

IN THE CIRCUIT COURT OF THE FIFTEEN  
JUDICIAL CIRCUIT IN AND FOR PALM  
BEACH COUNTY, FLORIDA

CASE NUMBER: CA 03-00721 AO

MONIQUE BENTAL, Individually and as  
Personal Representative of the Estate of  
ELIE BENTAL,

Plaintiffs,

vs.

THOMAS BARTZOKIS, M.D., BARTZOKIS  
AND SECKLER, M.D., P.A., ARISTIDES  
ZACHAROUDIS, M.D., ARISTIDES  
ZACHAROUDIS, M.D., P.A.,

Defendants.

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**MEMORANDUM OF LAW REGARDING VOIR DIRE**

Plaintiff, MONIQUE BENTAL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIE BENTAL, by and through the undersigned counsel, hereby files this Memorandum of law regarding Voir Dire, and states as follows:

**I. PARTIES ARE ENTITLED, BY RIGHT, TO A FAIR AND IMPARTIAL JURY:**

The fair and impartial jury, as guaranteed by the Sixth Amendment of the United States Constitution and Section 11 of the Florida Constitution, is crucial to the administration of justice under our legal system. Singer v. State, 109 So.2d 7 (Fla. 1959). The fundamental necessity of a fair and impartial jury was heralded by early Court decisions as judges initiated an effort to secure and safeguard the integrity of the jury trial. Jurors should, if possible, be not only impartial, but beyond even the suspicion of partiality. @ O'Connor v. State, 9 Fla. 215,222 (Fla. 1860), cited in Singer, 109 So.2d at 23. The Supreme Court noted in Singer:

To render the right to an impartial jury meaningful, cause challenges must be granted if there is a basis for any reasonable doubt as to the juror's ability to be fair.

Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality. See, Montozzi v. State, 633 So.2d 563 (Fla. 4<sup>th</sup> DCA 1994); Sydleman v. Benson, 463 So.2d 533 (Fla. 4<sup>th</sup> DCA 1985); Nash v. General Motors Corp., 734 So.2d 437 (Fla. 3<sup>rd</sup> DCA 1999).

See also, Moore v. State, 525 So.2d 870, 872 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985), cert. denied 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988); Singer, 109 S.2d at 23; Chapman v. State, 593 So.2d 605 (Fla. 4<sup>th</sup> DCA 1992); King v. State, 622 So.2d 134 (Fla. 3<sup>rd</sup> DCA 1993); Auriemme v. State, 501 So.2d 41 (Fla. 5<sup>th</sup> DCA 1986); rev. denied, 506 So.2d 1043 (Fla. 1987).

## **II.SCOPE OF QUESTIONING AND HYPOTHETICAL QUESTIONS:**

The purpose of jury selection is to determine whether a prospective juror is qualified and will be completely impartial in his judgment. The impartiality of the finders of fact is an absolute prerequisite to our system of justice. Therefore, its length and extensiveness should be controlled by the circumstances surrounding the jurors= attitude in order to assure a fair and impartial trial by persons whose minds are free from all interests, bias or prejudice. Barker v. Randolph, 239 So.2d 110, 112 (Fla. DCA 1970).

As stated in Lavado v. State, 492 So.2d 1322 (Fla. 1986) and Lavado v. State, 469 So.2d 917 (Fla. 3<sup>rd</sup> DCA 1985) (dissenting opinion of Third District adopted by the Supreme Court) (citing to Rosales- Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981)):

The scope of voir dire, therefore, should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require. Thus, were a juror=s attitude about a particular legal doctrine (in the words of the trial court, the law) is essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of voir dire properly includes questions about and references to that legal doctrine *even if stated in the form of hypothetical questions*. (emphasis added).

The Supreme Court characterized Judge Person=s dissent as articulate and logical. Lavado. 469 So. 2d at 1322.

It has long been held in this State that parties have wide latitude to examine jurors for the purpose of ascertaining the qualifications of persons drawn as jurors and whether they would absolutely impartial in their judgment. Fla.R.Civ.P. 1.431(b) (1999); Cross v. State, 89 Fla. 212 (Fla. 1925); Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967). Additionally, the trial court may not prevent the lawyer from asking questions the court already asked the jury. Miller v. State, 785 So.2d 662, 663 (Fla. 3d DCA 2001)(A prospective jurors do not respond in the same manner to inquiry by the judge as they do questions by counsel.).

III. AREAS OF INQUIRY FOR MEANINGFUL VOIR DIRE, AS MANDATED IN REPORTED CASES, INCLUDE:

1. Whether a juror has reservations about awarding money damages for the death of a loved one and disapproves of personal injury lawsuits. Nash v. General Motors Corp., 734 So.2d 437 (Fla. 3<sup>rd</sup> DCA 1999)(reversed denial of cause strike).
2. Whether a juror would have Adifficulty@ following the law on pain and suffering. Pacot v. Wheeler, 758 So. 2d 1141 (Fla. 4<sup>th</sup> DCA 2000) (reversed denial of cause strike); Sisto v. Aetna Casualty & Surety Co., 689 So.2d 438 (Fla. 4<sup>th</sup> DCA 1997).
3. Whether a juror has negative attitudes toward the legal system resulting from unfavorable experiences due to lawsuits being filed against them or members of their family, and that those predispositions would result in bias. Levy v. Hawk=s Cay, Inc., 543 So.2d 1299 (Fla. 3<sup>rd</sup> DCA 1989).
4. Whether a juror has relationships to a party or attorney within the third degree B Sikes v. Seaboard Coastline RR Co., 487 So.2d 1118 (Fla. 1<sup>st</sup> DCA 1986) (reversed denial of cause strike).
5. Whether a juror has friendly relationship with a party=s counsel. Johnson v. Reynolds, 121 So. 793 (Fla. 1929) (grounds for cause challenge); Sikes v. Seaboard Coastline RR Co., supra.
6. Whether a juror is or was an employee of one of the parties. Boca Teeca Corp. v. Palm Beach County, 291 So.2d 110 (Fla. 4<sup>th</sup> DCA 1974) (subject to challenge for cause).
7. Whether a juror feels that there is a relationship between the verdict the juror would render and the amount of insurance premiums they would have pay. Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981).
8. Whether a juror owned stock in defendant corporation. Club West, Inc. v. Tropigas 514 So.2d 426 (Fla. 3<sup>rd</sup> DCA 1987) (subject to cause challenge).
9. Whether there is something about the juror=s employment that Amay@ effect her decision in the case. Ortiz v. State, 543 So.2d 377 (Fla. 3<sup>rd</sup> DCA 1989) (sufficient to disqualify for cause).
10. Whether a juror could be fair whether she liked it or not, and whether he could or could not put dollar value on loss of companionship. Gootee v. Clevinger, 778 So.2d 1005 (Fla. 5<sup>th</sup> DCA 2000).
11. Whether or not he has formed or expressed an opinion on issues involved in a case based on newspaper articles and hearsay. Singer v. State, 109 So.2d 7, 19 (Fla. 1959).
12. Whether or not he could listen to the evidence and instruction of the court free from influence of what he has read or heard. Smith v. State, 463 So.2d 542 (Fla. 5<sup>th</sup> DCA 1985).
13. Hypothetical questions that correctly state the applicable law are proper. Pait v. State, 112 So.2d 380 (Fla. 1959)
14. Questions concerning the Ainsurance crisis@ or Alawsuit crisis@ should be permitted. Sutherlin v. Fenenga, 810 P.2d 353 (N.W. Ct. App. 1991); Babcock v. Northwest Memorial Hospital, 767 S.W. 2d 705 (Tex. 1989).

Furthermore, a party is permitted to ask direct and specific questions concerning the venire's attitude and impressions of the opposing party's position and defenses, even when concerning mixed issues of fact and law. In Lavado v. State, 469 So.2d 917 (Fla. 3d DCA 1985), a trial court refused counsel's attempt to ask questions of the venire regarding the facts and law regarding the defense of voluntary intoxication. While the majority of the 3rd DCA affirmed, Judge Pearson issued a strong dissent in which he stated that Aa meaningful voir dire must include questions about the juror's attitudes towards the defense. In reversing the majority opinion which upheld the trial court, the Supreme Court stated: Athe trial judge refused to permit the inquiry, permitting only a general question regarding a prospective juror's ability to follow the court's instructions. We can add nothing to Judge Pearson's comprehensive, articulate, and logical dissenting opinion, and therefore adopt it in its entirety as our majority opinion. @ Lavado v. State, 492 So.2d 1322 (Fla. 1986).

It is proper to question prospective jury members on whether they believe that a rendition of a verdict for the Plaintiff would have any influence on their life, especially with regard to insurance, and the premiums they have to pay. Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981). The Florida Supreme Court cited Graham v. Waite, 23 App. Div. 2d 628, 257 N.Y.S.2d 629 (App. Div. 1965) which stated Athe impact of monetary award in negligence cases upon automobile liability insurance rates may be proper subject for exploration upon voir dire examination of a jury panel.

#### IV. CHALLENGES FOR CAUSE

19076. A juror should be excused for cause if she is related to party or attorney within the third degree. Sikes v. Seaboard Coastline RR Co., 487 So.2d 1118 (Fla. 1<sup>st</sup> DCA 1986).

19077. A juror's friendly relationship with counsel for a party is grounds for challenge for cause. Johnson v. Reynolds, supra; Sikes v. Seaboard Coastline RR Co., supra.

19078. A juror who is an employee of one of the parties is subject to challenge for cause. Boca Teeca Corp. v. Palm Beach County, 291 So.2d 110 (Fla. 4<sup>th</sup> DCA 1974).

19079. When the plaintiff may be starting out with Aone strike against him because of the jurors initial feelings or beliefs, that creates a strike for cause. Club West, Inc. v. Tropigas of Florida, Inc., supra.

19080. A juror who was employed by a hospital at which the defendant doctor was president and chief of staff should be dismissed for cause. Martin v. State Farm, 392 So.2d 11 (5<sup>th</sup> DCA 1980).

19081. Juror should be excused for cause if there is a reasonable doubt as to juror=s ability to render an impartial verdict. Leon v. State, 396 So.2d 203 (Fla. 3<sup>rd</sup> DCA 1981).

19082. Juror should be excused for cause if there is a doubt as to the juror=s sense of fairness or mental integrity. Johnson v. Reynolds, 97 Fla. 591, 121 So. 793 (1929); City of Live Oak v. Townsend, 567 So.2d 926 (Fla. 1<sup>st</sup> DCA 1990).

19083. Jurors should be beyond even the suspicion of impartiality. O=Connor v. State, 9 Fla. 215 (Fla. 1860).

19084. If a juror makes a statement sufficient to cause doubt as to his/her ability to render impartial verdict, the fact that the trial judge or opposing counsel extracts a commitment that the juror will be fair or try to be fair, doesn=t affect the need to excuse that juror for cause. Price v. State, 538 So.2d 486 (Fla. 3<sup>rd</sup> DCA 1989); Leon v. State, *supra*; Sikes v. Seaboard Coast Line RR Co., *supra*; Longshore v. Fronrath Chevrolet, Inc., 527 So.2d 922 (Fla. 4<sup>th</sup> DCA 1988). See also Fazzolari v. City of West Palm Beach, 608 So.2d 927, 929 (Fla. 4<sup>th</sup> DCA 1992), *rev. denied*, 620 So.2d 760 (Fla. 1993) in which the court stated that the jurors subsequent change in their answers, arrived at after further questioning by appellee=s counsel, must be reviewed with some skepticism. The assurance of a prospective juror that the juror can decide the case on the facts and the law is not determinative of the issue of a challenge for cause. See also Goldenberg v. Regional Import & Export Trucking Co., Inc., 674 So.2d 761, 764 (Fla. 4<sup>th</sup> DCA 1996), in which the court stated that the juror=s efforts at rehabilitating a prospective juror should always be considered in light of what the juror has freely said before the salvage efforts began. See also Straw v. Associated Doctors Health and Life, 728 So.2d 354 (Fla. 5<sup>th</sup> DCA 1999).

19085. A juror=s statement that he can render a verdict based on the law and the evidence is not conclusive if it appears from other statements made by him that he is not possessed of a state of mind that will enable him to do so. Singer v. State, 109 So.2d 7 (Fla. 1959); Longshore v. Fronrath Chevrolet, Inc., *supra*; Ortiz v. State, 543 So.2d 377 (Fla. 3<sup>rd</sup> DCA 1989); Club West, Inc. v. Tropigas of Florida, Inc., 514 So.2d 426 (Fla. 3<sup>rd</sup> DCA 1987).

19086. A juror=s statement that there may be something about her employment that would affect her decision in the case, is sufficient to disqualify the juror for cause. Ortiz v. State, *supra*.

19087. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. Hill v. State, 477 So.2d 553 (Fla. 1985).

19088. A close case should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality. @ Sydleman v. Benson, 463 So.2d 533 (Fla. 4<sup>th</sup> DCA 1985). Straw v. Associated Doctors Health and Life, *supra*.

19089. Jurors should be excused for cause when they acknowledge negative attitudes toward the legal system resulting from unfavorable experiences due to lawsuits being filed against them or members of their family, and that those predispositions would result in bias. Levy v. Hawk = S. Cay, Inc., 543 So.2d 1299 (Fla. Ed DCA 1989) *rev. denied*, 553 So.2d 1165 (Fla. 3<sup>rd</sup> DCA 1989).

19090. A venire person who conceded that A Maybe. I have to be honest. Maybe. @ To a question asking whether matters raised in voir dire would cause her to view one party as A starting with one strike against [him]. @ Club West, Inc. v. Tropigas of Florida, Inc., 514 So.2d 426, 427 (Fla. 3<sup>rd</sup> DCA 1987) (reversing a trial court = s failure to strike said venire person for cause, despite her later statement that she could be impartial).

19091. The juror said he owed his life to a surgeon and therefore the plaintiff might be starting out with a half a strike against him. Jaffe v. Applebaum, 830 So.2d 136 (Fla. 4<sup>th</sup> DCA 2002) (reversing a trial court = s denial of a cause strike).

19092. A venire person admitted that he would A probably @ A give a little bit more weight to what they [opposing counsel] say as opposed to what I say Y @ Sikes v. Seaboard Coast Line Railroad Co., 487 So.2d 1118 (Fla. 1<sup>st</sup> DCA 1986) (reversing trial court = s failure to strike said venire person for cause).

19093. A venire person admitted, A I just wish I could say a hundred percent that I would be strictly impartial but I really can = t say that. @ Gootee v. Clevinger, 778 So.2d 1005 (Fla. 5<sup>th</sup> DCA 2000) (reversing a trial court = s failure to strike said venire person for cause despite her later statement that she A can be fair whether she likes it or not @).

19094. A venire person conceded by nodded head to counsel = s question A you = re not a hundred percent sure that you could be fair and impartial, is that A correct? @ Williams v. State 638 So.2d 976 (Fla. 4<sup>th</sup> DCA 1994) (reversing a trial court = s refusal to excuse said venire person for cause, despite the court = s efforts at rehabilitation).

19095. A venire person admitted a bias against some personal injury claimants by admitting that the Plaintiff would A have to overcome a burden and not be starting off even with the defense @ and that she would A have a little difficulty in being impartial in this case. @ Goldenburg v. Regional Import and Export Trucking Co., Inc., 674 So.2d 761 (Fla. 4<sup>th</sup> DCA 1996) (reversing trial court = s failure to excuse said venire person for cause).

19096. A venire man admitted a potential bias by stating A if I had a bias it would be against the defendant, @ and later responded by saying A I = d try not to @ and A I would give it my best shot @ when the judge attempted to rehabilitate him. Bell v. State, 870 So.2d 893 (Fla. 4<sup>th</sup> DCA 2004) (reversing trial court = s refusal to grant defendant = s cause challenge).

19097. It is acceptable to permit inquiry as to whether a juror feels that there is a relationship between the verdict the juror would render and the amount of insurance premiums they would have pay. Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981).

19098. Jurors should be excused for cause when they acknowledge a difficulty@ following the law on pain and suffering. Pacot v. Wheeler, 758 So. 2d 1141 (Fla. 4<sup>th</sup> DCA 2000) (Trial court was required to dismiss for cause jurors who testified during voir dire that they would have difficulty following the law regarding damages awards for pain and suffering) (Appendix 22); Sisto v. Aetna Casualty & Surety Co., 689 So.2d 438 (Fla. 4<sup>th</sup> DCA 1997).

19099. Juror who stated she could be fair whether she liked it or not, and jurors who could not put dollar value on loss of companionship, must be excused for cause. Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5<sup>th</sup> DCA 2000).

19100. A Juror=s subsequent statements that he or she could be fair should not necessarily control the decision to excuse a juror for cause when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes. See, e.g., Graham v. State, 470 So. 2d 97 (Fla. 1<sup>st</sup> DCA 1985).

19101. Reasonable doubt has been found where a juror admitted she Aprobably@ would be prejudiced, even though she then asserted she Aprobably@ could follow the Judge=s Instructions. Imbimbo v. State, 555 So. 2d 954 (Fla. 4<sup>th</sup> DCA 1990).

19102. The fact that a juror belonged to the same clinic as the Defendant and had been treated at the Defendant=s clinic is enough to sustain a challenge for cause. Mitchell v. CAC- Ramsay Health Plans, Inc., 719 So. 2d 930 (3<sup>rd</sup> DCA 1998) (Appendix 35); Tizon v. Royal Caribbean Cruise Line, 645 So. 2d 504 (Fla. 3<sup>rd</sup> DCA 1994) (Juror who would have a Adifficult time@ putting aside her feelings about recovery from back injuries was a cause strike. Conflicting statements by a juror create a reasonable doubt about the competence to serve on the jury.

19103. **When the juror admitted she was the Atiny bit@ prejudiced in favor of the defendant doctor and she guessed that her feelings against medical malpractice cases would stay with her through the trial and she was not 100% sure her bias would not affect her verdict, stricken for cause.** Sommerville v. Ahuja, 902 So. 2d 930 (Fla. 5<sup>th</sup> DCA 2005).

[A-1] Prospective Juror Love.

Love responded that her uncle is a physician, and he had talked to her about rising insurance costs caused by too many malpractice lawsuits against doctors. Appellant=s counsel asked her if she would have a problem bringing back a verdict against a health care provider, because of the cumulative effects of such lawsuits, and her ability to get good medical care. She replied, AI guess so, but I-but I think that I could separate that from-once I heard theY[evidence].@ When appellant=s counsel pressed her on whether or not she could assure him she would not let her preference play any role in her decision, she continued to vacillate by prefacing her responses AI thinkY@.

She confessed to having a lingering prejudice in favor of the defendant doctor, expressed as a A tiny bit.@ When asked what she based the Atiny bit@ on she said I don=t know. I don=t really know what it=s based on. I guess just a feeling. I would try not to.

[A-2] In the case of potential juror Love, she admitted to prejudices and biases against plaintiffs bringing medical malpractice cases. Later in her voir dire she denied that those feelings could have an influence on her. But, her responses were

AI don=t think so.@ And AI don=t believe so.@ Her testimony can be summarized by saying she was not one hundred percent sure her bias= would not affect her verdict but she would try. Her answers were too equivocal and vacillating to overcome her earlier, frank admission to prejudice against medical malpractice suits. She should have been excused for cause.

[B-1] Prospective Juror Garner.

Garner also responded affirmatively to appellant=s counsel=s general questions of whether he harbored prejudice against medical malpractice suits, because of their cumulative adverse affect on doctors, and his ability to obtain good medical care for himself. When asked if it would be his preference in this case to bring back a verdict for the defense, he answered, AYes and no. Sometimes it=s pretty difficult. I don=t believe-no, no.@ But he concluded, AYeah, I probably would. I=m thinking.@

The trial court refused to excuse Garner for cause, explaining AI=m telling you, you could probably get anybody on that jury to \*934 say that.@ Appellant=s counsel pointed out that Garner had said he Aprobably@ would have a preference for a defense verdict. The court responded, AI don=t think that gets it.@ The court also commented to appellant=s counsel: ASo you got a good appealY@

[B-2] In the case of Garner, his responses demonstrate he harbored prejudices against plaintiffs in medical malpractice cases more emphatically than Love. He said AYes I do absolutely.@ And when asked if he thought his preference not to add to the problem of too many malpractice cases would affect his decision, he responded, AYeah, probably would. I=m thinking.@ On balance, Garner admitted his bias against medical malpractice suits would affect his ability to render an impartial verdict. He never wavered or vacillated. He also should have been excused for cause.

19104. Will you have any difficulty in setting those negative feelings aside? Pacot v. Wheeler, 758 So.2d 1141, 1142 (Fla. 4th DCA 2000); James v. State, 736 So.2d 1260 (Fla. 4th DCA 1999).

19105. Do you feel that my client is not starting out with a clean slate? Overton v. State, 801 So.2d 877, 894 (Fla. 2001).

19106. Juror who disapproved of legal concept of awarding money to compensate someone for the loss of a loved one and therefore the plaintiff may not be starting off with A an even playing field.@ Nash v. General Motors Corp., 734 So.2d 437, 439 (Fla. 3d DCA 1999).

19107. Is my client starting out with a strike or half strike against him? Club West, Inc. v. Tropigas of Florida, Inc., 514 So.2d 426-28 (Fla.3d DCA 1987) (from Jaffe v. Applebaum, 2002 WL 31114757 (Fla. 4th DCA 2002): ATrial court abused its discretion in denying personal representative=s motion to strike juror for cause in medical malpractice action brought by patient=s personal representative against physician, and involved an allegedly negligent cosmetic surgical procedure, where juror candidly admitted that he owed his life to his surgeon and plastic surgeon, and juror admitted that because of such experience, patient would have been subject to starting out with a half strike against her.@ In addition, juror also stated that a person who undergoes plastic surgery is a Afool@. We conclude that juror Minker=s responses were sufficient to create a reasonable doubt as to his impartiality. We recognize that neither party attempted to rehabilitate juror Minker by asking him whether he could set his feelings aside and base his verdict on the evidence and the law as given to

him by the court. However, we also conclude that any attempt to rehabilitate juror Minker would have been futile in light of his response to appellant=s questions.

19108. Is there a burden in your mind that my client has to overcome? Goldenberg v. Regional Import & Trucking Co., Inc., 674 So.2d 761-63 (Fla. 4th DCA 1996).

19109. Where the juror stated three times that he would believe the police officer over the lay witness, any attempt to get the juror to recant was insufficient to overcome the reasonable doubt as to impartiality. Juede v. State, 837 So.2d 1114 (Fla. 4<sup>th</sup> DCA 2003).

19110. It is error for the trial court not to allow challenges for cause based on the following statements from jurors:

- a. A Could cloud my judgment. @ Hall v. State, 682 So. 2d 208;
- b. A Yeah, I think so. @ Brown v. State, 682 So. 2d 208;
- c. A I may have some preconceived ideas. @ Massad v. State, 703 So. 2d 1134;
- d. A I don=t know. @ Marquez v. State, 721 So. 2d 1206;
- e. A I couldn=t definitely say whether it would influence his verdict. @ Wilkins v. State, 607 So. 2d 500;
- f. A I would try to be fair and impartial. @ Gill v. State, 683 So. 2d. 158;
- g. A I fell very negative about people being accused of this type of crime. @ Gill v. State, supra.
- h. A I hope that I can. @ Williams v. State, 638 So. 2d 976, supra.
- i. A Possibly. @ In response to if it would prejudice him. Ferguson v. State, 693 So. 2d 596.
- j. A I would have difficulty in being objective, @ A I cannot stay very objective, @ and A I think I would try to be objective. @ Blye v. State, 566 So. 2d 877.
- k. A I would feel they are being dishonest. @ Goldenberg v. Regional Import and Export Trucking Co., 674 So. 2d 761.
- l. A Well if they can prove they=re innocent, its okay. @ Howard v. State, 698 So. 2d 923.

19111. Are you completely indifferent as we start this case? R. Civ. Pro. 1.431 B Challenge for Cause: A If it appears that the juror does not stand indifferent to the action... @

19112. Other language that indicates cause:

- a. The scales of justice are not starting out even.
- b. There is something on one of the scales for/against either party.
- c. You are a little behind the other side or the other side is a little ahead of you.
- d. I will have difficulty being completely fair and impartial.

Moreover, while a juror=s individual comments may not give individual bases for a case challenge, the cumulative effect of the juror=s cumulative comments may raise reasonable doubt sufficient to justify a cause challenge. See James v. State, 731 So.2d 781 (Fla. 3d DCA 1999) (reversing denial of cause challenge) and Jaffe v. Applebaum, 830 So.2d 136 (Fla. 4<sup>th</sup> DCA 2002) (reversing a trial court=s denial of a cause strike).

### **Rehabilitation Is Insufficient**

Florida appellate courts have repeatedly held that a juror is not impartial when one side must overcome preconceived opinions in order to prevail. @ Price v. State, 538 So.2d 486, 489 (Fla. 3<sup>rd</sup> CA 1989) (citations omitted). A juror should be excluded for cause when he has expressed reservations about either his preconceived opinions or his ability to be impartial even though the juror later asserts that he could be fair @.

We have no doubt but that a juror who is being asked leading questions is more likely to please the judge and give the rather obvious answers indicated by the leading questions and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented. @ Id.

A juror's sincere belief that he is a fair person @ does not control. In reversing a trial court's denial of a cause strike, the court in Williams v. State, 638 So.2d 976 (Fla. 4<sup>th</sup> DCA 1994) acknowledged that indeed, the juror in his own mind might even believe he could be fair and impartial. @ Likewise and because almost everyone considers themselves to be a fair person @, such statements, even if sincere, do not control the analysis of a reasonable doubt as to such. Nash v. General Motors Corp., 734 So.2d 437 (Fla. 3<sup>rd</sup> DCA 1999) (reversing refusal to grant cause strike).

Appellate courts have repeatedly reversed trial court's attempts to rehabilitate prospective jurors who initially expressed partiality, holding that such efforts were insufficient to remove reasonable doubt as to that prospective juror's impartiality. See Sikes v. Seaboard Coast Line Railroad Co., 487 So.2d 1118 (Fla. 1<sup>st</sup> DCA 1986); City of Live Oak v. Townsend, 567 So. 2d 926 (Fla. 1<sup>st</sup> DCA 1990); Williams v. State, 638 So. 2d 976 (Fla. 4<sup>th</sup> DCA 1994); King v. State, 622 So.2d 134 (Fla. 3<sup>rd</sup> DCA 1993). Once red flags are raised, a juror cannot be rehabilitated with comments, I think I could. @ A juror's later statement that she can be fair does not erase a doubt as to impartiality @ Peters v. State, 874 So.2d 677, 679 (Fla. 4<sup>th</sup> DCA 2004).

Thus, in summary, any appearance of partiality is sufficient to strike a prospective juror for cause, despite any later rehabilitation efforts by either counsel or the trial court. One appellate court pointedly stated that, The rehabilitation of prospective juror is a tricky business that often leads to reversal. @ Carratelli v.

State, 832 So.2d 850 (Fla. 4<sup>th</sup> DCA 2002). There are no known cases reversing a trial judge's striking a venire person for cause, while there is abundant case law reversing a trial judge's refusal to strike.

Where the prospective juror vacillates between assertions of partiality and impartiality, a reasonable doubt has been created which would require that the jury be excused. Plair v. State, 453 So.2d 917, 918 (Fla. 1<sup>st</sup> DCA 1985).

A juror's assurance that he or she is able to be impartial is not determinative, and it is error for the trial court to not excuse a juror for cause on the basis of the juror's testimony that he or she would try to be fair. Sikes v. Seaboard Coastline Railroad Company, 487 So.2d 1118 (Fla. 1<sup>st</sup> DCA 1986). In Sikes, a defense attorney (who played a marginal role in the actual trial) was close family friends with a prospective juror, who admitted that she didn't think she would be fair, and that she to the trial judge, she promised she would try to be fair. The Sikes Court held that it was manifest error to deny the challenge for cause.

Where a juror initially demonstrates a predilection in a case which in the juror's mind would prevent him or her from impartially reaching a verdict, a subsequent change in that opinion, arrived at after further questioning by the parties' attorneys or the judge, is properly viewed with some skepticism. Club West v. Tropigas of Florida, Inc., 514 So.2d 426 (Fla. 3<sup>rd</sup> DCA 1987). See also, Straw v. Associated Doctor's Health and Life, 728 So.2d 354 (Fla. 5<sup>th</sup> DCA 1999).

Similarly, Henry v. State, 724 So.2d 657 (Fla. 3<sup>rd</sup> DCA 1991) makes it clear that the trial judge should strike a juror for cause if there is the slightest doubt as to his or her impartiality. In this case, a juror acknowledged that she worked in the state attorney's office and knew the assistant state attorney. Although she thought she could be fair, the court noted that her employment status presented a compelling inference of partiality to state and that absent a strong showing to the contrary, the failure to exclude the juror for cause constituted an abuse of discretion.

The following decisions reflect the requirement for a juror to completely reject prejudice and be free from prejudice:

20108. It was only after the court asked a series of questions, which included leading questions, that this juror asserted her belief that she hoped she could be fair and impartial. See, Hagerman v. State, 613 So.2d 552 (Fla. 4<sup>th</sup> DCA 1993).

20109. A juror who is being asked leading questions (by the court) is more likely to please the judge and give the rather obvious answers indicated by the leading questions. Price v. State, 538 So.2d 486, 489 (Fla. 3<sup>rd</sup> DCA 1989) (Appendix 55). It becomes even more difficult for a juror to admit partiality when the court conducts the questioning. Indeed, the juror in his own mind might even believe he could be fair and impartial, but still interpret the evidence based on his own

previously expressed Adeep feelings in this kind of case.@ Montozzi v. State, 633 So.2d 563 (Fla. 4<sup>th</sup> DCA 1994) (Appendix 3). We find the trial court=s attempt to rehabilitate this juror to be insufficient. See, King v. State, 622 So.2d 134 (Fla. 3<sup>rd</sup> DCA 1993).

20110.Court structured questions causing the juror to respond affirmatively are invalid and AClose case should be resolved in favor or excusing the juror rather than leaving a doubt as to his or her impartiality@. Sydleman v. Beson, 463 So.2d 533 (Fla. 4<sup>th</sup> DCA 1985) (Appendix 4). Straw v. Associated Doctors Health and Life, 728 So. 2d 354 (Fla. 5<sup>th</sup> DCA 1999).

20111.Answers to the trial court=s leading questions should not be the sole factor for rehabilitating a potential juror. Hagerman v. State, supra.

20112.Jurors that remain dubious or uncertain after an attempt to rehabilitate them should be removed for cause. Overstreet v. State, 712 So.2d 1174 (Fla. 3<sup>rd</sup> DCA 1998).

20113.A single qualified response to the court during an attempt to rehabilitate a potential juror is not enough to guarantee a fair trial. Montozzi v. State, supra.

20114.Biased statements coupled with no retraction during an attempt to rehabilitate is clear evidence a potential juror should have been removed for cause. Diaz v. State, 608 So.2d 888 (Fla. 3<sup>rd</sup> DCA 1992).

20115.If a party rehabilitates a venire member after a response to the party=s own question, the trial court has discretion to decide if the rehabilitation was effective. Carrier v. Ramsey, 714 So.2d 657, 658 (Fla. 5<sup>th</sup> DCA 1998).

## V. PROCEDURAL MATTERS

### Time

To be afforded Athe right of the parties to conduct a reasonable examination of each juror,@ as prescribed by Florida Rule of Civil Procedures 1.431(b), counsel must be given adequate time. The permissible scope of questioning is broad. The general rule as to length of questioning was succinctly stated by the court in Williams v. State, 424 So.2d 148, 149 (Fla. 5<sup>th</sup> DCA 1982):

AThe purpose of voir dire is to obtain a >fair and impartial jury to try the issues in the cause.= King v. State, 390 So.2d. 315,319 (Fla. 1980). Time restriction or limits on number of questions can result in the loss of this fundamental right. Loftin v. Wilson, 67 So.2d 185 (Fla. 1953). They do not flex with the circumstances, such as when a response to one question evokes follow-up questions.@

This prevailing principle was more recently reiterated in Miller v. State, 785 So.2d 662,664 (Fla. 3<sup>d</sup>DCA 2001):

It is widely recognized that the trial court may not impose arbitrary time limits on voir dire. See O=Hara v. State, 642 So.2d 592, 593-94 (Fla.4<sup>th</sup> DCA 1994) (AThe purpose of voir dire is to ensure a fair and impartial jury. A trial court abuses its discretion when the imposition of

unreasonable time limitations or limitations on the number of questions results in the loss of this fundamental right. @); Zitnick v. State, 576 So.2d 1381 at 1381-82 (Fla. 3d DCA 1991) (on confession of error); Pineda v. State, 571 So.2d 105, 106 (Fla. 3d DCA 1990); Gosha v. State, 534 So.2d 912 (Fla. 3d DCA 1988).

As stated in context of a civil action Barker v. Randolph, 239 So.2d 110, 112 (Fla. 1<sup>st</sup> DCA 1970), cert. Denied, 242 So. 2d 137 (Fla. 1970):

The purpose of the voir dire is to determine whether the prospective juror is qualified and will be completely impartial in his judgment. Its length and extensiveness should be controlled by the circumstances surrounding the juror's attitude in order to assure a fair and impartial trial by persons whose minds are free from all interest, bias or prejudice. @

The trial court cannot arbitrarily limit time for jury selection. Williams v. State, 424 So.2d 148 (Fla. 5<sup>th</sup> DCA 1982); Cohn v. Julien, 574 So.2d 1202 (Fla. 3<sup>rd</sup> DCA 1991). Also see Somerville v. Ahuja, 902 So.2d 930 (Fla. 5<sup>th</sup> DCA 2005)(The Court may not arbitrarily rush to pick a jury.); Campbell v. State, 812 So.2d 540 (Fla. 4<sup>th</sup> DCA 2002)(Imposing an unreasonable time limit or limitations on the number of voir dire questions is an abuse of discretion.).

Various errors occurred with Trial Judge rushing to pick jury and frustrated with having to bring in a second panel. Are we going to pick a jury today, I'm going until 7:00 p.m. if we have to. @ Sommerville, supra.

The trial court erred in a medical malpractice case by refusing to allow two potential jurors who expressed prejudice against medical malpractice suits to be excused for cause. Somerville v. Ahuja, Id at 932 (Fla. 5<sup>th</sup> DCA 2005). The court noted that the record indicated that the trial judge was rushing to pick a jury and was frustrated with having to bring in a second panel of jurors, but it said this did not justify depriving the plaintiff of a needed peremptory challenge to excuse yet another juror deemed objectionable in counsel's view. The court observed: One of the difficulties in picking this jury was the number of persons on venire panels who harbored bad feelings about malpractice suits against doctors. They were concerned about the number of such suits, the potential problems which could make it difficult for them to find a doctor to treat them and their families, and the rising insurance costs for doctors, which they thought were caused by malpractice lawsuits. @

## **Peremptory Challenges**

1. Generally, counsel is allowed to alternate in the exercise of challenges, but this is not required. Ter Keurst v. Miami Elevator Co., 486 So.2d 547 (Fla.1986).
2. To preserve an issue on appeal, counsel must object to the jury as finally composed. Ter Keurst v. Miami Elevator Co., *supra*.
3. If there is an erroneous denial of a challenge for cause and the affected party exhausts its peremptory challenges, in order to preserve the error for appellate purposes, the party must request additional peremptory challenges. Longshore v. Fronrath Chevrolet, Inc., *supra*; Connors v. Sears, Roebuck & Co., 721 So.2d 418 (Fla. 4<sup>th</sup> DCA 1998).
4. To preserve for appellate review the refusal to grant a challenge for cause, A[I]t is necessary not only to exhaust all the remaining challenges and to request additional peremptory challenges, but to identify to the trial court a particular objectionable juror whom the party would have also struck had peremptory challenges not been exhausted.@ Griever v. DePietro, 625 So.2d 1226, 1228 (Fla. 4<sup>th</sup> DCA 1993).
5. Error to force a party to use peremptory challenges on juror who should have been excused for cause where party exhausted all peremptory challenges and additional challenges were sought and denied. Hill v. State, 477 So.2d 553 (Fla. 1985), cert. Denied, 485 U.S. 993, 1085 Ct. 1302, 99 L.Ed.2d 512 (1988). If a party exhausts his peremptory challenges but does not request additional challenges, any error in the court=s denial of that party=s challenges for cause is not preserved. Dardar v. Southard Distributors of Tampa, 563 So.2d 1112, (Fla. 2d DCA 1990); Dobek v. Ans, 560 So.2d 328 (Fla. 4<sup>th</sup> DCA 1990); Jenkins v. Humana of Florida, Inc., 553 So.2d 201 (Fla. 5<sup>th</sup> DCA 1989).
6. The trial court=s failure to excuse a juror for cause, in order to constitute reversible error, counsel must object to the jury which is ultimately empanelled. Metropolitan Dade County v. Sims Paving Corps., 576 S0.2d 766 (Fla. 3<sup>rd</sup> DCA 1991); Taylor v. Public Health Trust, 546 So.2d 733 (Fla. 3<sup>rd</sup> DCA 1989); Melara v. Cicione, 712 So.2d 429 (Fla. 3<sup>rd</sup> DCA 1998).

## **Back striking**

The trial court cannot limit or prohibit the use of back striking and a party can use its peremptory challenges until the jury has been sworn. This process cannot be circumvented by trial court=s swearing of individual jurors. Teddor v. Video Electronics, Inc., 491 So.2d 533 (Fla. 1986); Van Sickle v. Zimmer, 807 So.2d 182 (Fla. 2<sup>nd</sup> DCA 2002). See also Peacher v. Cohn, 786 So.2d 1282 (Fla. 5<sup>th</sup> DCA 2001).

## **Racially-Based And Gender-Based Peremptory Challenges**

Racial discrimination with peremptory challenges was first dealt with in Florida under State v. Neil, 457 So.2d 481 (Fla.1984). It was extended to civil cases in City of Miami v. Cornett, 463 So.2d 399 (Fla. 3<sup>rd</sup> DCA 1985).

Under Neil and its progeny distinct racial or cognizable groups included:

- a. Race- (African American)
- b. Ethnic- (Hispanics), State v. Allen, 616 So.2d 452 (Fla. 1993)
- c. Gender- Abshire v. State, 642 So.2d 542 (Fla. 1994)
- d. Religion (Jewish)- Joseph v. State, 636 So.2d 777 (Fla. 3<sup>rd</sup> DCA 1994)
- e. American Indians- Tennie v. State, 593 So.2d 1199 (Fla. 2<sup>nd</sup> DCA 1992)
- f. White Jurors- Rome v. State, 627 So.2d 45 (Fla. 1<sup>st</sup> DCA 1993)
- g. Gay or Lesbian Jurors- No Florida case law to date.

To make a Neil objection a formal objection on that basis must be made and it must be demonstrated on the record that the challenged juror is of a distinct racial or cognizable group. The trial judge then shifts focus to the proponent of the strike to provide a race-neutral or gender-neutral basis for the peremptory strike. The court may sustain the strike if the court is satisfied with the race-neutral or gender-neutral explanation. The court may deny the strike if the explanation is not satisfactory. Failure of the court to require the proponent to articulate a gender-neutral explanation is per se reversible error. Murry v. Haley, 833 So.2d 877 (1<sup>st</sup> DCA 2003).

1. Use of peremptory challenges based on the juror=s race is prohibited and the rule applies in civil cases. Edmonson v. Leesville Concrete Co., Inc. 860 F.2d 1308 (5<sup>th</sup> Cir. 1988); City of Miami v. Cornett, 463 So.2d 1308 (5<sup>th</sup> Cir. 1988); City of Miami v. Cornett, 463 So.2d 399 (Fla. 3<sup>rd</sup> DCA 1985). Dismissed 469 So.2d 748 (1985).
2. Counsel must provide a clear and reasonably specific racially neutral explanation for the use of the peremptory challenges. State v. Slappy, 522 So.2d 18 (Fla. 1998); American Security v. Hettel, 573 So.2d 1020 (Fla. 2<sup>d</sup> DCA 1991); Mitchell v. CAC-Ramsey Health Plans, Inc., 719 So.2d 930 (Fla. 3<sup>rd</sup> DCA 1998).
3. Where the plaintiffs=counsel makes a timely, gender-based objection to the defendant having stricken three female jurors and the defendant refuses to supply a gender-neutral reason for the strikes, to preserve error plaintiffs= counsel must not accept the jury and must renew their gender-based objection or condition-acceptance of the jury on their previous objection. Mazzouccolo v. Gardner, McLain & Perlman, M.D., P.A., 714 So.2d 534 Fla. 4<sup>th</sup> DCA 1998).
4. The trial court=s ruling on whether a party has stricken a juror for racial reasons Aturns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.@ King v. Byrd, 733 So.2d 516 (Fla. 4<sup>th</sup> DCA 1999).

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to **Michael K. Mittelmark, Esq.**, Michaud, Buschmann, Mittelmark, et al., 621 Northwest 53<sup>rd</sup> Street, Suite 420, Boca

Raton, FL 33487; and **Jonathon P. Lynn, Esq.**, Stephens, Lynn et al., 301 East Las Olas Boulevard, Fort Lauderdale, FL 33301 this \_\_\_\_ day of \_\_\_\_\_, 2006.

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