the Petitioner with no relevance to his case; the issue was "back-striking". The court there held that a party is entitled to consider the panel as a whole, and peremptory challenges may be exercised until the jury is sworn; not instructive here where the issue is the fairness of simultaneous peremptory challenges. Saborit v. Delifort, 312 So.2d 795 (Fla. 3d DCA 1975), is a case of reversible error where the trial court incorrectly refused to permit plaintiff's attorney to exercise retained peremptory challenges to two jurors after the panel had been questioned on voir dire by the defendant's attorney. Brown v. McArthur's Dairies, Inc., 280 So.2d 520 (Fla. 3d DCA 1973) concerns a similar issue: the court denied the plaintiff's right to exercise one of her remaining peremptory challenges after she had tendered the jury. This case is also inapposite here. Grabow v. Lehrer, 224 So.2d 767 (Fla. 3d DCA 1969) is still another case irrelevant to the issue on appeal here. In that case, the court committed reversible error by refusing plaintiff's request to exercise his third peremptory challenge after the defendant's attorney had accepted the jury, but before the jury had been sworn. Funland Park, Inc. v. Dozier, 151 So.2d 460 (Fla. 3d DCA 1963) concerns the issue of whether plaintiffs, husband and wife, were entitled to three peremptory challenges each, as they both had causes of action in the suit. There is no issue of multiple parties here. In Minnis v. Jackson, 330 So.2d 847 (Fla. 3d DCA 1976), the issue was: what recourse could be taken where a jury member denied, during voir

dire examination, the fact that a member of his family had been injured in an accident when, in reality, his daughter had been injured. Again, the case cited is irrelevant here.

The Petitioner cannot support, with cases or group dynamic theories, a reversal of the trial court, nor the Third District Court of Appeal. Petitioner has failed to support his allegations of unfairness. Indeed, Petitioner has failed to raise any allegations of unfairness. Instead, he chose to fill his brief with hypotheses and stereotypes and wild imaginings. Just as the characters in his brief are imaginary, so is any injustice in this case.

Eastern Airlines v. Gellert, supra, supports the jury selection system employed by the trial court here: the simultaneous exercising of peremptory challenges. A trial court may require the parties to exercise all of their peremptory challenges simultaneously in writing where the original panel has been thoroughly examined and challenges for a cause exercised, and there remain sufficient members to comprise a jury after all peremptory challenges have been exhausted. There was no reversible error committed in this case.

CONCLUSION

Based on the foregoing arguments and legal authorities, MIAMI ELEVATOR COMPANY and CENTAUR INSURANCE COMPANY respectfully request this Court to affirm the finding at the trial court and at the Third District Court of Appeals, and to answer the certified question in the affirmative with the statement:

> A trial court may require the parties to exercise all of their peremptory challenges simultaneously in writing where the original panel has been thoroughly examined and challenges for a cause exercised, and there remain sufficient members to comprise a jury after all peremptory challenges have been exhausted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 21st day of September, 1984, to Michael P. Maguire, Esquire, MAGUIRE & FRIEND, P.A., 201 Sevilla Avenue, Suite 202, Coral Gables, FL 33134.

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