IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,731

JAMES TER KEURST and CECILIA TER KEURST,

Petitioners,

vs.

MIAMI ELEVATOR COMPANY and CENTAUR INSURANCE COMPANY,

Respondents.

_____/

PETITIONERS' INITIAL BRIEF

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STATEMENT OF THE CASE

The Plaintiffs, JAMES TER KEURST and CECILIA TER KEURST, husband and wife, filed suit based on negligence arising out of an incident where an elevator door closed on JAMES TER KEURST'S arm causing him to sustain back injuries when attempting to free his arm. The Defendants, MIAMI ELEVATOR COMPANY and CENTAUR INSURANCE COMPANY, filed an Answer denying liability. The case went to trial and the jury returned a verdict for the Defendants. A Motion for New Trial was filed and denied and the Plaintiffs appealed. The Third District Court of Appeals (two to one) affirmed the Judgment and certified the following question:

> 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?

JAMES TER KEURST and CECILIA TER KEURST will be referred to as the Plaintiffs and MIAMI ELEVATOR COMPANY and CENTAUR INSURANCE COMPANY will be referred to as Defendants. Reference to the Record shall be by the designation "R." Reference to the Transcript will be by the designation "Tr." (Emphasis supplied unless otherwise noted)

STATEMENT OF THE FACTS

The Plaintiff, JAMES TER KEURST, is a Dade County Policeman who severely injured his back while attempting to free his arm from an elevator door. The Defendants were responsible for the maintenance of the elevator on which he was hurt.

At the beginning of the trial, the Court announced that it was going to seat eighteen jurors each of whom would be questioned. (Tr. 3-4). The Court further announced that after challenges for cause, counsel would have the opportunity to exercise preemptory challenges by writing them down on paper. Defendants' counsel at that time asked, "In other words, there is no back striking?" (Tr. 4).

The Court replied:

> 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....

After the questioning of all of the prospective jurors, one juror was excused for cause. (Tr. 56). The following exchange then took place:

The Court: Go ahead and write down the names of the people you challenge up to three on the yellow legal sheet and write the number where they are sitting in the box.

Mr. Maguire: (Plaintiffs' counsel) Perhaps I did not understand you, Judge. You want all of our challenges?

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 Air Lines vs. Gellert or Gellert vs. Eastern Air Lines.

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: (Defendants' counsel) 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 No. 4, Leverich; No. 5, Brown; and No. 10, Goldman.

The Defendant has challenged No. 1, Romero; No. 6, Lopez; and No. 10 Goldman.

Mr. Maguire: Can I state my further objection, Your Honor?

The Court: Yes.

Mr. Mgauire: For the record, I further object to this procedure because I had to strike people before I knew whether or not they would even be reached.

I would have possibly struck No. 6 and No. 10 and No. 12 before I even knew if they were going to be on the panel.

The Court: Well, now I will tell you who the jurors are. They are: Carlos Diaz, Gary Hutchinson, Annie Wilson, Zoila Lievano, Sylvania Sergeon, and Redessie Reid. That is six.

ISSUE FOR REVIEW

WHETHER THE PARTIES ARE DENIED THE RIGHT TO MAKE AN "INTELLIGENT JUDGMENT" IN EXERCISING THEIR PEREMPTORY CHALLENGES WHERE THE COURT FORCES THEM TO USE ALL THEIR CHALLENGES AT ONCE, SIMULTANEOUSLY?

ARGUMENT

I. IT IS IMPOSSIBLE FOR COUNSEL TO MAKE AN INTELLIGENT JUDGMENT IN USING PEREMPTORY CHALLENGES WHERE THE COURT FORCES THE USE OF ALL CHALLENGES AT ONCE AND SIMULTANEOUSLY.

At the start of this case, eighteen prospective jurors were called for Voir Dire. After questioning, counsel approached the bench and one juror was excused for cause. Each side had three peremptory challenges. The Court ordered counsel to submit a list which contained all the peremptory challenges they were going to use. The Court then ordered that no further challenges would be permitted after the list was submitted. The Plaintiffs immediately objected to this procedure pointing out that they would be forced to challenge jurors who may never even be reached to be sworn. All objections were overruled.

> [T]he right of fair trial by an impartial jury is destroyed when the right to make an intelligent judgment as to whether a juror should be challenged is lost or unduly impaired. Minnis vs. Jackson, 330 So.2d 847, 848 (Fla. 3d DCA 1976).

When the trial court in this case ruled that both counsel must use all their peremptory challenges at once, without further opportunity to challenge, the jury sworn was not a matter

of "intelligent judgment" but rather a dangerous guessing game.

Any analysis of how a jury works inevitably must include an understanding of group dynamics. e.g., R. J. Simon, The Jury System in America (1975); American Judicature Society, Materials on Juries and Jury Research (Jury Deliberations Viewed As Small Group Behavior) (1977). This is particularily true in Dade County where jurors may be farmers from rural Homestead; young professionals from Coral Gables and Kendall; recent immigrants from Little Havana; long time residents of the inner city; or retirees from Miami Beach.

Any particular juror from any one of these groups may be fine but counsel who doesn't take into consideration how they will interact with each other will rarely obtain a satisfactory verdict. In point of fact, ignorance of group dynamics will probably result in a hung jury and no verdict. A juror does not sit in a vacuum - how he or she will influence or be influenced by others is a vital element of jury selection.

The method used for jury selection in this case makes any such consideration impossible. Even as counsel writes the last name on the list of those to be challenged, neither he nor his opponent has any idea of who will be on the jury.

For example, counsel "A" may think jurors 1 through 6 are fine. He may also feel that jurors 1, 2, 3, 10, 11 and 12 would be fine as would jurors 4, 5, 6, 7, 8, 9 (for simplicity's

sake consecutive numbers are being used in this example. However, virtually any numbers can be substituted and the result is the same - confusion).

If counsel "A" writes none on his list but opposing counsel "B" challenges 4, 5 and 6, the jury will be 1, 2, 3, 7, 8, 9 not the jury "A" wanted or expected. If counsel "A" anticipates that opposing counsel "B" will challenge 4, 5, 6 and so counsel "A" challenges 7, 8, 9 but opposing counsel instead challenges 1, 2 and 3, the jury will be 4, 5, 6, 10, 11 and 12. Again a totally unexpected and unwelcome result. Any notion of selecting jurors who will be compatible with each other is out the window.

What is even worse is that by using this method, the right to challenge a juror who will surely sit has to be given up to challenge a juror who may not ever be reached. For example, if counsel dislikes (for whatever reasons) jurors 1, 2 and 3 but absolutely hates number 11, what can he do? If he strikes 1, 2 and 3 and opposing counsel strikes 4, 5 and 6, then number 11 will sit. If he strikes 1, 2 and 11 and opposing counsel strikes none, jurors number 3 through 8 will sit, the challenge to number 11 being useless. If opposing counsel strikes jurors 3 and 4, then 5 through 10 will sit, the challenge to 11 is still wasted.

If he strikes 1, 2 and 3 and opposing counsel challenges any three different jurors (except 12) then 11 will sit. If

opposing counsel duplicates two or more of his challenges, i.e., "A" strikes 1, 2 and 3; "B" strikes 2, 3 and 4, 11 will not sit. Bearing in mind that both sides simultaneously use up all or part of their challenges, how on earth can an intelligent judgment be made whether to challenge juror 11?

The guessing game becomes even more complex if counsel doesn't like the last two jurors - 11 and 12. He still may not like 1, 2 and 3 but if 11 and 12 are both horrible - what can he do? Should he strike 11 and 12 guessing that opposing counsel will use all three challenges? Assuming opposing counsel strikes numbers 4, 5 and 6, the scenario then is jurors 1, 2, 3, 7, 8 and 9 will sit - counsel who struck 11 and 12 has wasted those since they could never sit.

Actually, by using this method, <u>there is no way</u> to challenge jurors 10, 11 and 12 who <u>may</u> never sit without giving up the right to challenge 1 through 6 who definitely <u>will</u> sit unless challenged.

To compound the problem, the opinion of the Court below does not restrict this method to one against one cases. Presumably, it would be permissible with multiple parties. Now with eighteen potential jurors - each side would simultaneously strike up to six. The final jury sworn would not even be a guessing game. It would be beyond anyone's guess to say who the jury would be.

The point is that jury selection has enough uncertainties without it becoming a matter of trying to ascertain how many challenges your opponent will use and whether those challenges will duplicate yours.

It is extremely difficult to articulate the difficulty created by using this method of jury selection because necessarily we are dealing in the abstract. The following example is offered as an attempt to put the matter into a more concrete context.

In a typical case, challenges alternate. By way of illustration: In a Personal Injury case, twelve potential jurors are left after challenges for cause.

Plaintiff strikes number 1 - an insurance adjuster.

Defendant strikes number 2 - a legal secretary for a Plaintiffs firm.

Plaintiff strikes number 3 - a doctor.

Defendant strikes number 4 - an ex-Marine who also was a Plaintiff in connection with a car accident.

At this point in the hypothet, the next four jurors all seem to be relatively fair and impartial.

Juror number 9 is an insurance salesman. Juror number 10 is a Bay of Pigs veteran with very strong opinions. Juror number 11 is a 65 year old retiree from Miami Beach and juror number 12 is a young urban professional from Coral Gables.

At this point, the Plaintiff, who will challenge first in the typical case, has to decide the relative merits of the remaining jurors vis-a-vis what looks to be the panel. He can "live" with the insurance salesman if the Bay of Pigs vet is off, then the panel would for four (4) impartials, the salesman and either the retiree or the "yuppie". He can also "live" with the Bay of Pigs vet if the salesman is off. He fears, however, that the vet is too opinionated and may hang the jury and so strikes him.

The Defendant is wary of both the retiree and the "yuppie" both of whom seem unlikely to turn down such a sympathetic but undeserving Plaintiff. The unchallenged jurors seem to be fair and will exert considerable pressure to be fair even if it means a defense verdict. In his judgment, the insurance salesman would be able to do so too. Reasoning that the young person may be much more susceptible to such pressure, he strikes the retiree.

The jury now sworn is numbers 5, 6, 7, 8, 9 and 12.

Suppose however that the Defendant decides to keep juror number 2 - the secretary in the Plaintiffs firm reasoning that she may not be sympathetic to exaggerating Plaintiffs (as he is sure he can show in this case). The Defendant also decides to keep juror number 4 - the former Marine with a substantial injury reasoning that he, too, would find the Plaintiff in this case is

exaggerating. He decides, however, that, for those instinctive reasons known only to trial lawyers, he doesn't like 7 or 8. So the Plaintiff strikes number 1 - number 7 "moves up" and the Defendant strikes him. The Plaintiff strikes number 3 - number 8 "moves up" and the Defendant strikes him.

The Plaintiff now has a considerably different choice. The relative merits have changed. The opinionated Bay of Pigs veteran may get along very well with the ex-Marine and he seemed charmed by the secretary for the Plaintiffs firm. If those two (2) find for the Plaintiff, chances are he will too, the Plaintiff's counsel reasons.

The Defendant, too, has to rethink his challenges. Assuming that the Plaintiff <u>now</u> strikes the insurance salesman, the Defendant has to decide whether to keep the Bay of Pigs vet, the retiree or the "yuppie". The retiree may be overly respectfull to both veterans who served their countries. The young urbanite not really so much so. He almost seems resentful and perhaps won't weigh their opinions too heavily if they were in favor of the Plaintiff.

When the Plaintiff strikes the insurance salesman, the Defendant strikes the retiree. Because the composition of the initial group has changed substantially, the Plaintiff and the Defendant have had to make different decisions on their final challenges.

Admittedly, the undersigned has indulged in some "poetic license" in the outline given above but it is not too different from the reasoning and judgment that take place virtually every day in our Courts. Both attorneys in the hypothet are able to make choices based on their skill, background, intelligence and client's position.

How much different is the "guessing game" forced on counsel by compelling them to use all their challenges at once. The relative merits of each juror cannot be judged.

For a further example, in the situation outlined above, suppose the Plaintiff only strikes numbers 1 and 3. The Defendant, who doesn't want 7 or 8, has to make a decision to strike them or the Bay of Pigs vet or the retiree or the "yuppie". If he strikes the "yuppie", he has wasted a challenge. Since the Plaintiff is using only two (2) challenges, it means that number 12 would never be reached. If he strikes the retiree, he has also wasted a challenge since he couldn't be reached either.

What's even worse is that if the Plaintiff only strikes number 1 and 3 and the Defendant strikes number 7, 11 and 12 - the jury would be 2, 4, 5, 6, 8 and 9 and he has wasted both challenges to 11 and 12. Incidently, it makes no difference whether the Plaintiff or Defendant is used for the example, the process is equally impossible.

As pointed out by Judge Baskin in her dissenting opinion in this case:

> Rule 1.431(b) of the Florida Rules of Civil Procedure states that the parties have the right to examine jurors orally on their voir dire. It continues: "The order in which the parties may examine each juror shall be determined by the court." It is readily apparent that the rule itself contemplates an order to be determined by the court for the exercise of peremptory challenges. Unfortunately, the order set in this case was no order at all, but a simultaneous exercise of challenges depriving the litigants of an opportunity to exercise fair judgment.

II. THE VERY REAL POSSIBILITY OF SUBSTANTIAL UNFAIRNESS TO A PARTY EXISTS BY USING A METHOD OF JURY SELECTION THAT MAY SO EASILY BE ABUSED.

In addition to the chaos created by using this method, there also exists a strong possibility of abuse. It has long been black letter law that a juror may be challenged at any time before being sworn. Jones vs. State, 332 So.2d 615 (Fla. 1976).

The reason given is that "A party litigant whether Plaintiff or Defendant, is entitled to consider the panel as a whole at any time that litigant has peremptory challenges remaining..." Florida Rock Industries vs. United Building Systems, 408 So.2d 630, 632 (Fla. 5th DCA 1982).

Thus counsel, who misunderstands or deliberatly ignores the court's instructions has the distinct advantage of making future strikes knowing exactly who the jury will be while opposing counsel had no such knowledge. If the court disallows such strikes, an appellate reversal is guaranteed should the verdict be unfavorable. Florida Rock Industries vs. United Building Systems, 408 So.2d 630 (Fla. 5th DCA 1982); Saborit vs. Delifort, 312 So.2d 795 (Fla. 3d DCA 1975); Brown vs. McCarthy Dairies, Inc., 280 So.2d 520 (Fla. 3d DCA 1973); Gragow vs. Lehrer, 224 So.2d 767 (Fla. 3d DCA 1969); Funland Park, Inc. v. Dozier, 151 So.2d 460 (Fla. 3d DCA 1963).

CONCLUSION

The right of counsel to make an "intelligent judgment" in exercising peremptory challenges is lost when all challenges must be made simultaneously or waived. It becomes impossible to make an intelligent selection in such a situation. Additionally, the method used invites unfairness by rewarding a party who accidently or deliberatly abuses it. It is requested that this Court remand this case for a new trial.

Respectfully submitted,

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By: 
Michael P. Maguire

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of September, 1984 to G. J. Godfrey, Esquire, Schwartz and Santone, P.A., Attorneys for Respondents, Suite 240, Ingraham Building, 25 S.E. Second Avenue, Miami, FL 33131.

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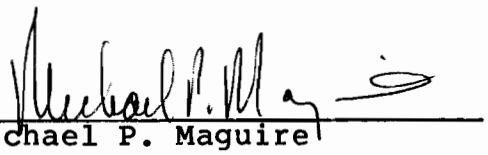
By: 
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