Case No. SC22-984
L.T. No. 1D19-850

IN THE SUPREME COURT OF FLORIDA

JAMES SEADLER

Appellant/Petitioner,

v.

MARINA BAY RESORT CONDOMINIUM ASSOCIATION
d/b/a MARINA BAY RESORT

Appellee/Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

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August 15, 2022

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-850

JAMES SEADLER,

Appellant,

v.

MARINA BAY RESORT
CONDOMINIUM ASSOCIATION,
INC. d/b/a MARINA BAY RESORT,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
William F. Stone, Judge.

April 26, 2021

TANENBAUM, J.

James Seadler sued to recover damages for an injury he sustained when his pool chair collapsed as he vacationed at Marina Bay. He won. The jury found Marina Bay liable and awarded Seadler $50,000 in past medical expenses and $10,000 in non-economic damages. Because of collateral set-offs, the trial court rendered a final judgment in Seadler's favor for $14,504.50. Seadler appeals the final judgment and asks for a new trial.

Seadler offers one basis for relief. He contends that the trial court erred when it denied his for-cause challenge of Juror 16 during jury selection. Seadler argues strenuously that Juror 16

was biased and could not be impartial. Perhaps. Juror 16, however, did not serve on Seadler's jury. Seadler nonetheless contends that he had to use a peremptory challenge to strike Juror 16, which left him without a challenge later in the process to strike a juror he found subjectively objectionable. This, according to Seadler, denied him a fair trial. A review of the selection process, however, reveals that there would have been someone that Seadler found subjectively objectionable serving on his jury regardless of whether the trial court had allowed Juror 16 to be stricken for cause. Because Seadler fails to demonstrate any miscarriage of justice that ensued from the remainder of the jury selection process, we affirm.

I.

Florida law provides for various juror disqualifications. *See* § 40.013, Fla. Stat.; *cf.* Art. I, § 22, Fla. Const. (providing that the "qualifications and the number of jurors, not fewer than six, shall be fixed by law"). By rule, meanwhile, a party may ask that a potential juror be replaced for any of several objections "for cause," which include that a potential juror is biased or "does not stand indifferent to the action." Fla. R. Civ. P. 1.431(c) ("Challenge for Cause"). The same rule allows each party to make three peremptory challenges to remove potential jurors from a panel without any legal cause at all. *See* Fla. R. Civ. P. 1.431(d); *cf.* ch. 73-333, § 24, Laws of Fla. (repealing section 53.011, Fla. Stat., which had given each party the substantive right to make three peremptory challenges to potential jurors). If there are going to be alternate jurors empaneled with the principal jurors, those alternates must be selected in the same manner. Fla. R. Civ. P. 1.431(g). During selection of these alternates, the rule allows each party one peremptory challenge, to "be used only against the alternate jurors." *Id.* An unused peremptory challenge available for the principal jurors may not be used against the alternates. *Id.*

The trial court used a common methodology for jury selection in this case. The parties were to select six jurors and two alternates from a venire, but the trial court had the parties address ten randomly selected venirepersons at a time. The first six randomly selected from the venire would be put "in the box" as a panel of presumptive principal jurors. The next two would be a panel of

presumptive alternates. And the final two would be "on deck." To pick the principal jurors, for-cause and peremptory strikes would be exercised just on those six venirepersons "in the box" at the time. When a party would strike a presumptive juror from this principal panel, a venireperson from the alternate panel would move in, and the resulting empty slot on the alternate panel would be filled by someone from the "on-deck" panel.

We diagram the process in the following way, starting with ten hypothetical potential jurors randomly selected from the venire at large and labeled Jurors A through J:

Presumptive Principal Jurors

Juror A	Juror B	Juror C
Juror D	Juror E	Juror F

Presumptive Alternates

Juror G	Juror H

On Deck

Juror I	Juror J

Let us say a party strikes Juror D. Then the juror behind Juror D (here, Juror E) would move up to fill the slot vacated by Juror D. Juror F would advance to fill the slot where Juror E had been, Juror G would move up "into the box," and so on. A new potential juror, Juror K—selected at random from the venire—would be brought in to fill the second position on the panel that

was "on deck." That position of course would have been left open when Juror J moved over to fill Juror I's slot on the same panel. Here is what the three different panels at this point would look like:

Presumptive Principal Jurors

Juror A	Juror B	Juror C
~~Juror D~~ Juror E	Juror F	Juror G

Presumptive Alternates

Juror H	Juror I

On Deck

Juror J	<u>Juror K</u>

We see here that Jurors E and F have moved to the left (because Juror D has been stricken), which opened up the sixth spot on the presumptive principal juror panel. Juror G has moved from the alternate juror panel to fill that sixth position "in the box" on the principal juror panel. Juror I has moved from the "on-deck" panel to the second position on the presumptive alternate panel. Juror K, shown in underline, now will be one of the ten venirepersons under consideration. This process, with the focus on six at a time "in the box" as presumptive principal jurors, would continue until the parties have no further for-cause challenges and each has either exhausted the allotted three peremptory challenges or tendered the principal panel as acceptable.

At this point, the parties would turn to the presumptive alternates, and each party could move to strike only from the alternate panel, based on cause, or use the single peremptory challenge the party is allowed by rule for this part of the process. If one of the parties strikes a presumptive alternate from the panel, then each venireperson behind that stricken alternate juror would move up to fill the vacated spot to the left. That would open up the tenth spot (the second "on-deck" position) again, which would be filled by another venireperson randomly selected from the venire at large. Going back to our diagram, if Jurors A, B, C, E, F, and G were accepted as the principal jury, and one party then strikes Juror H as a presumptive alternate, the lineup would appear as follows on our diagram:

Presumptive Jurors

Juror A	Juror B	Juror C
Juror E	Juror F	Juror G

Presumptive Alternates

~~Juror H~~ Juror I	Juror J

On Deck

Juror K	<u>Juror L</u>

Notice that Juror J would fill the second alternate juror position, and Juror L (underlined) would then come from the larger venire pool to fill the second position on the "on-deck" panel. Once

the parties have exhausted their alternate strikes, or tendered the alternates as acceptable, the presumptive principal jurors (Jurors A, B, C, E, F, and G) and the presumptive alternates (Jurors I and J) would be sworn in. The trial then would commence.

Next, we will use this diagram to explain what occurred at jury selection in this case and why Seadler's claimed error could not have resulted in a miscarriage of justice.

II.

A.

Juror 16 appeared amongst the first six "in the box" at the start of the selection process. That is, Juror 16 was a presumptive principal juror from the very beginning. Based on certain statements that Juror 16 made in response to questions during voir dire, Seadler asserted that Juror 16 was biased against his case and asked that the juror be excused for cause. The trial court refused that request, and Seadler used the first of his three peremptory challenges to remove Juror 16 as a potential juror. To be clear here, Juror 16 did not serve on the jury at the trial of Seadler's case.

As the selection process continued, the trial court excused other presumptive principal jurors for cause, and Seadler used his remaining two peremptory challenges. After Marina Bay tendered the six presumptive principals, Seadler asked for a fourth peremptory challenge. He already had exhausted his peremptory challenges (he used the third one to strike Juror 8), and he wanted to strike Juror 22. By the very nature of a peremptory challenge, Seadler did not have to explain why Juror 22 was objectionable, and he did not do so. The trial court denied the request.

When Seadler later objected to Juror 22 serving on his jury and renewed his request to strike (notably, after the venire had been excused, but before the jury had been sworn), he acknowledged that his objection to Juror 22 was not for cause. Nonetheless, he claimed, without elaboration, that he would not receive a fair trial with Juror 22 on the jury. The trial court once

again denied Seadler's request, and Juror 22 was sworn in as a principal juror.

Seadler now wants a new trial because he had no peremptory challenges left to strike Juror 22, and he was stuck going to trial with someone on his jury who was subjectively objectionable to him. Even if Seadler could have stricken Juror 22 with an extra peremptory, though, that would have led to *another* juror who Seadler found subjectively objectionable—Juror 12—serving as a principal juror at his trial. By law, an appellant in a civil case is not entitled to have a judgment set aside or reversed, or to be granted a new trial, unless he can show that an error has "resulted in a miscarriage of justice." § 59.041, Fla. Stat. Any error in the trial court's refusal to strike Juror 8 for cause did not prejudice Seadler, because he would have had a subjectively objectionable principal juror sitting at his trial one way or another. In our view, there was not a miscarriage of justice under the circumstances of this case. A diagram like the one we used above shows why.

B.

For the purpose of this discussion, we join the selection process at the point when Seadler exercised his third peremptory challenge. We will use the jurors' actual numbers, with the two jurors that Seadler found to be subjectively objectionable—Jurors 22 and 12—shown in bolded text because their respective movement in our diagram will be relevant to the analysis. Recall that Seadler exercised his first peremptory challenge on Juror 16; he exercised his third peremptory challenge on Juror 8. Our diagram illustrates what the lineup would have looked like at that point:

Presumptive Principal Jurors

Juror 25	~~Juror 8~~	Juror 13
Juror 27	**Juror 22**	Juror 10

Presumptive Alternates

Juror 17	Juror 19

On Deck

Juror 12	Juror 2

As indicated by the strikethrough, Seadler's exercise of his third peremptory struck Juror 8 from the panel of six presumptive principal jurors. Juror 22 was in the fifth position on the presumptive principal juror panel. As a result of Seadler's striking of Juror 8, Juror 22 moved to the fourth position (with Juror 10 of course moving over one position as well). This opened the sixth position on the principal panel, which Juror 17 filled by moving from the alternate juror panel. Seadler was out of strikes, and Marina Bay tendered the principal panel. The principal juror panel then would have looked like so on our diagram:

Presumptive Principal Jurors

Juror 25	Juror 13	Juror 27
Juror 22	Juror 10	Juror 17

The parties then turned to the presumptive alternates. Here is what that panel would have looked like at this point:

Presumptive Alternates

Juror 19	**Juror 12**

Juror 12 was in the second position on this panel, having come from the "on-deck" panel following Juror 19's move over to fill the first position, vacated by Juror 17. Meanwhile, Juror 20 filled the empty second slot on the "on-deck" panel because of Juror 2's move to the first slot on the panel, vacated by Juror 12. We can diagram this as follows:

On Deck

Juror 2	Juror 20

The trial court allowed a for-cause strike of Juror 19, and after Juror 2 moved into the second position on the presumptive alternate panel, the trial court allowed a for-cause strike of that juror, too. That left Juror 12 in the first position on the presumptive alternate panel, and because of those for-cause strikes in quick succession, Juror 20 moved from the second position on the "on-deck" panel to the second position on the alternate panel, like so:

Presumptive Principal Jurors

Juror 25	Juror 13	Juror 27
Juror 22	Juror 10	Juror 17

Presumptive Alternates

~~Juror 19~~ **Juror 12**	~~Juror 2~~ Juror 20

On Deck

Juror 26	Juror 1

Seadler at that point exercised his alternate peremptory challenge on Juror 12, so Juror 20 then went in the first alternate slot, and Juror 26 in the second alternate slot. Juror 1 shifted to the first "on-deck" position, with Juror 11 coming from the venire at large to fill in behind Juror 1 in the second "on-deck" position. Both parties tendered (Marina Bay did not use its alternate peremptory challenge), and the final lineup of principal jurors and alternates could be represented as follows:

Principal Jurors

Juror 25	Juror 13	Juror 27
Juror 22	Juror 10	Juror 17

Alternates

~~**Juror 12**~~ Juror 20	Juror 26

Jurors 25, 13, 27, 22, 10, and 17 served as the sworn members of the jury, and there is no indication in the record that any of these

six were excused. That means these six together would have rendered a verdict in Seadler's favor at the end of the trial, with neither alternate being called up. Now look again at the two jurors we put in bolded text—Jurors 22 and 12. Seadler sought to strike both jurors without cause, so we know that Seadler found both subjectively objectionable. Seadler was able to strike Juror 12 only because Juror 12 had not advanced to the presumptive principal panel. And Juror 12 remained on the presumptive alternate panel because Seadler was out of principal peremptory challenges and could not strike Juror 22. Because Juror 12 remained on the alternate panel when the alternate-juror selection process began, the rule allowed Seadler an alternate peremptory that he could use on Juror 12.

However, as we play out an alternate scenario, where Seadler is permitted to exercise a fourth peremptory challenge on Juror 22 as he requested, we see from our diagramming that Seadler would not have been able to avoid having a subjectively objectionable juror serve on his jury. Assume the trial court had allowed Seadler to have an additional peremptory challenge to strike Juror 22. From there we can assume, based on what occurred during the alternate-juror selection process, that both Jurors 19 and 2, in quick succession, would have been stricken for cause as they moved into the sixth position on the presumptive principal juror panel (vacated by Juror 17, who would have moved left in the diagram after Juror 22 was stricken through Seadler's fourth peremptory challenge). In this scenario, Juror 12 would have moved up from the alternate panel to that sixth position on the principal panel, and Seadler would not have been able to strike Juror 12 with his alternate peremptory. Because Seadler would have had no more peremptory challenges and no basis to ask for a fifth during principal-juror selection (and because Marina Bay did not strike Juror 12 with the peremptory challenge it had remaining), Juror 12 undoubtedly would have served on Seadler's jury instead of Juror 22.

This means that one way or another—regardless of whether Seadler could strike Juror 22—Seadler was going to be stuck with a juror that he otherwise wished to strike peremptorily. That is, even if he could have struck Juror 22, Juror 12—whom Seadler also found objectionable—would have served on his jury. Seadler's

theory in the trial court was that having someone serve on his jury that he would have stricken peremptorily denied him a fair trial. As we have seen, though, that would have occurred (with Juror 12 sitting on the jury instead of Juror 22) even if Juror 16 had been stricken for cause. For our analysis here, regardless of whether the trial court erred in its denial of Seadler's for-cause challenge to Juror 16, Seadler cannot claim that this amounted to the miscarriage of justice he purports to describe.*

III.

In the absence of a demonstration by Seadler that a miscarriage of justice stemmed from the asserted error by the trial court, we have no authority to reverse the judgment or grant a new trial. *See* § 59.041, Fla. Stat.

AFFIRMED.

OSTERHAUS and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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* We acknowledge that a party might employ one tactical calculus for deciding whether to strike a subjectively objectionable juror from the principal panel, and another for deciding whether to strike the same type of objectionable juror from an alternate panel. However, this difference is of no moment when considering whether there was a miscarriage of justice here. Whatever Seadler's calculus in striking Juror 12 from the alternate panel was, it is a fact that he would not have been able to keep both of the subjectively objectionable jurors from the principal panel even if the error he asserts had not occurred.

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Lissette Gonzalez of Cole, Scott & Kissane, P.A., Miami, for Appellee.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-0850

JAMES SEADLER,

Appellant,

v.

MARINA BAY RESORT
CONDOMINIUM ASSOCIATION,
INC., d/b/a MARINA BAY RESORT,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
William F. Stone, Judge.

June 29, 2022

ON APPELLANT'S MOTION FOR REHEARING OR, IN THE ALTERNATIVE, FOR CERTIFICATION TO THE SUPREME COURT

PER CURIAM.

We deny the motion. However, on our own, we certify conflict between our decision in this case and the following decisions of other district courts: *Kochalka v. Bourgeois*, 162 So. 3d 1122, 1126 (Fla. 2d DCA 2015) (characterizing jury selection errors in a civil case as "per se errors" that "are not subject to any harmful error analysis and instead require a new trial whenever there is a

showing that an error occurred"); *Tizon v. Royal Caribbean Cruise Line*, 645 So. 2d 504, 506 (Fla. 3d DCA 1994) ("It is reversible error [in a civil case] to deny a challenge for cause, thereby forcing a party to 'waste' a peremptory challenge to remove an objectionable juror and forcing him to keep another objectionable juror on the panel because all of the challenges were used."); *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 996 (Fla. 4th DCA 2004) (adopting principle in civil case that "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges," such that if the party "makes a request for additional peremptory challenges which is denied ... an appellate court will reverse and grant a new trial"); *Gootee v. Clevinger*, 778 So. 2d 1005, 1009–10 (Fla. 5th DCA 2000) ("It is reversible error [in a civil case] to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.").

Motion DENIED; CONFLICT CERTIFIED.

OSTERHAUS and JAY, JJ., concur; TANENBAUM, J., concurs with opinion.

TANENBAUM, J., concurring.

James Seadler of course disagrees with the reasoning behind our disposition of his appeal. We rejected his contention that he automatically was entitled to a new trial because he had to use a peremptory challenge to remove a potential juror that he thought should have been removed for cause (an issue he then "preserved" by exhausting the remainder of his peremptories). In doing so, we did not just reflexively look at whether there was cause to strike the potential juror such that the trial court would have harmfully erred by failing to. We recognized that the arguably biased juror did not serve on the jury anyway, so we looked instead at the specific circumstances of the jury selection to determine whether the trial court's failure to strike the potential juror for cause "resulted in a miscarriage of justice." § 59.041, Fla. Stat. We affirmed, holding that even if the juror should have been stricken

for cause, there was no miscarriage of justice because Seadler still would have had a juror he wished to exclude serving on the jury regardless of whether the cause challenge was denied.

The main premise underlying Seadler's request for rehearing is that a party's being forced to "waste" a peremptory challenge on a potential juror who should have been stricken for cause is itself a miscarriage of justice—provided the party otherwise exhausts his allotment of challenges, requests another one, and has that request denied. As the argument goes, a trial court's erroneous failure to strike a potential juror for cause cannot be harmless because it effectively reduces the number of peremptory challenges that have been made available to the party. Seadler contends that his having to use a peremptory challenge to remove the objectionable juror discussed in our disposition opinion—rather than on another potential juror that he did not want for reasons known only to Seadler—standing alone should have been enough to get him a new trial.

This principle, however, finds its home in criminal law jurisprudence. Seadler relies on a line of cases that ends most recently with *Matarranz v. State*, 133 So. 3d 473 (Fla. 2013), and traces back through those like *Busby v. State*, 894 So. 2d 88 (Fla. 2004), and *Hill v. State*, 477 So. 2d 553 (Fla. 1985). From this line, the other district courts have extrapolated concepts relating to the right to a fair and impartial jury in a *criminal* case, and based on those concepts, found that in a *civil* case, an improper denial of a for-cause challenge necessarily results in the denial of a similar right related to the availability of peremptory challenges to remove potential jurors other than for cause.

In affirming the underlying judgment and now denying Seadler's request for rehearing, this court reaches a different conclusion. Our conclusion is what the written law requires, but it also is consistent with the common-law usage of peremptory challenges as they were understood at the time the Florida Constitution was adopted. I write separately to emphasize how there is no historical support for finding an equivalency between the peremptory challenge made available in a Florida criminal trial and one available in a civil trial. In fact, the approach reflected in the decisions of the other district courts misses the

unique historical purpose and role behind the peremptory challenge in the criminal context. The challenge does not have the same historical roots—in fact, the challenge did not exist at all—at English common law for civil trials. That history cabins to criminal trials alone the special treatment the Florida Supreme Court has given to peremptory challenges. Equally important is this point: In Florida there is a substantive right to peremptory challenges in criminal trials (established by statute); no similar right exists for civil trials. Given the lack of an historical basis for the peremptory challenge in a civil trial context, and absent a constitutional or statutory right to such a challenge, we could not say that having to "waste" a challenge provided merely by procedural rule provides a legal basis to find a miscarriage of justice.

I.

Let me start by stating that there is no question both of the parties to the underlying civil suit were entitled to an impartial jury. For everyone, "[t]he right of trial by jury shall be secure to all and remain inviolate." Art. I, § 22, Fla. Const. The supreme court has said that "[t]he tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *State v. Silva*, 259 So. 2d 153, 160 (Fla. 1972). "[A]nything less than an impartial jury is the functional equivalent of no jury at all." *R.J. Reynolds Tobacco Co. v. Allen ex rel. Allen*, 228 So. 3d 684, 693 (Fla. 1st DCA 2017) (Osterhaus, J., dissenting) (quoting *City of Miami v. Cornett*, 463 So. 2d 399, 402 (Fla. 3d DCA 1985), *dismissed*, 469 So. 2d 748 (Fla. 1985)).

Seadler's main argument for a new trial in this case, though, does not turn on whether one of the jurors on the panel was not impartial. He used one of his peremptories to strike the juror he challenged for cause, so that potential juror never served at his trial. Rather, Seadler's argument turns on the significance of a peremptory challenge in a civil trial, asserting that the right to peremptory challenges is critically important to effectuate the right to an impartial jury. Seadler bases his motion for rehearing on the following from the supreme court:

> Given that the requirements of preservation were satisfied, Matarranz would suffer a violation of his due process rights if the Juror should have been, but was not, removed for cause. "Florida ... adhere[s] to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." *Hill,* 477 So.2d at 556. "The value of peremptory challenges is that they are intended and can be used when defense counsel cannot surmount the standard for a cause challenge." *Busby v. State,* 894 So.2d 88, 100 (Fla.2004). This value is destroyed if counsel is forced to use a peremptory challenge on a juror who should have been removed for cause. *See Hill,* 477 So.2d at 556 (noting that "such error cannot be harmless because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available [to] him"). . . .

Matarranz, 133 So. 3d at 483.

There are two problems with relying on *Matarranz* in this way. First, that case and the line of cases that it draws from address criminal trials, which historically have been treated differently with respect to jury selection because the consequences of such a trial were much more severe. Second, unlike in a criminal trial, there is no constitutional or statutory right to a peremptory challenge in a civil trial. The other district courts, which nevertheless apply the principle stated in *Matarranz* in the context of civil trials, fail to address these important—I say dispositive—distinctions. After all, our charge on appeal is to determine whether an asserted error resulted in a "miscarriage of justice," and I frankly do not see how we could just assume an equivalency of significance between a party's being "forced" to use a peremptory in a criminal trial and the same in a civil trial. Our refusal to grant rehearing is an historically defensible recognition that the basis for the peremptory in each context differs in such a way that bears on whether the erroneous failure to strike a potential civil juror *necessarily* is harmful within the meaning of section 59.041.

II.

At common law in England, there was considerable overlap in how potential jurors could be challenged in criminal and civil trials. In both contexts, there were the "challenges to the *array*" and the "challenge to the *polls*." 3 WILLIAM BLACKSTONE, COMMENTARIES *358 (Thomas M. Cooley ed., 3d ed. rev.) (1884) (describing challenges with respect to civil juries); *see also* 4 BLACKSTONE at *352 (noting that the same two types of challenge may be asserted with respect to criminal juries). A challenge to the array was "an exception to the whole panel" based on the "partiality or some default in the sheriff, or his under-officer who arrayed the panel." 3 BLACKSTONE at *359. A challenge to the polls is an objection to a particular juror based on his "fitness" to serve. *Id.* at *361, *364. A juror would have been considered unfit and subject to challenge "for suspicion of bias or partiality," for some legal disability, or for a criminal conviction "that affects the juror's credit and renders him infamous." *Id.* at *361–363.[1]

These challenges were "styled challenges *for cause*; which may be without stint in both criminal and civil trials." 4 BLACKSTONE at *353. That, though, is where the overlap in challenges stops. In contrast to the *for-cause* challenges available in both types of trials, Blackstone mentions the peremptory challenge only in his discussion of the criminal trial, as so: "But in criminal cases, or at least in capital ones, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing [sic] any cause at all; which is called a *peremptory* challenge." 4 BLACKSTONE at *353. Blackstone notably does not include the peremptory challenge in his catalog of jury challenges for civil trials.

Blackstone characterized the provision for peremptories in these criminal cases as "full of that tenderness and humanity to prisoners for which our English laws are justly famous." *Id.* at *353. Presumably, he said so because in England in the seventeenth and eighteenth centuries, the typical punishment for conviction of a felony was death. Blackstone, in turn, gives two

[1] In addition to these challenges, a potential juror could ask to be excused based on various statutory exemptions. *Id.* at *364.

reasons behind providing a "prisoner" (*i.e.*, a criminal defendant) the benefit of peremptory challenges. For one, because of the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," Blackstone explains that the peremptory ensured "a prisoner (when put to defend his life) [had] a good opinion of his jury, the want of which might totally disconcert him." 4 BLACKSTONE at *353. Under the law at the time, the prisoner should not have to "be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike." *Id.* For the other reason, Blackstone makes a related point: "Because upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment." *Id.* English common law allowed the prisoner to set that juror aside anyway, through the peremptory challenge, "to prevent [such] ill consequences." *Id.*

We easily can see from this history that the peremptory challenge finds its origin in England's common-law heritage regarding criminal trials; there is no such tradition for civil trials. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 639 (1991) (O'Connor, J., dissenting). The challenge stems from the ancient law's intention to make that criminal trial—particularly where life is on the line—more humane from the perspective of the defendant.[2] This history, then, counsels against any equivalency between the supreme court's harmful error analysis in criminal cases like *Matarranz*, *Busby*, and *Hill* and an analysis to be used in a civil trial context where a party has to expend a peremptory to strike a potential juror who should have been stricken for cause. As significant as the stakes may be in a civil trial, they obviously still do not compare to the liberty at stake in a criminal trial. Moreover, the parties in a civil trial have a parity that does not exist between the parties in a criminal trial, where a defendant faces off against the sovereign. All of this to say that, in the light of the unique history behind the *criminal* peremptory challenge, there is no readily apparent, logically cogent rationale for taking

[2] For this reason, the king did not have access to the same type of challenge. *Id.* at *353.

the supreme court's "reversible error" analysis with regard to the use of that challenge in a criminal trial context, and simply applying it—without further consideration—in the civil trial context.

III.

Add to this historical consideration the fact that the supreme court's "reversible error" analysis is firmly rooted in the existence of a defendant's *right* to a peremptory challenge in a criminal trial. That is a serious problem for someone trying to apply that analysis in a civil trial context because in Florida, *there is no right* to a peremptory challenge in a civil trial. Let me first observe that even in the criminal context, there is no *constitutional* right to a peremptory challenge; any right to such a peremptory has to be statutorily based. *See Stilson v. United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."); *Gray v. Mississippi*, 481 U.S. 648, 663 (1987) ("Peremptory challenges are not of constitutional origin."); *Smith v. State*, 59 So. 3d 1107, 1111 (Fla. 2011) (acknowledging that "peremptory challenges are not themselves constitutionally guaranteed at either the state or federal level"); *Deviney v. State*, 322 So. 3d 563, 584 (Fla. 2021) (Lawson, J., concurring in part) ("Additionally, in Florida, the use of peremptory challenges in criminal trials is a statutory creation, as the Florida Constitution does not establish a defendant's right to peremptories. . . . [T]here is no federal or state constitutional right to peremptory challenges."); *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension."); *id.* at 89 (explaining that "peremptory challenges are a creature of statute," and that "it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise").

Sure enough, there is a statute that grants a criminal defendant the right to peremptory challenges. *See* § 913.08, Fla.

Stat. The supreme court repeatedly has given special significance to this statutory right. *See Smith*, 59 So. 3d at 1111 (characterizing purpose of a peremptory challenge as "the effectuation of the constitutional guaranty of trial by an impartial jury," such that the challenge is "one of the most important of the rights secured to the accused" (internal quotations and citations omitted)). Decades earlier, the court stated something similar as follows:

> Under the Constitution of the United States and the State of Florida the defendant in a criminal case is guaranteed the right to a trial by an impartial jury and it is to effectuate this guaranty that he may reject a certain number of those who are called to the jury box without giving his reason for not wishing them to pass upon his guilt or innocence. By this means he may escape the judgment of those whom he may consider prejudiced against him but whom he may not be able to show disqualified for causes defined by statute.

Carroll v. State, 190 So. 437, 438 (Fla. 1939). Along these lines, then, the following has been the rule—again, in *criminal* cases—in Florida for nearly a century, if not longer:

> In a case where an objectionable juror is challenged by the defendant for cause, and the court wrongfully overrules the challenge, and the defendant uses one of his peremptory challenges to excuse the objectionable venireman, the record should show that the jury finally impaneled contained at least one juror objectionable to the defendant, who sought to excuse him peremptorily, but the challenge was overruled.

Young v. State, 96 So. 381, 383 (Fla. 1923).

It bears repeating, however, that the principle reflected in the preceding two quotes works only if there is a substantive right that exists in the first place to be impaired by the trial court's error. That is, with respect to the peremptory, the Legislature must create a right to it before it can be a basis for harmful error. The United States Supreme Court did once note that the legislatively granted right to a peremptory challenge "is one of the most important of the rights secured to the accused," so "denial or

impairment of the right is reversible error without a showing of prejudice." *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986) (internal quotation and citation omitted). It later observed, though, that a "denial or impairment" of this right occurs only when "the defendant does not receive that which state law provides." *Ross*, 487 U.S. at 89.

And there is the rub. Florida law provides *nothing* in the way of peremptories for civil trials. Since 1973, there has been no statutory right at all to peremptory challenges in a civil trial. *See* ch. 73-333, § 24, at 840, Laws of Fla. (repealing the statute providing for peremptory challenges in civil trials); *cf.* § 53.011, Fla. Stat. (1971) (entitling each party in a civil trial to three peremptory challenges). The only reason we are talking about peremptories at all in this case is because there is a judicially adopted civil *rule* that allows for peremptory challenges. *See* Fla. R. Civ. P. 1.431(d) ("Each party is entitled to 3 peremptory challenges of jurors . . . ."). Because there is no constitutional right to any peremptory challenges, this allowance for peremptories in civil trials as a matter of procedure does not effectuate a constitutional right and cannot amount to a substantive right. *See Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975) ("Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions."); *see also Boyd v. Becker*, 627 So. 2d 481, 484 (Fla. 1993) ("While the Florida Constitution grants this Court exclusive rule-making authority, this power is limited to rules governing procedural matters and does not extend to substantive rights.").

In a civil trial, then, the peremptory challenge at best is a procedural grace. Without the historical roots that the criminal peremptory can claim, the civil peremptory could be viewed only from an administrative perspective, as a tool to promote judicial economy. That is, as a procedural matter, the peremptory challenge serves as a "backstop" or "failsafe" in a civil trial to

conserve judicial resources and limit the likelihood a case will not be sent back for a new trial. It does this by establishing a mechanism by which a prospective juror who may not be impartial can still be excluded from the trial panel, notwithstanding a trial court's error in failing to strike that juror for cause. *Cf. United States v. Martinez-Salazar*, 528 U.S. 304, 315–16 (2000) ("In choosing to remove Gilbert rather than taking his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury."); *id.* at 313 (explaining that when a defendant uses a peremptory challenge "to remove a juror who should have been excused for cause," he "received all that state law allowed him" as well as the fair trial that the federal constitution guarantees).

* * *

Seadler received the three peremptory challenges provided by rule, and he used them as intended. It is fair to say that his use of the peremptory challenge in the breach—to ensure a potential juror suspected of bias is excluded at any cost, even if the trial court failed to do so—was the *fulfillment* of the purpose behind the procedural challenge. It arguably saved the case from having to be tried again. At all events, in the absence of a substantive right to that challenge—and no historical basis for considering it to be of fundamental importance—there was no legal authority for us to conclude that Seadler's use of a peremptory to strike the juror he found objectionable on appeal, by itself, was a miscarriage of justice.

Our fact-specific review of the process by which the jury was selected in Seadler's case revealed no irregularity that deprived him of the fair trial to which he was entitled. This we explained at length in our opinion on the merits, and we did not overlook any controlling law. Seadler can rest assured that we were well aware of the criminal cases that he cites in his motion for rehearing. The history behind the peremptory, which I have done my best to describe here, demonstrates that the operative principle stated in those cases has no application outside the context of the criminal

trial—at least for as long as there is no statutory right to a peremptory challenge in a civil trial.

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