

IN THE CIRCUIT COURT OF THE  
SEVENTEENTH JUDICIAL CIRCUIT, IN  
AND FOR BROWARD COUNTY,  
FLORIDA

COMPLEX CIVIL DIVISION

CASE NO. 08-80000 (19)

JUDGE JEFFREY E. STREITFELD

IN RE: *ENGLE* PROGENY CASES  
TOBACCO LITIGATION

*Pertains To: Kaplan, 2008-CV-19469 (19)*

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**DEFENDANTS' BENCH MEMORANDUM REGARDING THE IMPROPRIETY  
OF ADDING MEMBERS TO THE JURY PANEL AFTER THE PARTIES HAVE  
BEGUN EXERCISING THEIR PEREMPTORY CHALLENGES**

The Court has stated that it is inclined to add entirely new members to the jury panel after the parties have begun exercising their peremptory challenges. If this is done, the parties would be placed in the position of having had to exercise their challenges without knowledge of the full panel from which all challenges would be exercised.<sup>1</sup> Such a procedure would run afoul of clear binding authority and would embed reversible error into this case from the outset.

The Florida Supreme Court has instructed trial judges that, in structuring jury selection procedures, “[t]he only fair scheme is to allow the parties to exercise their challenges, singularly,

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<sup>1</sup> Indeed, before any peremptory challenges were exercised and Plaintiff had indicated she was making twenty-three challenges for cause (later increased to twenty-five), the Court made sure the parties understood that the jury would be selected from the existing panel, or not at all at this time. *Kaplan v. R.J. Reynolds Tobacco Co., et. al.*, No. 08-19469, at 1005 (Fla. 17th Cir. Ct.) (“[I]f we don't pick a jury on this -- on this panel, I don't know when we're going to be able to do this case.... Because I need to reserve a panel this big way in advance, and I already have a four-week case starting immediately after this one.”) (Ex. A).

alternately, and orally *so that, before a party exercises a peremptory challenge, he has before him the full panel from which the challenge is to be made.*” *Ter Keurst v. Miami Elevator Co.*, 486 So. 2d 547, 549 (Fla. 1986) (emphasis added). Violation of this rule, where there has been an appropriate objection, constitutes reversible error. *Tedder v. Video Elecs., Inc.*, 491 So. 2d 533, 535 (Fla. 1986). Indeed, as set forth below, this Court has twice recently acknowledged and acted upon this bedrock principle in the first *Hess* trial and the recent *Ferlanti* trial.

Two Florida Supreme Court cases directly govern this issue. In *Ter Keurst v. Miami Elevator Co.*, the Supreme Court addressed the procedure for the exercise of peremptory challenges and concluded that the only fair scheme is to allow the parties to exercise their challenges singularly, alternately, and orally so that, before a party exercises a peremptory challenge, he has before him the full panel from which the challenge is to be made. 486 So. 2d at 549. The Court observed that the jury selection process must afford counsel the opportunity to know “who will serve if not excused.” *Id.* at 549.<sup>2</sup>

Similarly, in *Tedder v. Video Elecs., Inc.*, the Supreme Court held that “[t]he right to unfettered exercise of peremptory challenges -- which . . . includes the right to view the panel as a whole before the jury is sworn -- is an essential component of the right to a trial by jury.” 491 So. 2d at 535 (quoting *Grant v. State*, 429 So. 2d 758, 760-61 (Fla. 4th DCA 1983) (Hurley, J., specially concurring)) (emphasis added). Indeed, the Court went further to describe this right as “fundamental to the American scheme of justice.” *Id.*, citing *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491 (1968). While the Court “encourage[d] trial courts to continue to explore new ways of increasing trial court efficiency,” it firmly established that the

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<sup>2</sup> In *Ter Keurst* the jury verdict was not reversed, but only because counsel did not object to the jury as finally composed. 486 So. 2d at 550. In this case, in contrast, defense counsel has timely and properly objected to the Court’s proposed procedure.

procedures employed “cannot be used to defeat a litigant’s right to view the panel as a whole in order to use his peremptory challenges intelligently and efficiently.” *Id.*; *see also, e.g., Van Sickle v. Zimmer*, 807 So. 2d 182, 185 (Fla. 2d DCA 2002) (“A litigant is entitled to view the panel as a whole in order to intelligently and effectively use his or her peremptory challenges.”); *Fla. Rock Indus., Inc. v. United Building Sys., Inc.*, 408 So. 2d 630, 632 (Fla. 5th DCA 1981). Adding new jurors to the panel after strikes have been exercised, as the Court has at least preliminarily indicated it is inclined to do, is precisely the type of procedure which violates the fundamental rights discussed in *Ter Keurst* and *Tedder*.

The right of counsel to view the panel as a whole before exercising peremptory challenges is especially important because, as the Fourth DCA has recognized, “jury selection is a dynamic, evolving process where a lawyer’s evaluation of jurors turns on those who have been seated and those potential jurors who might be called if a challenge is exercised.” *Carratelli v. State*, 915 So. 2d 1256, 1259 (Fla. 4th DCA 2005). As discussed below, this Court has previously recognized the error involved in altering the line-up of known potential jurors once the peremptory challenge phase of the selection process has begun. Here, the error is exacerbated where the Court envisions adding entirely new jurors to the panel after challenges have been exercised.

Specifically, in the first *Hess* trial, during the peremptory challenge phase but after Plaintiff had exercised all of her peremptory challenges, the Court on its motion granted a hardship cause challenge of the next juror up for consideration. Plaintiff’s counsel objected, representing as Defendants have here, that his peremptory strike strategy was predicated upon knowing that the juror the Court had just stricken was in play as a potential juror. *See* Nov. 25, 2008 Trial Tr., *Hess v. Philip Morris USA Inc.*, No. 07-11513, at 391-97 (Fla. 17th Cir. Ct.) (Ex.

B). The Court agreed that changing the make-up of the potential panel, even after a party had exercised all of its peremptory challenges, was improper and started the whole peremptory striking process over. *Id.* at 400-01 (“I am agreeing that if I was going to announce a challenge for cause, that I should have done it at the inception before you began to exercise your peremptories.”).

The Court expressed these same views in the recent trial of *Ferlanti v. Liggett Group, Inc.*, No. 03-21697(19). There, Plaintiff’s counsel renewed a previously denied cause challenge after the peremptory challenge process had begun. When the Court indicated a willingness to grant that challenge, Defense counsel objected on the grounds that granting the cause challenge once peremptory challenges had been exercised would deprive counsel of the ability to know the make-up of the entire panel in order to intelligently exercise its challenges. The Court correctly agreed and gave Plaintiff’s counsel the opportunity to either exercise the cause challenge and start anew with peremptories, or to waive the cause challenge. Plaintiff’s counsel chose the latter and jury selection continued. *See* Feb. 22, 2008 Trial Tr. at 74-79 (where plaintiff’s counsel raised a for-cause challenge after the parties had begun exercising their peremptory challenges, the Court acknowledged that defense counsel’s argument that “this is a huge issue because we’ve already exercised our peremptory challenges based on the panel as it was before us,” would necessitate the re-starting of the preemptory challenge process if Plaintiff persisted with her cause challenge). (Ex. C). Again, the procedure the Court envisions here, namely adding completely new jurors after peremptory challenges have been exercised, is far worse than that which it has already acknowledged would have been error in *Hess* and *Ferlanti*.

It is axiomatic that the exercise of peremptory challenges can be done intelligently only with knowledge of who will come into the “box” if such peremptory is exercised. *See Carratelli*

*v. State*, 915 So. 2d 1256, 1259 (Fla. 4th DCA 2005). Normally, when circumstances cause a change in the make-up of the jury panel, the only available remedy short of a mistrial (as was done in *Hess* and conditionally granted in *Ferlanti*) would be to empanel additional jurors and begin the exercise of peremptory challenges anew. However, now that the previous panel has been exhausted and excused,<sup>3</sup> Defendants are deprived of the “fundamental right” to choose to keep a previously challenged (and now excused) juror, and instead exercise a challenge on a yet unknown, unseen juror who would be called in any new panel. *Tedder*, 491 So. 2d at 535; *Ter Keurst*, 486 So. 2d at 549. Accordingly, the only way to proceed forward is to dismiss the remaining jurors from the previous panel, and to reschedule this trial to a later time convenient to the Court’s schedule and when the Court has a sufficient pool of potential jurors to begin the jury selection process anew.


### **CONCLUSION**

For the foregoing reasons, the Court’s inclination to bring in more jurors for consideration after the parties have begun exercising peremptory challenges would violate the parties’ right to view the full panel from which a jury will be selected prior to the exercise of peremptory challenges. As this Court recognized in *Hess* and *Ferlanti*, and as clear Supreme Court precedent holds, the proposed procedure will introduce reversible error into the trial from the outset.

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<sup>3</sup> Here, in order to avoid the situation the Court and parties now face, counsel for the Defendants urged the Court not to excuse the existing panel of jurors so the striking process could begin anew with the extra jurors now necessary to form a jury. Unfortunately, the Court excused the existing panel, thereby making it impossible to remedy the fundamental error that will occur as soon as additional jurors are added to the panel. *Kaplan v. R.J. Reynolds Tobacco Co., et al.*, No. 08-19469, at 1072-1081 (Fla. 17th Cir. Ct.) (“Your Honor, just so the record’s [sic] clear we do not believe you can just pick up with a new panel, you would have to start the striking over because you need to know who’s [sic] in the box when you exercise your strikes.”) (Ex. A).

Respectfully submitted,

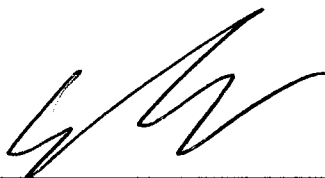
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail and E-mail on Plaintiff's counsel listed below and by other agreed means on Defendants' counsel listed below this 31 day of May, 2009.



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Andrew S. Brenner

**SERVICE LIST**

***Kaplan, et al. v. R.J Reynolds Tobacco Co., et al.***

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