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**RACIAL DISCRIMINATION IN THE EXERCISE  
OF PEREMPTORY CHALLENGES  
by Ted Babbitt**

Wicks v. Publix Super Markets, Inc., 908 So. 2d 1190 (Fla. 2<sup>nd</sup> DCA 2005)

is a per curiam decision which contains a concurring opinion which lays out a road map for the appropriate raising and preserving of the issue of whether a peremptory challenge was motivated by racial discrimination.

The U.S. Supreme Court opinions in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed 2d 69 (1986) and Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed 2d 660 (1991) together with the Florida case of State v. Neil, 457 So. 2d 481 (Fla. 1984) hold that it is constitutionally inappropriate to strike a potential juror on the basis of race. Wicks was a slip and fall case brought by an African-American plaintiff who objected to the defense peremptorily striking an African-American juror. The trial court concluded the strike was not racially motivated and after an adverse verdict the plaintiff appealed. The opinion discusses the failure to properly preserve the objection for appeal and states that even if it had been, the Court would not have disturbed the trial court's exercise of its' discretion that the challenge was not racially motivated.

When defense counsel exercised the peremptory challenge, plaintiff's counsel merely noted for the record that the juror was an African American female and asked the Court to inquire further. The concurring judge found this

was insufficient to preserve the objection. What was necessary was that plaintiff's counsel specifically state his belief that the challenge was impermissibly made on the basis of race and the Court should have been asked to request opposing counsel to provide a race neutral reason. As it turns out, the trial judge, even without being asked, did just that. After hearing the defense counsel's explanation, the Court found those reasons would be acceptable and sustained the challenge. At the close of the voir dire, both parties exhausted their peremptory challenges and the jury was sworn without plaintiff's counsel raising any objection. The next morning, plaintiff's counsel noted that after further research, he was uncertain as to whether it was necessary to object to the panel and did so to make sure that an appellate court did not conclude that he had not renewed his objection.

The opinion reviews the appellate decisions on the appropriate way to preserve a Neil challenge. It points out that more than a contemporaneous objection is necessary. It is necessary to preserve the objection and that the jury be accepted only subject to the Neil objection. This affords the trial judge the opportunity to either recall the challenged juror, to strike the entire panel or to stand by the earlier ruling.

Thus, the appropriate way to raise and preserve a Neil challenge is for the objecting party to state at the time the challenge is made, the belief that the challenge is racially motivated while noting the race of the juror. At that point, the challenging party must be asked by the Court to state a race neutral reason for the challenge. The trial judge then has discretion to determine whether the

stated reason is a pretext or not. If not, the challenge will be allowed and the objection overruled. The objecting party must then restate the objection prior to accepting the jury and accept the jury only subject to the objection.

In the Wicks opinion, the concurring judge makes two suggestions to trial courts in conducting Neil inquiries. First, he suggests that the trial judge excuse the venire from the courtroom or hold the Neil hearing elsewhere. Since the focus of the issue at this hearing is the genuineness of the explanation of the party exercising the challenge, statements of counsel regarding the juror's potential bias are sufficiently sensitive so as to make it absolutely necessary that there is no chance that any potential juror might overhear the explanation.

The concurring Judge also suggests that counsel on either side may desire to have the portion of the record read back concerning the challenged juror's statements to make sure that the trial judge is in the best position possible to understand the rationale for the strike.

Challenging a peremptory strike as racially motivated requires precise action to both make the challenge and preserve it for appeal. This opinion lays out the procedure counsel must use under those circumstances.

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