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BACKSTRIKING THE JURY
by Ted Babbitt

It has been held over and over again that a trial court's failure to allow a party to exercise a peremptory challenge at any time before the jury is sworn is reversible error. Dobeck v Ans, 475 So.2d 1266 (Fla. 4th DCA 1985), Carames v Golden, 445 So.3d 1140 (Fla. 3rd DCA 1984); Fla. Rock Indus., Inc. v United Bldg. Sys., Inc., 408 So.2d 630 (Fla. 5th DCA 1981); Brown v McArthur Dairies, Inc., 280 So.2d 520 (Fla. 3rd DCA 1973). Nevertheless, some trial judges take the position that once both sides have accepted the jury further backstriking is not permitted. Intellectually this would seem to make sense. Otherwise, parties could make a mockery of the strategy of continuously accepting the jury to see what the other side does. Nevertheless, a recent Second District case makes it clear that no matter how many times a party accepts the jury that party is entitled to utilize a remaining peremptory challenge to backstrike a juror at any time before the jury is sworn and the failure to allow that backstrike is reversible error.

Van Sickle v Zimmer, 807 So.2d 182 (Fla. 2nd DCA 2002), was just such a case. In that malpractice action, the Court informed the parties that it would allow backstrikes until both sides had accepted the jury. Once the six jurors were accepted without backstrikes, the Court indicated that it would not permit further backstrikes and that an alternate juror would then be chosen. Six jurors were accepted without backstrikes by both sides after the plaintiff unsuccessfully

sought to strike one of them for cause. Even though the plaintiff had accepted the jury, she apparently had a change of heart and sought to use one of two remaining peremptory challenges in the form of a backstrike. The Court denied the request indicating that the Court had explained the rules in advance and that no further backstriking would be permitted. An alternate juror was selected and the plaintiff again sought to utilize one of her remaining peremptory challenges in the form of a backstrike to the main panel prior to the jury being sworn. The Court again denied the request and proceeded to swear the jury including the chosen alternate.

After the conclusion of final arguments and before the jury began deliberating, the defendants, recognizing the apparent mistake of the trial judge, offered to allow the plaintiff to exercise her peremptory challenge from any of the jurors and substitute the alternate. The plaintiff declined and the matter went to the jury.

The ultimate result was that the jury found for the defendant and the plaintiff appealed.

In reversing the trial court, the Second District explained that there is no room for discretion in the area of backstriking jurors.

Florida Rule of Civil Procedure 1.431 governs the procedure for jury selection in civil litigation. It states that '[n]o one shall be sworn as a juror until the jury has been accepted by the parties or until all challenges have been exhausted.'

Fla.R.Civ.P. 1.431 (f). While the time and manner of challenging and swearing jurors rests within the sound discretion of the trial court, a party may peremptorily challenge a juror until the juror is sworn. Tedder v Video Elec., Inc., 491 So.2d 533, 534 (Fla. 1986).

This is not an area open for discussion. Regardless of what rules are set by the trial court, those rules may be broken if a party has a peremptory challenge and the jury has not been sworn. In that case, a party has a right to utilize that peremptory challenge at any time prior to the jury being sworn.

The trial court's refusal to permit a party to exercise its peremptory challenges is not harmless error when the jury returns a verdict against that party. Saborit v Deliford, 312 So.2d 795, 797-98 (Fla. 3d DCA 1975). Indeed, the Fifth District Court of Appeal has held that disallowing the exercise of a peremptory challenge by way of a backstrike, prior to the jury being sworn, is reversible error per se. Peacher v Cohn, 786 So.2d 1282, 1283 (Fla. 5th DCA 2001).

The Defendant in this case tried to pull a rabbit out of the hat by suggesting to the appellate court that the plaintiff had effectively waived the trial court's error by refusing the offer made after final argument to substitute the alternate for any juror of the plaintiff's choice. The Second District explained that a party is entitled to view the panel as a whole in order to utilize that party's peremptory challenge. An offer to substitute an alternate juror for a juror in the

panel is not the same as being permitted to utilize a backstrike prior to the selection of the alternate. Once the backstrike is used, and the alternate is seated, the party may decide to use another peremptory or the defendant might have used a peremptory. There are simply too many variables. The bottom line is that there is an absolute rule that a party has a right to strike a juror with a remaining peremptory challenge at any time prior to the swearing of the jury. The refusal of a trial court to permit that is reversible error.