

IN THE CIRCUIT COURT FOR THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

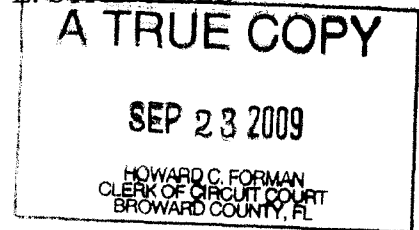
COMPLEX CIVIL DIVISION

CASE NO.: 08-80000 (19)

JUDGE JEFFREY F. STREITFELD

IN RE: *ENGLE* PROGENY CASES
TOBACCO LITIGATION

Pertains To: *Naugle*, Case No. 07-036736 (19)



**PLAINTIFF'S OBJECTION TO DEFENDANT'S ANTICIPATED
REQUEST TO USE A JUROR QUESTIONNAIRE AT TRIAL**

COMES NOW, the Plaintiff, LUCINDA NAUGLE, by and through undersigned counsel, and hereby submits this Objection to Defendant's Anticipated Request to use a Juror Questionnaire at Trial, and in support thereof states:

1. Plaintiff anticipates that the Defendant, PHILIP MORRIS, will request this Court to use a Juror Questionnaire during the jury selection process at trial. Prior experience has evidenced in this Court and other trial courts around the State of Florida that the Defendant's proposed Juror Questionnaire will contain 50 + questions, and conservatively, an additional 90 + subparts. It is the Plaintiff's position that the Defendant's anticipated proposed juror questionnaire:

- A. violates Florida law and the Florida Rules of Civil Procedure;
 - B. complicates the jury selection process and lengthens the time spent in voir dire;
- and
- C. is a poorly disguised attempt to both profile the prospective jurors and precondition them to the potential issues in the trial.

MEMORANDUM OF LAW

Florida law and civil procedure regarding qualification for jury duty and jury selection has been developed over a significant period of time. (LexisNexis F.S.A. §40.01 Qualifications of jurors; LexisNexis F.S.A. §40.02 Selection of Jury lists; LexisNexis F.S.A. §40.013 Persons disqualified or excused from jury service; LexisNexis F.S.A. §69.071 Number of jurors in civil cases; etc.).¹ Historically, Florida had passed a statute that authorized county commissioners to propound questions to prospective jurors for petit or grand juries. *Smith v. Portante*, 212 So. 2d 298 (Fla. 1968)(discussing Fla. Stat. §40.101 Florida Statutes (1967)). In *Smith v. Portante*, the Florida Supreme Court reviewed the constitutionality of that statute and held it to be an unconstitutional delegation of power. The court was clearly concerned that use of broad and unfettered juror questionnaires would expand the traditional areas of legitimate inquiry contemplated by voir dire.

In the instant case the ‘essential information’ to be gathered from prospective jurors is not indicated in the language of the Act. The Act does not suggest the nature of the questions to be propounded to the prospective jurors. It provides no objective guidelines or standards for the Judicial Council to follow in formulating and promulgating an appropriate questionnaire. Consequently, the Act on its face represents an unlawful delegation of authority to the Judicial Council and to jury commissioners to propound any question they see fit to prospective jurors.

...

Conceivably, such an uncircumscribed questionnaire as here contemplated could cover the widest range of inquiries unconnected with traditional voir dire questioning or statutory requisites relating to qualifications of jurors.

Smith v. Portante, 212 So. 2d 298, 299-300 (Fla. 1968).

¹ LexisNexis F.S.A. § 40.013 contains the statutory grounds for disqualification. They include present prosecution for a crime or convictions of a felony unless civil rights have been restored; exemptions for the Governor, Lt. Governor, Cabinet officers, clerks of court, and judges, interested persons, expectant mothers, parents with children under 6 and not employed full time, practicing attorney, physician, physically infirm, hardship, prior jury service, age in excess of 70 and caretakers for incompetent persons. See Fla. R. Civ. P. form 1.983.

Subsequent to the *Smith v. Portante* decision, the Supreme Court specifically addressed the use of juror questionnaires and adopted Florida Rule of Civil Procedure Rule 1.431 and the Juror Voir Dire Questionnaire, form 1.984.²

Florida Rules of Civil Procedure 1.431(a)(1) and (2) and form 1.984

Fla. R. Civ. P. 1.431(a) (1) and (2):

(1) The circuit court may direct the authority charged by law with the selection of prospective jurors to furnish each prospective juror with a questionnaire **in the form approved by the supreme court** from time to time to assist the authority in selecting prospective jurors. The questionnaire shall be used after the names of jurors have been selected as provided by law but before certification and the placing of the names of prospective jurors in the jury box. The questionnaire shall be used to determine those who are not qualified to serve as jurors under any statutory ground of disqualification.

(2) To assist in voir dire examination at trial, any court may direct the clerk to furnish prospective jurors selected for service with a questionnaire in **the form approved by the supreme court** from time to time. The prospective jurors shall be asked to complete and return the forms. Completed forms may be inspected in the clerk's office and copies shall be available in court during the voir dire examination for use by parties and the court.

The rule provides the court with discretion **to use** a juror questionnaire, but gives **no discretion to alter the form of the questionnaire** approved by the Supreme Court. The approved jury questionnaire for voir dire in civil trials is Fla. R. Civ. P. 1.984. If any questionnaire is to be used at all in this case, it must be the approved form. This rule regarding the use of juror questionnaires in civil cases has remained unchanged through four (4) amendments; 1976, 1988, 1992 and 2005.

The Florida Supreme Court's decision *In Re: Amendments to The Florida Rules of Civil*

² RULE 1.431. TRIAL JURY. The committee note to the 1971 Adoption of Rule 1.431 states:

1971 Adoption. Subdivision (a) is new. It is intended to replace section 40.101, Florida Statutes, declared unconstitutional in *Smith v. Portante*, 212 So.2d 298 (Fla. 1968), after supplying the deficiencies in the statute. It is intended to simplify the task of selecting prospective jurors, both for the venire and for the panel for trial in a particular action. The forms referred to in subdivision (a) are forms 1.983 and 1.984.

Procedure, et al., 967 So.2d 178 (Fla. 2007) once again addressed the issue of what written voir dire questions would be allowed to be provided to jurors selected for service. The Court noted that in “November [of] 1999 the Jury Innovations Committee . . . of the Court's Judicial Management Council embarked on the most comprehensive review and evaluation of Florida's jury system in the history of this state.” *In Re: Amendments to the Florida Rules of Civil Procedure, et al.*, 967 So. 2d 178, 179 (Fla. 2007). The purpose of the committee was to review the entire jury system and advocate innovative reforms in an attempt to improve our jury system. It is interesting to note that the very first section in the Supreme Court's decision dealt with the issue of jury questionnaires. *See id.* at 179-180. The Jury Innovations Committee recommended the development of juror questionnaires for use in both civil and criminal cases. However, the Supreme Court rejected that recommendation for civil cases and stated:

As noted, the Jury Innovations Committee recommended the development of juror questionnaires for use in both civil and criminal cases. The Florida Rules of Civil Procedure currently contain a standard juror questionnaire, form 1.984 - - Juror Voir Dire Questionnaire. **We conclude that this form is adequate for use in civil cases.** . . . The **use** of these forms shall be at the discretion of the **chief judge** of each circuit court.

Id. at 180-181 (emphasis added).

Not only has the Supreme court specifically rejected changes to Form 1.984, the issue of the authority of the trial court to go beyond the Supreme Court approved questionnaire forms has already been addressed by the Fourth District Court of Appeal. In *State v. Thayer*, the trial court granted a defense motion to submit a written questionnaire to prospective jurors. *State v. Thayer*, 489 So. 2d 782, 783 (Fla. 4th DCA 1986). The State sought review of that order by writ of certiorari. *Id.* The Fourth District Court of Appeal held that the trial court **abused its discretion** when it allowed the questionnaire containing 36 questions (with numerous subparts). *Id.* The court ultimately denied the petition because of its interpretation of *Jones v. State*, 477 So.2d 566

(Fla. 1985) which the appellate court felt required them to deny the writ of certiorari. The Fourth District Court of Appeal certified the question to the Supreme Court seeking guidance on whether *Jones v. State* precluded the State from seeking certiorari review of a non-appealable interlocutory order in a criminal case where the State had demonstrated a clear departure from the essential requirements of law. *Id.* In his dissenting opinion, Judge Glickstein felt that certiorari should not have been denied. He also stated: "**[u]ntil the Supreme Court adopts a rule to the contrary, the only questionnaire that veniremen should be sent is that permitted by Florida Rule of Civil Procedure 1.431.**" *Id.* at 783-784 (emphasis added).

The Supreme Court responded that the Fourth District, did, in fact, have the jurisdiction to entertain the writ and remanded the case. *State v. Thayer*, 520 So. 2d 571 (Fla. 1988). On remand, the Fourth District quashed the order of the trial court that allowed the written questionnaire and held that the trial court abused its discretion and departed from the essential requirements of law when it approved the submission of the written questionnaire to prospective jurors. *State v. Thayer*, 528 So.2d 67, 68 (Fla. 4th DCA. 1988). Judge Glickstein, in his now concurring opinion, stated that the trial court was **without authority** to order the questionnaire and repeated his original statement that "[u]ntil the Supreme Court adopts a rule to the contrary, the **only** questionnaire that veniremen should be sent is that permitted by Florida Rule of Civil Procedure 1.431." *Id.* at 69.

This Court is bound by the decisions of the Fourth District Court of Appeal and the ruling in *State v. Thayer*, 528 So. 2d 67 (Fla. 4th DCA 1988).³

³ The relationship between the criminal rules and civil rules with regard to written voir dire questionnaires is a distinction without a difference in this case. At the time of the *Thayer* decision, there was no approved form for written questionnaires in criminal cases. The request in the *Thayer* case was made by the defendant pursuant to Fla. R. Crim. P. Rule 3.281 which stated that any party shall be furnished by the clerk of the court with a list containing the names and addresses of the prospective jurors summoned to try the case together with copies of all jury questionnaires returned by the prospective jurors. The committee note of that rule referred to questionnaires which

In *Sisto v. Aetna*, the Plaintiff moved for a new trial after the court refused to permit certain queries relevant to the case. *Sisto v. Aetna Cas. & Sur. Co.*, 689 So. 2d 438 (Fla. 4th DCA 1997). Although *Sisto* involved oral questions, not a written questionnaire, the court's analysis does examine the purpose of Fla. R. Civ. P. 1.431(a). The court explained:

Subsequent to *Smith*, [referring to *Smith v. Portante*] the supreme court adopted rule 1.431(a), which vested in the circuit courts the authority to furnish each prospective juror with a questionnaire in the form approved by the supreme court. The questionnaire is intended as a timesaving measure to assist in determining whether a juror is **qualified** to serve. It does not assist the lawyers in determining whether a juror could be **fair and impartial** in the particular case being tried. This is the function of the voir dire examination, governed by rule 1.431(b).

Id. at 440 (emphasis in the original).

Granting the use of the Defendant's anticipated proposed juror questionnaire is exactly what the Supreme Court over forty years ago stated should be avoided, what it specifically rejected in its' 2007 decision when it declined to approve any changes to the approved form 1.984, and what the Fourth District has already ruled would be an abuse of this court's discretion and a departure from the essential requirements of law.

It is anticipated that the Defendant will argue that the use of the questionnaire will "save time" or promote judicial efficiency. However, experience demonstrates otherwise. In a recent case tried before Judge Terrell, in Florida's First Judicial Circuit, in and for Escambia County, a questionnaire very similar to the one being proposed in this case was used initially. Voir dire took nine days, and ultimately resulted in a mistrial for juror misconduct. When the trial commenced again, no, questionnaire was allowed and jury selection took two days and a few

were authorized by §40.101. That statute had been found unconstitutional and had been repealed by the legislature prior to the *Thayer* decision. **The only** written questionnaires approved by the Supreme Court for any cases, civil or criminal, were Forms 1.983 and 1.984. Therefore the *Thayer* holding regarding the authority of the court to go beyond the approved written voir dire questionnaire forms is squarely on point and equally applicable to civil cases. The written voir dire questionnaire ultimately approved by the Supreme Court for criminal cases, Form 3.9855, arose out of its 2007 opinion and is remarkably similar to Forms 1.983 and 1.984 and equally limited in scope.

additional hours. This is probably the best evidence of the ultimate impact of a juror questionnaire such as the one proposed in this case on the efficiency of the jury selection process.

Finally, a review of the questions previously proposed in prior cases before this Court and other trial courts around this state demonstrate that the Defendants are attempting to obtain information to "profile" prospective members of the jury in an attempt to gain an insight into which jurors might be best for their defensive positions. Such questions as political party affiliation, substance abuse problems in the past, cigarette brand preference, reasons they began smoking, whether they "like smoking", whether they feel guilty about smoking, whether they wished they had never started smoking, the symptoms they experienced when they attempted to quit smoking, multiple questions regarding attempts to "quit" smoking, whether they smoke within an hour of awakening, in what year or decade did they first believe that cigarette smoking may cause lung cancer, whether older smokers began smoking before they were aware of the risks of smoking, whether older smokers only continued to smoke because they were addicted by the time they learned of the risks of smoking, when the juror first became aware of the substantial dangers of smoking, whether the juror blogs or post their thoughts and comments online and which websites they use, including social networking sites etc. The offensive and intrusive questions go on *ad infinitum* and demonstrate the defendants' true purpose.

The formality of the court setting is an important factor in jury selection and responses. Legitimate questions can be propounded during oral voir dire when the court, the parties, and their counsel have the opportunity not only to see and assess the jurors' demeanor when they respond, but to inquire into the underlying basis of their responses.

CONCLUSION

The Plaintiff vehemently objects to the use of the Defendant's anticipated questionnaire as violating Florida decisional law, the Florida Rules of Civil Procedure, and as a poorly disguised attempt to gain an advantage in the voir dire process which is contrary to the spirit and purpose of voir dire.

WHEREFORE, Plaintiff, LUCINDA NAUGLE, respectfully requests this Honorable Court to enter an order denying Defendant's anticipated request to allow the use of its proposed questionnaire.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Email and U.S. Mail to all Counsel on the attached service list, this 23rd day of September, 2009.

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