



LEXSEE 786 SO. 2D 1282, 1283

JOANNA I. PEACHER, Appellant, v. MILDRED SHACHTMAN COHN, Appellee.

Case No. 5D00-828

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

786 So. 2d 1282; 2001 Fla. App. LEXIS 8490; 26 Fla. L. Weekly D 1564

June 22, 2001, Opinion Filed

SUBSEQUENT HISTORY: [**1] Released for
Publication July 11, 2001.

PRIOR HISTORY: Appeal from the Circuit Court for
Orange County, Lawrence R. Kirkwood, Judge.

DISPOSITION: REVERSED and REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff sued defendant, alleging she was injured in a automobile collision between the parties. Defendant was awarded a final judgment. Plaintiff later challenged the judgment of the Circuit Court for Orange County, Florida, denying plaintiff's request to use her final peremptory challenge during jury selection by way of a back strike.

OVERVIEW: After a jury trial, plaintiff received a \$ 3,150 verdict arising out of a low speed, minimal impact accident. The main dispute for the jury was whether the alleged injuries were related to the accident and whether her injuries were permanent. As a result of certain collateral sources stipulated to, and defendant's \$ 20,000 offer of judgment, a final judgment in favor of defendant was entered in the amount of \$ 18,365, mainly representing the defendant's costs and attorney's fees. The main issue on appeal involved the jury selection process. The record revealed that plaintiff made no objection to one of the jurors during the selection process, but later requested use of her third, and final, peremptory strike seeking to dismiss the juror from the panel. Counsel for defendant argued that once the trial court had begun to

consider alternates, plaintiff's third peremptory challenge could not be used. Apparently, based on that argument, the trial court denied the plaintiff's request. The appellate court held plaintiff's right exercise peremptory challenges was a fundamental part of her right to a fair trial and that the trial court's denial of that right was reversible error.

OUTCOME: The appeals court reversed and remanded the trial court's judgment.

LexisNexis(R) Headnotes

Civil Procedure > Trials > Jury Trials > Jurors > Selection > General Overview
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview

[HN1] In a civil case, a trial judge cannot infringe upon a party's right to challenge any juror, whether for cause or peremptorily, prior to the time the jury is sworn. The denial of this right is per se reversible error.

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

[HN2] Fla. R. Civ. P. 1.431(f) prohibits the swearing of a jury until the jury has been accepted by the parties or until all challenges have been exhausted.

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

Civil Procedure > Appeals > Standards of Review >

Reversible Errors

[HN3] The right to exercise peremptory challenges is a fundamental part of a right to a fair trial and the denial of that right should be treated as reversible error and the cause remanded for a new trial.

COUNSEL: Thomas P. Hockman of Law Offices of Hockman, Hockman & Hockman, Winter Park, for Appellant.

Jamie Billotte Moses and Philip Turner King, Jr., of Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, Orlando, for Appellee.

JUDGES: PLEUS, J. THOMPSON, C.J., and COBB, J., concur.

OPINION BY: PLEUS

OPINION

[*1283] PLEUS, J.

The main issue in this case is whether the refusal of the trial judge to allow a third and final peremptory challenge by way of a back strike prior to swearing the jury is reversible error per se. The defendant, while conceding it was error, argues it was harmless error because the plaintiff won on the issue of liability when the jury ruled in her favor. We agree with the plaintiff's claim that it was reversible error per se.

After a five-day jury trial, the plaintiff received a \$ 3,150 verdict arising out of a low speed, minimal impact accident. The main dispute for the jury was whether the alleged injuries were related to the accident and whether her injuries were permanent.

[**2] As a result of certain collateral sources stipulated to, and the defendant's \$ 20,000 offer of judgment, a final judgment in favor of the defendant was entered in the amount of \$ 18,365, mainly representing the defendant's costs and attorney's fees.

The process by which the jury was empaneled is worthy of discussion. The first juror was selected with no objection. Plaintiff used her first peremptory on the second juror. The third and fourth were selected without opposition. The fifth and sixth were stricken by the defendant. The seventh was admitted without objection and the eighth juror was the defendant's third strike. At

this point, four jurors had been selected with the plaintiff having two strikes left and the defendant none. Plaintiff did not initially strike number nine. Juror ten, the juror plaintiff claims should have been stricken, was not challenged for cause or as a peremptory. Before alternative selections began, the court asked if plaintiff challenged the six picked at that point. She then preempted nine and made no mention of ten. Plaintiff moved for cause on number eleven and defendant agreed. Juror twelve became the sixth juror. The judge asked if the attorneys were [**3] satisfied and no objection was made. They moved on to selection of an alternate. Juror 13 was stricken by the defendant. At this point, the plaintiff attempted to exercise a strike on juror ten. Counsel for the defendant made an erroneous and misleading argument that once the court began to consider alternates, the third peremptory could not be used. Apparently, based on that argument, the court denied the request. Juror fourteen became the alternate and the trial proceeded.

In *Gilliam v. State*, 514 So. 2d 1098, 1099 (Fla. 1987), the Florida Supreme Court reiterated [HN1] that a trial judge cannot infringe upon a party's right to challenge any juror, whether for cause or peremptorily, prior to the time the jury is sworn and further stated that the "denial of this right is per se reversible error." While *Gilliam* was a criminal case and we have [*1284] found no civil case similarly proclaiming such an error to be per se reversible, we see no reason to not apply the same rule in the civil arena. Florida Rule of Criminal Procedure 3.310 provides that either party can challenge a juror before the juror is sworn to hear the cause. [HN2] Florida Rule of Civil Procedure 1.431(f) similarly [**4] prohibits the swearing of a jury until "the jury has been accepted by the parties or until all challenges have been exhausted." The harmless error analysis suggested by the defendant is impractical to apply; one can hardly determine whether a jury, minus the challenged juror and replaced by another, would have acted more in the plaintiff's favor. We conclude that [HN3] the right to exercise peremptory challenges is a fundamental part of a right to a fair trial and that the denial of that right should be treated as reversible error and the cause remanded for a new trial. *See* Padovano, Judge Phillip J., *Florida Civil Practice*, § 17.4 (2000 ed.).

In ordering this cause to be remanded for a new trial based on the above, we need not reach the second issue raised on appeal: whether the trial court erred in denying

plaintiff's motion in limine to exclude from evidence the fact that the defendant's accident reconstruction expert spent six and one-half years as a prisoner of war in Vietnam in the late 1960's and early seventies. We note, however, that short of an "opening the door" comment or question by plaintiff's counsel, there is no reason for the jury to hear this evidence. *See*, [**5] *e.g.*, *Ruiz v. State*, 743 So. 2d 1 (Fla. 2000) (error for prosecutor to attempt to gain jury's sympathy by discussing in closing argument her heroic and dutiful father). Defense counsel's argument, that it needed to fill in this time gap on its

expert's resume, was answered by plaintiff's offer of having the jury told that, during this period, the expert was a pilot in the United States Air Force or simply that he was in the Air Force. On remand, unless plaintiff's counsel opens the door for the evidence of this expert's POW status to come in, this evidence, as requested in the limine motion, should not be presented to the jury.

REVERSED and REMANDED.

THOMPSON, C.J., and COBB, J., concur.