



LEXSEE 889 SO2D 165

**ANDREW LOTTIMER, individually, Appellant, v. NORTH BROWARD
HOSPITAL DISTRICT, d/b/a CORAL SPRINGS MEDICAL CENTER, etc., et al.,
Appellee.**

CASE NO. 4D03-1576

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

889 So. 2d 165; 2004 Fla. App. LEXIS 18768; 29 Fla. L. Weekly D 2738

December 8, 2004, Opinion Filed

SUBSEQUENT HISTORY: [**1] Released for
Publication December 8, 2004.
Rehearing granted by Lottimer v. N. Broward Hosp.,
2004 Fla. App. LEXIS 20590 (Fla. Dist. Ct. App. 4th
Dist., Dec. 8, 2004)

PRIOR HISTORY: Appeal from the Circuit Court for
the Seventeenth Judicial Circuit, Broward County; Allen
Kornblum, Judge; L.T. Case No. 99-19829 08.
Lottimer v. N. Broward Hosp. Dist., 2004 Fla. App.
LEXIS 15897 (Fla. Dist. Ct. App. 4th Dist., Oct. 27,
2004)

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: A motion was filed
seeking clarification of the opinion entered in appellant
individual's appeal in a civil action against appellee
medical center and others.

OVERVIEW: The trial court had refused to allow the
individual to exercise a peremptory challenge to a juror
prior to the jury being sworn. Selection of alternate jurors
had taken place and the trial court had warned that it
would not allow any backstrikes after the jury came in.
Despite the warning, the individual's counsel attempted to
exercise a remaining strike he had to the main panel. The
court reversed the final judgment entered in the case
because Fla. R. Civ. P. 1.431 and Florida case law were

absolutely clear that the individual could exercise his
peremptory challenges until the jury is sworn. The failure
to permit the exercise of a peremptory challenge before
the jury was sworn constituted an error as a matter of law.

OUTCOME: The court granted the motion for
clarification, withdrew its previously issued opinion and
substituted the instant opinion in which it reversed the
final judgment in the case and remanded for a new trial.

LexisNexis(R) Headnotes

*Civil Procedure > Trials > Jury Trials > Jurors >
Selection > General Overview*

[HN1] While the time and manner of challenging and
swearing jurors have traditionally rested within the sound
discretion of the trial court, a trial court does not have the
discretion to infringe upon a party's right to challenge any
juror, either peremptorily or for cause, prior to the time
the jury is sworn.

*Civil Procedure > Trials > Jury Trials > Jurors >
Selection > General Overview*

[HN2] A party may exercise an unused peremptory
challenge at any time prior to a jury being sworn. This is
so even if the main panel has been accepted, the parties
are selecting alternates, and one party chooses to exercise
an unused peremptory to a juror on the main panel.

Civil Procedure > Trials > Jury Trials > Jurors > Selection > General Overview

[HN3] The failure to permit the exercise of a peremptory challenge before a jury is sworn constitutes an error as a matter of law.

COUNSEL: Dan Cytryn of Cytryn & Santana, P.A., Tamarac and Nancy Little Hoffmann of Nancy Little Hoffmann, P.A., Pompano Beach, for appellant.

Marlene S. Reiss and Cory W. Eichhorn of Stephens Lynn Klein La Cava Hoffman & Puya, P.A., Miami, for appellee.

JUDGES: WARNER, J. SHAHOOD and MAY, JJ., concur.

OPINION BY: WARNER

OPINION

[*166] ON MOTION FOR CLARIFICATION

WARNER, J.

We grant the motion for clarification, withdraw our previously issued opinion, and substitute the following in its place.

We reverse the final judgment in this case because the trial court refused to permit plaintiff to exercise a peremptory challenge to a juror prior to the jury being sworn. The rule and case law are absolutely clear that a party may exercise peremptory challenges until the jury is sworn.

A panel of six jurors had been selected, with plaintiff having unused peremptory challenges.¹ Although one of the defendants suggested swearing in the panel before alternates were selected, the court declined [**2] to do so. Each defendant received one additional strike for the alternate jurors, while plaintiff received two, both of which plaintiff exercised. Two alternate jurors were selected. Before the trial court brought the jury in to be sworn, the court warned counsel not to exercise any backstrikes after the jury came in. Despite this warning, when the jury was about to be sworn, plaintiff's counsel made it known that he intended to exercise another strike

to the main panel, for which he had peremptory strikes remaining. The trial court denied the backstrike, concluding that plaintiff would indirectly be allowed eight strikes to the main panel instead of the permitted six strikes.

¹ Plaintiff was allowed six challenges because there were two defendants. *See* Fla. R. Civ. P. 1.431(d).

[HN1] While "the time and manner of challenging and swearing jurors have traditionally rested within the sound discretion [*167] of the trial court," *Tedder v. Video Elecs., Inc.*, 491 So. 2d 533, 534 (Fla. 1986), [**3] a trial court does not have the discretion "to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn." *Jackson v. State*, 464 So. 2d 1181, 1183 (Fla. 1985). [HN2] A party may exercise an unused peremptory challenge at any time prior to the jury being sworn. *Fla. Rock Indust., Inc. v. United Bldg. Sys., Inc.*, 408 So. 2d 630, 632 (Fla. 5th DCA 1981); *Dobek v. Ans.*, 475 So. 2d 1266, 1266-67 (Fla. 4th DCA 1985). This is so even if the main panel has been accepted, the parties are selecting alternates, and one party chooses to exercise an unused peremptory to a juror on the main panel. *See Van Sickel v. Zimmer*, 807 So. 2d 182 (Fla. 2d DCA 2002); *Pecher v. Cohn*, 786 So. 2d 1282 (Fla. 5th DCA 2001).

Appellees seek to distinguish the instant appeal because plaintiff had already exercised his two challenges to the alternates when he sought to exercise another strike to the main panel. Thus, by again using a remaining peremptory against the main panel, plaintiff would actually be allowed more than his share of peremptory challenges against the main [**4] panel. We do not agree that this would inevitably follow.

[HN3] The failure to permit the exercise of a peremptory challenge before the jury is sworn constitutes an error as a matter of law, requiring reversal of the final judgment. *See St. Paul Fire & Marine Ins. Co. v. Welsh*, 501 So. 2d 54, 56 (Fla. 4th DCA 1987); *Dobek*, 475 So. 2d at 1268.

Reversed and remanded for a new trial.

SHAHOOD and MAY, JJ., concur.