THE LAW OF JURY SELECTION

By

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I. THE 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. The procedure of *voir dire* was developed to ensure the proper administration of justice by the seating of a fair and impartial trier of fact. Florida Rule of Civil Procedure 1.431 encompasses the procedural aspects of *voir dire*.

"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. 4th DCA 1994); Sydleman v. Benson, 463 So.2d 533 (Fla. 4th DCA 1985); Nash v. General Motors Corp., 734 So.2d 437 (Fla. 3rd DCA 1999).

See also, Mitchell v. State, 862 So.2d 908 (Fla. 4th DCA 2003); Carratelli v. State, 832 So.2d 850 (Fla. 4th DCA 2002); Scott v. State, 825 So.2d 1057 (Fla. 4th DCA 2002); 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 So.2d at 23 ; Chapman v. State, 593 So2d 605 (Fla. 4th DCA 1992); King v. State, 622 So.2d 134 (Fla. 3rd DCA 1993); Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986); rev. denied, 506 So.2d 1043 (Fla. 1987).

II. SCOPE AND MANNER OF QUESTIONING:

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. 3rd 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.

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).

As long ago as 1923, the Supreme Court of Florida held that the examination of jurors:

> "…should be so varied and elaborated as the circumstances surrounding the jurors under examination in relation to the case on trial would seem to require, in order to obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice. Hypothetical questions having correct reference to the law of the case that aid in determining whether challenges for cause or peremptory are proper, may, in the sound and reasonable discretion of the trial court, be propounded to the veniremen on *voir dire* examination." Pope v. State, 94 So. 865, 869 (1923).

The United States Supreme Court discussed the concept of a "meaningful *voir dire*" in Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct 1629, 68 L.Ed. 2d 22 (1981).

> "What is a meaningful *voir dire* which will satisfy the Constitutional imperative of a fair and impartial jury depends on the issues in the case to be tried. 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, where 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." Id.

A trial court may exercise its discretion to permit counsel to ask hypothetical questions if they make a correct reference to the law of the case that aids in determining whether challenges for cause or peremptory are proper. Ferreiro v. State, 936 So.2d 1140 (Fla. 3rd DCA 2006). The purpose of *voir dire* is to obtain a fair and impartial jury, whose minds are free of all interest, bias or prejudice. Id.

III. AREAS OF INQUIRY

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. 3rd DCA 1999)(reversed denial of cause strike).

2. Whether a juror would have "difficulty" following the law on pain and suffering. Pacot v. Wheeler, 758 So. 2d 1141 (Fla. 4th DCA 2000) (reversed denial of cause strike); Sisto v. Aetna Casualty & Surety Co., 689 So.2d 438 (Fla. 4th 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. 3rd DCA 1989).

4. Whether a juror has relationships to a party or attorney within the third degree – Sikes v. Seaboard Coastline RR Co., 487 So.2d 1118 (Fla. 1st 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. 4th 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 to pay. Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981).

8. Whether a juror owned stock in a defendant corporation. Club West, Inc. v. Tropigas 514 So.2d 426 (Fla. 3rd DCA 1987) (subject to cause challenge).

9. Whether there is something about the juror's employment that "may" affect her decision in the case. Ortiz v. State, 543 So.2d 377 (Fla. 3rd DCA 1989) (sufficient to disqualify for cause).

10. Whether a juror could be fair whether she liked it or not and whether she could or could not put dollar value on loss of companionship. Gootee v. Clevinger, 778 So.2d 1005 (Fla. 5th 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. 5th DCA 1985).

13. Hypothetical questions that correctly state the applicable law are proper. Pait v. State, 112 So.2d 380 (Fla. 1959).

13. Questions concerning the "insurance crisis" or "lawsuit 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).

IMPROPER COMMENTS *DURING* VOIR DIRE:

1. "Appellee's trial counsel stated, "I'm a consumer justice attorney, and I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate." We find the trial court reversibly erred in denying Appellant's motion for mistrial based on this statement. Appellant immediately objected following this statement, asserting that Appellee's trial counsel was in fact retained by Appellee's insurer; therefore, he did represent "one of those big companies." The trial court required Appellee's trial counsel to explain the

> definition of a "consumer justice attorney." Counsel replied that he represented a "client who is a consumer and who is here for justice," and explained that his statement should be considered in the context of Appellant's voir dire questions regarding large verdicts and whether the venire believed in "caps." The trial court sustained Appellant's objection, noting that courts do not tell juries about insurance companies and explaining that "we strive not to actively misrepresent facts, and certainly it is true that you represent the insured. But I actually was concerned about . . . playing on the sympathies of the jury for an individual as opposed to a corporation, and even a corporation would be entitled to justice in our courts." The trial court denied Appellant's motion for mistrial, finding that counsel's remark had no "visible impact on the jury." Appellant renewed his motion for mistrial before the jury was sworn and again during the questioning of one of Appellee's witnesses. After the verdict was returned, Appellant timely moved for a new trial, based in part on counsel's statement….Counsel's misleading statement implied that an award of damages would be paid solely by the individual and was nothing less than an appeal to the jury to protect that individual from a harmful verdict. *See Padrino v. Resnick*, 615 So. 2d 698 (Fla. 3d DCA 1992). As the trial court noted, a jury trial must be focused solely on the merits of the case, and it is not appropriate to appeal to a jury's sympathy; appeals to sympathy and attempts to inject a party's wealth, or lack thereof, are improper. *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 242 (Fla. 5th DCA 1991); *Seaboard Air Line Ry. v. Smith*, 43 So. 235 (Fla. 1907). Counsel's statement did not expressly contrast Appellee's status as an individual with a corporation; nevertheless, his status was inappropriately injected into the case. *See Sossa By & Through Sossa v. Newman*, 647 So. 2d 1018, 1019-20 (Fla. 4th DCA 1994).As Appellant notes, counsel's statements were impossible to refute at trial. It would have been clear error for the trial court to inform the venire that, in fact, Appellee's counsel was retained by an insurance company to represent Appellee. *Thompson v. Fla. Drum Co.*, 651 So. 2d 180, 182 (Fla. 1st DCA 1995). In addition, the venire could have easily assumed that Appellee did not have insurance coverage and determined that he would unduly suffer from an award of damages." ***Hollenbeck v. Hooks***, 33 FLW D2027a (Fla. 1st DCA 2008).

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 "a 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: "the 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 "the 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."

While the trial court certainly has the discretion to limit repetitive and argumentative *voir dire*, to prohibit counsel from asking improper questions or questions that elicit answers on legal issues the jurors have not been instructed on, and to preclude attorneys from pre-trying their cases or in obtaining a commitment on ultimate issues to be decided after hearing all of the evidence, a trial judge must allow counsel to ascertain latent or concealed prejudgments by prospective jurors. Figueroa v. State,----So.2d---- (Fla. 3rd DCA 2007).

IV. CHALLENGES FOR CAUSE

A. GROUNDS FOR CHALLENGE FOR CAUSE: EXAMPLE CASES

1. 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. 1st DCA 1986).

2. A juror's friendly relationship with counsel for a party is grounds for challenge for cause. Johnson v. Reynolds, 121 So. 793 (Fla. 1929); Sikes v. Seaboard Coastline RR Co., supra.

3. 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. 4th DCA 1974).

4. A juror who owned stock in a defendant corporation is subject to challenge for cause. Club West, Inc. v. Tropigas of Florida, Inc., 514 So.2d 426 (Fla. 3rd DCA 1987).

5. 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 (5th DCA 1980).

6. 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. 3rd DCA 1981).

7. 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. 1st DCA 1990).

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

9. 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. 3rd DCA 1989); Leon v. State, supra; Sikes v. Seaboard Coast Line RR Co., supra; Longshore v. Fronrath Chevrolet, Inc., 527 So.2d 922 (Fla. 4th DCA 1988). See also Fazzolari v. City of West Palm Beach, 608 So.2d 927, 929 (Fla. 4th 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 …", and Goldenberg v. Regional Import & Export Trucking Co., Inc., 674 So.2d 761, 764 (Fla. 4th DCA 1996), in which the court stated that … "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. 5th DCA 1999).

10. 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, supra; Chevrolet, Inc., supra; Ortiz v. State, 543 So.2d 377 (Fla. 3rd DCA 1989); Club West, Inc. v. Tropigas of Florida, Inc., 514 So.2d 426 (Fla. 3rd DCA 1987).

11. 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.

12. 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).

13. 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. 4th DCA 1985). Straw v. Associated Doctors Health and Life, supra.

14. 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. 3rd DCA 1989).

15. A venire person who conceded that "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 "starting with one strike against [him]." Club West, Inc. v. Tropigas of Florida, Inc., 514 So.2d 426, 427 (Fla. 3rd DCA 1987) (reversing a trial court's failure to strike said venire person for cause, despite her later statement that she could be impartial).

16. A venire person who admitted that the Plaintiff would be starting out with "half a strike against him". Jaffe v. Applebaum, 830 So.2d 136 (Fla. 4th DCA 2002) (reversing a trial court's denial of a cause strike).

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

18. A venire person admitted, "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. 5th DCA 2000) (reversing a trial court's failure to strike said venire

person for cause despite her later statement that she "can be fair whether she likes it or not").

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

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

21. A venireman admitted a potential bias by stating "If I had a bias it would be against the defendant," and later responded by saying "I'd try not to" and "I would give it my best shot" when the judge attempted to rehabilitate him. Bell v. State, 870 So.2d 893 (Fla. 4th DCA 2004) (reversing trial court's refusal to grant defendant's cause challenge).

22. 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).

23. Jurors should be excused for cause when they acknowledge "difficulty" following the law on pain and suffering. Pacot v. Wheeler, 758 So. 2d 1141 (Fla. 4th 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. 4th DCA 1997).

24. 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. 5th DCA 2000).

25. 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. 1st DCA 1985).

26. Reasonable doubt has been found where a juror admitted she "probably" would be prejudiced, even though she then asserted she "probably" could follow the Judge's Instructions. Imbimbo v. State, 555 So.2d 954 (Fla. 4th DCA 1990).

27. 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 (3rd DCA 1998) (Appendix 35); Tizon v. Royal Caribbean Cruise Line, 645 So. 2d 504 (Fla. 3rd DCA 1994).

28. Bell v. Greissman, 902 So.2d 846 (Fla. 4th DCA 2005).

Upon being asked if he brought some related feelings to the court, Furey replied, "Honestly I do. . . . [As a juror] I would try to keep an open mind, but I am definitely of the opinion that [damage awards] need[s] to be capped and it has gone [sic] detrimental to the healthcare system." He declared that his beliefs would "probably" interfere with his obligations as a juror. In response to Appellees' attempt to rehabilitate him, Furey stated, "I would do what I believe is the fair thing, yes. . . ." "[My decision] would be based on my personal beliefs, correct."

Although trial courts are afforded great discretion in ruling on challenges for cause, nevertheless, close cases involving challenges to the impartiality of potential jurors should be resolved in favor excusing the juror rather than leaving doubt as to impartiality. Williams v. State, 638 So.2d 976 (Fla. 4th DCA 1994).

We conclude that the totality of Furey's remarks raised reasonable doubt as to his ability to be impartial. See Imbimbo v. State, 555 So.2d 954 (Fla. 4th DCA 1990) (reasonable doubt found where a juror admitted he "probably" would be prejudiced, even though he asserted he "probably" could follow the judge's instructions); Goldenberg, supra; Montozzi v. State, 633 So.2d 563 (Fla. 4th DCA 1994); Nash v. Gen. Motors Corp., 734 So.2d 437 (Fla. DCA 1999).

In Goldenberg, a juror was the daughter of an orthopedic surgeon who had been sued for malpractice "many times." The juror related a personal experience with her father and stated "some people are dishonest." This court found it was error for the trial court not to excuse the juror for cause after she had expressed bias, based on her personal experiences, against the particular type of personal injury suit brought by the plaintiffs. Further, the court concluded that the juror was not rehabilitated simply by adding that she was a fair person.

Similarly, in Nash, where the claim was based on a design defect, a prospective juror was challenged for cause after indicating that she harbored prejudices about personal injury lawsuits and that, when she was injured with a potential claim, she had felt compelled not to bring suit against a manufacturer. The juror also was quite clear that she disapproved of awarding money as a means by which to compensate someone for the loss of a loved one. In reversing and granting a new trial, the Nash court found that, in light of the remarks casting doubt as to her impartiality, the juror's subsequent affirmation that she was a fair person and that

statement "I think I could be fair" did not sufficiently indicate the juror could set aside her feelings and decide the case solely on evidence submitted. We recognize that Goldberg and Nash may be distinguished, in that the prospective jurors in those cases expressed a specific personal bias which called their impartiality into question while, here, Juror Furey expressed skepticism about tort claims in general. However, Furey's skepticism was also coupled with comments reflecting strong bias arising out of his previous personal experience.

In Bell v. State, 870 So.2d 893 (Fla. 4th DCA 2004), this court found reversible error where the trial court denied a challenge for cause after a juror responded "I'd try not to" and "I would give it my best shot" in reference to his previously stated bias. Here, Furey's response, taken as a whole, is not indicative of a neutral mind and was legally insufficient to show rehabilitation and to assure impartiality. A juror is not impartial when one side must overcome a pre-conceived opinion in order to prevail. Hill v. State, 839 So.2d 883 (Fla. 3d DCA 2003). Juror Furey never concealed his pre-disposition to make decisions based on his personal beliefs. He acknowledged that his past experience and his feelings would probably interfere with his impartiality and stated that "I honestly do [think I will bring feelings to the court], and [although] I would do what I believe is the fair thing. . . [I]t would be based on my personal beliefs, correct." Furey said, "I will try to keep an open mind, but I am definitely of the opinion that [damage awards] need [s] to be capped and it has gone [sic] detrimental to the healthcare system."

29. Sommerville v. Ahuja, 902 So.2d 930 (Fla. 5th DCA 2005).

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, "I guess so, but I-but I think that I could separate that from-once I heard the…[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 "I think…".

She confessed to having a lingering prejudice in favor of the defendant doctor, expressed as a "tiny bit." When asked what she based the "tiny 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.

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 "I don't think so." And "I 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 over-come her earlier, frank admission to prejudice against medical malpractice suits. She should have been excused for cause.

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 effect 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, "Yes and no. Sometimes it's pretty difficult. I don't believe-no, no." But he concluded, "Yeah, I probably would. I'm thinking."

The trial court refused to excuse Garner for cause, explaining "I'm telling you, you could probably get anybody on that jury to say that." Appellant's counsel pointed out that Garner had said he "probably" would have a preference for a defense verdict. The court responded, "I don't think that gets it." The court also commented to appellant's counsel: "So you got a good appeal…"

In the case of Garner, his responses demonstrate he harbored prejudices against plaintiffs in medical malpractice cases more emphatically than Love. He said "Yes 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, "Yeah, 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.

30. 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).

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

32. Do you feel my client is not starting out on an even playing field? Nash v. General Motors Corp., 734 So.2d 437, 439 (Fla. 3d DCA 1999).

33. 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, 830 So.2d 136 (Fla. 4th DCA 2002): "Trial 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, which 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 "fool". 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.

34. Error to refuse to excuse for cause juror who expressed distaste for lawyers, suggested he would hold plaintiff to "clear and obvious" standard of proof, indicated that plaintiffs in general were "looking for easy money" and "trying to cheat the system" to "make an easy buck," and agreed that plaintiff would have to overcome a "resistance" on his part if he served as a juror. Fraizer v. Wesch, 913 So.2d 1216 (Fla. 4th DCA 2005).

35. 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).

36. It is error for the trial court to disallow challenges for cause based on the following statements from jurors:

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

37. Jurors must start out as impartial, forming opinions only from the evidence produced during trial and from the law given by the judge; any doubt as to one's

impartiality should lead to excusal of that juror for cause. Dorsett v. State, 941 So.2d 587 (Fla. 4th DCA 2006).

38. A juror must be excused for cause if there is any reasonable doubt about a juror's impartiality; close cases should be resolved in favor of excusing the juror. Lewis v. State, 931 So.2d 1034 (Fla. 4th DCA 2006).

39. The trial court must excuse a prospective juror for cause if there is any reasonable doubt that the juror possesses the requisite impartial state of mind; and, close cases should be resolved in favor of excusing the juror rather than leaving doubt. Cottrell v. State, 930 So.2d 827 (Fla. 4th DCA 2006).

40. A cause challenge should be granted if there is a basis for any reasonable doubt as to any juror's possessing a state of mind that will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at trial. Segura v. State, 921 So.2d 765 (Fla. 3rd DCA 2006). Impartiality of a juror is so essential to affording a defendant a fair trial that in a close case it should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality. Id.

41. Prospective juror who admitted bias against plaintiffs bringing medical malpractice cases should have been excused for cause, insofar as she responded that she did not "think" or "believe" that her bias would influence her, which responses indicated she was not absolutely sure her bias would not affect her verdict. Somerville v. Ahuja, 902 So.2d 930 (Fla. 5th DCA 2006). A juror should not serve if he or she is not indifferent to the action and should be excused if there is a reasonable doubt as to the juror's ability to render an impartial verdict, and if it is a close call, the juror should be excused. Id.

42. A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. Busby v. State, 894 So.2d 88 (Fla. 2004).

43. Trial court erred in failing to strike for cause a ***juror who had been sued*** as result of a similar accident which caused his insurance rates to double, and who expressed negative feelings about the claim against him. Court erred in failing to strike for cause juror who expressed ***belief that there should be cap on damages*** and who stated that his beliefs on damages would possibly come into play during deliberations. A new trial is required where plaintiff had to accept an objectionable juror because he had been forced to exhaust peremptory challenges on jurors that court failed to strike for cause. Rodriguez v. Lagomasino, 33 FLW D310b (Fla. 3rd DCA 2008).

B. CUMULATIVE EFFECTS OF JUROR COMMENTS MUST BE CONSIDERED

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. 4th DCA 2002) (reversing a trial court's denial of a cause strike).

In *Joseph v. State,* --- So.2d --- (Fla. 4th DCA 2008), the Fourth District Court of Appeal reversed a criminal conviction because the trial judge failed to strike for cause a juror who "held conflicting views" on the presumption of innocence. Initially, during jury selection the juror stated "he's guilty until proven innocent," but later said "I think it was a misunderstanding earlier…," and then went on to state "I can be fair and impartial." The Court looked at the entirety of the juror's comments (which are set forth in the opinion) and concluded there was reasonable doubt about the juror's ability to serve in the case. The Court reiterated the long-standing principle that "close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving a doubt as to impartiality."

C. REHABILITATION OF PROSPECTIVE JUROR 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. 3rd CA 1989) (citations omitted). A juror should be excluded for cause when he has expressed reservations about either his preconceived options or his ability to be impartial even though the juror later assets 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. 4th DCA 1994) acknowledged that "indeed, the juror in his own mind might even believe he could be 'fair and impartial'." Likewise and because "most 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. 3rd 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. 1st DCA 1986); City of Live Oak v. Townsend, 567 So.2d 926 (Fla. 1st DCA 1990); Williams v. State, 638 So.2d 976 (Fla.4th DCA 1994); King v. State, 622 So.2d 134 (Fla. 3d 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. 4th 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. 4th DCA 2002).

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. 1st 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 should would "try to be fair." Sikes v. Seabord Coastline Railroad Company, 487 So.2d 1118 (Fla. 1st 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 promised the trial judge 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. 3rd DCA 1987). See also, Straw v. Associated Doctor's Health and Life, 728 So.2d 354 (Fla. 5th DCA 1999).

Similarly, Henry v. State, 724 So.2d 657 (Fla. 3rd 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

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

1. 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. 4th DCA 1993).

2. 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. 3rd 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 "deep feelings in this kind of case." Montozzi v. State, 633 So.2d 563 (Fla. 4th 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. 3rd DCA 1993).

3. Court structured questions causing the juror to respond affirmatively are invalid and "Close 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. 4th DCA 1985) (Appendix 4). Straw v. Associated Doctors Health and Life, 728 So.2d 354 (Fla. 5th DCA 1999).

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

5. 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. 3rd DCA 1998).

6. 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.

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

8. 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. 5th DCA 1998).

9. Doubts raised by a juror's initial statements are not necessarily dispelled simply because the juror later acquiesces and states that he can be fair. Lewis v. State, 931 So.2d 1034 (Fla. 4th DCA 2006). Efforts at rehabilitating a prospective juror should always be considered in light of what the juror had freely said before the salvage efforts began. Id.

10. A juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind that will enable him to do so. Segura v. State, 921 So.2d 765 (Fla. 3rd DCA 2006).

11. Potential jurors' responses to questions by the court or counsel in an effort to rehabilitate him or her, after having admitted to harboring some bias or prejudice, that they can set aside those prior admitted feelings are not determinative of whether the juror should be excused for cause, and it is not sufficient if their responses are vacillating or couched with "I think" or "I would try." Somerville v. Ahuja, 902 So.2d 930 (Fla. 5th DCA 2005).

V. PROCEDURAL MATTERS

A. TIME

To be afforded "the 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. 5th DCA 1982):

> "The 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 reiterated in Miller v. State, 785 So.2d 662,664 (Fla. 3d 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.4th DCA 1994) ("The 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 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. 1st 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 the time allowed for jury selection. Williams v. State, 424 So.2d 148 (Fla. 5th DCA 1982); Cohn v. Julien, 574 So.2d 1202 (Fla. 3rd DCA 1991).

Trial court abused its discretion in limiting *voir dire* to 30 minutes per side, even though the court itself questioned the jurors first, and even though the court then allowed an additional 15 minutes per side, where the total time allowed counsel only 2-3 minutes with each juror and counsel pointed out specific areas of questioning he needed to pursue,

and was not repetitive in his questioning of the jurors. The fact that the court first questioned the jurors did not, by itself, make the allotted time adequate. The trial court also abused its discretion in waiting until the beginning of questioning to announce the time limit. Carver v. Niedermayer, 920 So.2d 123 (Fla. 4th DCA 2006) rev. den. 936 So.2d 566 (Fla. 2006).

In Somerville v. Ahuja, 902 So.2d 930 (Fla. 5th 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."

B. 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. 4th DCA 1998).

4. To preserve for appellate review the refusal to grant a challenge for cause, "[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." Griefer v. DePietro, 625 So.2d 1226, 1228 (Fla. 4th 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. 4th DCA 1990); Jenkins v. Humana of Florida, Inc., 553 So.2d 201 (Fla. 5th 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. 3rd DCA 1991); Taylor v. Public Health Trust, 546 So.2d 733 (Fla. 3rd DCA 1989); Melara v. Cicione, 712 So.2d 429 (Fla. 3rd DCA 1998).

C. BACKSTRIKING

The trial court cannot limit or prohibit the use of backstriking 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. 2nd DCA 2002). See also Peacher v. Cohn, 786 So.2d 1282 (Fla. 5th DCA 2001).

D. RACIAL AND GENDER BASED PEREMPTORY CHALLENGES

A party concerned about whether the other side's use of a peremptory challenges is based solely upon race must make a timely objection and demonstrate on the record

that the challenged persons are of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race; if the court decides that there is a substantial likelihood that peremptory challenges are being exercised solely on the basis of race, the burden shifts to the other party to show that the questioned challenges were not exercised solely because of the prospective juror's race; if the other party has been challenging prospective jurors solely on the basis of race, then the trial court should dismiss that jury pool and start *voir dire* over with a new pool. State v. Neil, 457 So.2d 481 (Fla. 1984).

While the opponent of a peremptory challenge must make a timely objection, identify the distinct racial or ethnic class or gender of the juror being challenged, and request that the trial court ask the striking party to articulate its reason(s) for the strike, Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996), there is no magical incantation which must be uttered to satisfy this requirement. The opponent need only alert the court to its objection. Franqui v. State, 699 So.2d 1332, 1335 (Fla. 1997), *cert. denied,* 523 U.S. 1040, 118 S.Ct. 1337, 140 L.Ed.2d 499 (1998); State v. Holiday, 682 So.2d 1092, 1093 (Fla. 1996); Alsopp v. State, 855 So.2d 695, 696 (Fla. 3rd DCA 2003). "Any doubt concerning whether the objecting party has met its initial burden must be resolved in that party's favor." Holiday, 682 So.2d at 1093 (quoting Valentine v. State, 616 So.2d 971, 974 (Fla. 1993). Smith v. State, So.2d (Fla. 3rd DCA 2007).

This court and the other district courts of this State have likewise repeatedly held that as long as the trial court understands the nature of the objection, an inquiry may be made. See Murray v. Haley, 833 So.2d 877, 879 (Fla. 1st DCA 2003)(rejecting appellees' argument that appellant failed to satisfy step one because counsel never

requested the trial court to make a Neil inquiry and, therefore, did not mandate further inquiry by the trial court and holding that "although appellants never actually requested that the trial court ask appellees to articulate a gender-neutral reason for their challenges, it is apparent that the trial court understood the nature of the objections. It would elevate form over substance to conclude that, even though the trial court understood the nature of the objections, those objections were insufficient to preserve the issue for appellate review."); Alsopp v. State, 855 So.2d 695, 697 (Fla. 3d DCA 2003)(holding that "where it is clear that the challenged juror is a member of a racial or ethnic group and the court is aware of the fact, a general objection is sufficient to trigger an inquiry"); Foxx v. State, 680 So.2d 1064, 1065 (Fla. 3d DCA 1996)(finding the State's comment that "we would ask for a Neil inquiry" sufficient where it was clear from the record that the prospective juror was a member of a distinct racial group and the trial court was aware of this fact); Joseph v. State, 636 So.2d 777, 781 (Fla. 3d DCA 1994)(rejecting State's argument that because there was no showing that a juror was, in fact, Jewish, the defendant had not met the threshold requirement of Neil, finding, instead, that because "there is no question that the trial judge understood the basis of the defendant's objection" an inquiry was required. Id.

Additional cases on racial or gender discrimination in the use of peremptory challenges in jury selection:

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 (5th Cir. 1988); City of Miami v. Cornett, 463 So.2d 1308 (5th Cir. 1988); City of Miami v. Cornett, 463 So.2d 399 (Fla. 3rd 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. 2d DCA 1991); Mitchell v. CAC-Ramsey Health Plans, Inc., 719 So.2d 930 (Fla. 3rd 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. 4th DCA 1998).

4. The trial court's ruling on whether a party has stricken a juror for racial reasons "turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." King v. Byrd, 733 So.2d 516 (Fla. 4th DCA 1999).

5. Limitations on the exercise of Peremptory Challenge-Neil Inquiry

The Neil inquiry places a limitation on a party's use of peremptory challenges based on national origin or gender. A party making a objection to the exercise of a peremptory challenge must: a) make a timely objection that the challenge is being made on the basis of race, national origin or gender, b) show that a venire person is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.

At this point the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). IF the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather on its genuineness. Harrison v. Emanuel, 649 So. 2d 759 (Fla. 4th DCA 1997).

It is extremely important to note that in conducting the Neil inquiry the trial court must not only look at the reasonableness of the reason given by the party seeking to exercise the strike. The court must seek to determine whether the real reason for the strike is because of the race of the prospective juror.

In determining whether the reason given is a pretext, the court should look to see how the peremptory strikes are being utilized. In Harrison v. Emanuel, 649 So. 2d 759 (Fla. 4th DCA 1997) the Defendant attempted to strike an African American. The reason given was that the prospective juror had been rear ended as had the plaintiff in the case. Although, the reason was reasonable one the trial court failed to allow the strike. In upholding the trial courts ruling the Appellate Court noted

that there were other prospective jurors that had also been involved in accidents that were not challenged.

The trial court properly fulfilled his duty to look behind the reason given and made a determination that the reason given was just a pretext to remove a prospective juror because of race.

In Hall v. Daee, 602 So.2d 512 (Fla. 1992), the Florida Supreme court determined that the number of strikes used by multiple parties was an indication of a race motivated peremptory challenge. In addition, the court noted that reasons given are pretexts when strikes are not exercised on white jurors even though the same reasons applied to white jurors.

In order to prevent a peremptory challenge based on a Neil Inquiry, it is not required to show that a party is systematically excluding jurors on the basis of race. In fact, it is improper to exclude even one potential juror on the basis of race. Hall v. Daee, 602 So.2d 512 (Fla. 1992).

The Neil Inquiry applies to gender as well as race. Mazzouccolo v. Gardner, 714So.2d 534 (Fla. 4th DCA 1998).

The trial court should not necessarily rely on the recollection of the attorneys in ruling on a Neil Inquiry. In Michelin Tire Corporation v. Lovett, 731 So. 2d 736 (Fla. 4th DCA 1999), the court, in reversing a $30,424,000.00 verdict against a tire manufacturer based on an erroneous denial of a peremptory challenge because of a Neil Inquiry and noted that the trial attorney seeking to prevent the challenge misstated the answers of the prospective juror. Instead of relying on the memory of the attorneys, the trial court should have the court reporter read the answers of the prospective juror.

VI. REMEDY FOR MISREPRESENTATIONS AND NONDISCLOSURES BY JURORS

A case will be reversed because of a juror's non-disclosure of information when the following three-part test is met: (1) the facts must be material; (2) the facts must be concealed by the juror upon his voir dire examination; and (3) the failure to discover the concealed facts must not be due to the want of diligence of the complaining party. Indus. Fire & Casualty Ins. Co. v. Wilson, 537 So.2d 1100, 1103 (Fla. 3d DCA 1989). The

following cases are samples of the many cases in which juror nondisclosure during *voir dire* has been raised on appeal following undesirable verdicts:

1. Failure to disclose a prior accident one year earlier thought unintentional was grounds for new trial. Bernal v. Lipp, 580 So. 2d. 315 (Fla. 3rd DCA 1991).

2. In a crash-worthiness case failure of a juror to disclose a prior workers compensation claim was not material when potential jurors that listed prior litigation on questionnaire were not questioned about prior litigation. Ford Motor Co. v. D'Armario, 732 So.2d 1143 (Fla 2nd DCA 1999).

3. Failure of prospective juror to disclose a relationship with defendant insurance company- that he had the same insurance company and that insurance company had denied his claims was grounds for new trial due to non-disclosure. Industrial Fire and Casualty v.Wilson, 537 So. 2d. 1100 (Fla. 3rd DCA 1989).

4. In Norman v. Gloria Farms, 668 So. 2d 1016 (Fla. 4th DCA 1996) the court ordered a new trial when the brother of one of the jurors who worked for the insurance company for the defendant about the case. The court, however, did not find that the juror concealed any material information because neither party asked the venire whether they had family members who worked for the insurance company.

5. Non-disclosure of information by venire member is considered material if it is substantial and important so that if the facts were known, a party may be influenced to peremptorily challenge the juror from the jury. Based on this standard, the court failed to find material the non disclosure of a prior automobile accident. The court examined the entire *voir dire* and determined that the party alleging the non-disclosure was only interested in striking persons in prior accidents that continued to be in pain. Thus the court was examining whether the party would in fact have determined the information important at the time of trial to its decision making process. Garnett v. Mcclellan, (Fla. 5th DCA 2000).

6. A juror's answer to an ambiguous question cannot constitute juror misconduct necessitating a new trial. Ottley v. Kirchharr, 917 So.2d 913 (Fla. 1st DCA 2005). A potential juror cannot and should not conceal information on *voir dire* or fail to answer questions completely, but where a juror correctly answers a question, it is counsel's responsibility to inquire further if more information is needed. Id.

7. Juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such

misconduct is prejudicial to the party, for it impairs his right to challenge. Taylor v. Magana, 911 So. 2d 1263 (Fla. 4th DCA 2005). To determine whether juror misconduct concerning failure to disclose information during *voir dire* warrants new trial, three-part test applies: complaining party must establish that information is relevant and material to jury service in case, that juror concealed information during questioning, and that failure to disclose information was not attributable to complaining party's lack of diligence. Id. Juror's nondisclosure of information during *voir dire* need not be intentional to constitute concealment, because the impact remains the same; counsel is prevented from making an informed judgment regarding the composition of the jury and the utilization of his or her peremptory challenges. Id. To establish concealment of information by juror, the moving party must demonstrate, among other things, that the *voir dire* question was straightforward and not reasonably susceptible to misinterpretation. Id. Juror's answer during *voir dire* cannot constitute concealment when the juror's response about litigation history is ambiguous and counsel does not inquire further to clarify that ambiguity. Id. Information is considered "concealed," for purposes of the three-part test governing whether juror concealment during *voir dire* constitutes misconduct warranting new trial, where the information is squarely asked for and not provided. Id. Due-diligence part in three-part test governing whether juror concealment during *voir dire* constitutes misconduct warranting new trial requires that counsel provide sufficient explanation of type of information which potential jurors are being asked to disclose; this includes articulating types of lawsuits or claims being inquired about in layperson's language, and counsel is expected to make further inquiry about litigation history where pertinent and ask follow-up questions to clarify or obtain relevant information. Id.

8. A juror's failure to disclose the fact that she had been treated by defendant medical group was not so material as to warrant new trial in patient's medical malpractice action against two medical groups and two physicians alleging that she had been misdiagnosed as having asthma; it was not clear whether juror had asthma or bronchitis or whether she was treated by either of two physicians in current case, nothing in questioning of juror revealed bias, and juror's one-time treatment or consultation was so long ago or so insignificant that she did not remember it. Murphy v. Hurst, 881 So.2d 1157 (Fla. 5th DCA 2004). In order to be entitled to new trial for a juror's failure to disclose, the complaining party must show that: (1) the information is relevant and material to jury service in the case; (2) the juror concealed the information during questioning; and (3) the failure to disclose the information was not attributable to the complaining party. Id. Whether the concealed information of a juror is material involves consideration of many factors, and the determination of materiality should primarily be made at the trial level where the dynamics and context of the entire trial process can best be evaluated. Id. Nondisclosure by a juror is

considered material if it is substantial and important so that if the facts were known, the defense may have been influenced to peremptorily challenge the juror. Id. "Materiality" of juror's omission is only shown where the omission of the information prevented counsel from making an informed judgment, which in all likelihood would have resulted in a peremptory challenge. Id.

9. In deciding whether juror's non-disclosure during *voir dire* warrants new trial, complaining party must establish that: (1) information is relevant and material to jury service in case; (2) juror concealed information during questioning; and (3) failure to disclose information was not attributable to complaining party's lack of diligence. Tripp v. State, 874 So.2d 732 (Fla. 4th DCA 2004). De La Rosa v. Zequeira, 659 So.2d 239, 241 (Fla.1995); accord Davis v. State, 778 So.2d 1096, 1097 (Fla. 4th DCA 2001). Moreover, "a juror's non-disclosure need not be intentional to constitute concealment." Roberts v. Tejada, 814 So.2d 334, 343 (Fla.2002).

10. A party is not required to complete venire investigations during trial and may, after the verdict, submit evidence of juror's non-disclosure of information during *voir dire*. State Farm v. Levine, 837 So.2d 363 (Fla. 2002). Trial court's decision to deny new trial motion alleging juror's failure to disclose involvement in automobile accident could not be affirmed on the ground that the accident was not material; the record lacked evidence regarding materiality of prior accident on ability to serve as a juror, the trial court's primary focus was timeliness of the venire investigation, confusion existed regarding prejudice as an element of the test, and remand was thus warranted for further consideration of the proper principles. Id. Materiality of information not disclosed by juror during *voir dire* is only shown where the omission of the information prevented counsel from making an informed judgment that would in all likelihood have resulted in a peremptory challenge. Id.

11. Patron, in premises liability action against bar owner, was entitled to new trial based on juror's failure to disclose his past litigation involvement, even though records check as to the juror's litigation history was not completed until after the verdict was rendered; due diligence did not require a lawsuit index search prior to the conclusion of jury selection. Vanderbilt Inn On The Gulf v. Pfenninger, 835 So.2d 202 (Fla. 2nd DCA 2002).

12. Defendants in wrongful death action based on automobile accident were entitled to new trial, where one juror failed to disclose, despite extensive questioning on *voir dire*, that he had been the plaintiff in a previous lawsuit arising from an auto accident, in which plaintiff's attorneys in the present case represented juror, and defendant's attorneys in the present

case represented defendant. Davis v. Cohen, 816 So.2d 671 (Fla. 3rd DCA 2002).

13. In the seminal case of Roberts v. Tejeda, 814 So.2d 335 (Fla. 2002) the Supreme Court, Lewis J., held that: (1) issue of whether juror's prior litigation history, which she failed to disclose upon initial questioning, was material and thus would have been the basis for peremptory challenge required remand, and (2) trial counsel was not required to conduct public records search of venirepersons in order to satisfy due diligence requirement regarding juror nondisclosure of information; disapproving Vanderbilt Inn on the Gulf v. Pfenninger, --- So.2d ----, 2002 WL 459252 (Fla. 2d DCA February 8, 2002), Bornemann v. Ure, 778 So.2d 1077 (Fla. 4th DCA 2001), and Silva v. Lazar, 766 So.2d 341 (Fla. 4th DCA 2000).

14. In Allstate Insurance Company v. Wiley, 32 F.L.W. D1146a (Fla. 2nd DCA 2007) Allstate moved for a new trial, claiming that upon post trial review, it discovered that two jurors had failed to properly respond to the juror questionnaires that they had completed prior to trial and that Allstate had relied upon at trial. Specifically, Allstate alleged that one juror denied having previously been a party to a lawsuit when, in fact, she had been a defendant in a small claims action and had also gone through a divorce. Another juror had identified himself as a financial planner but had failed to disclose that he had been sued recently in small claims court over a credit card debt. Although he had reported on his questionnaire that he had been a party to a claims court action in another county some years earlier, he had not reported the more recent, local claim. The court found no abuse of discretion in the trial court's denial of Allstate's motion for new trial, stating as follows:

> "Our review of this record does not disclose such an abuse. One juror's prior legal experience occurred almost seventeen years before the instant case. The other juror did disclose a prior claims court involvement, although he did not disclose the more recent lawsuit. Furthermore, although Allstate claims that this juror's credibility as a financial planner was compromised by his apparent failure to timely pay his credit card obligations, we are not persuaded that the trial judge was unreasonable in denying Allstate's motion for new trial on this basis. "If reasonable people could differ as to the propriety of the court's ruling, then the abuse of discretion standard has not been met." *Vanderbilt Inn on the Gulf v. Pfenninger*, 834 So. 2d 202, 203 (Fla. 2d DCA 2002). Accordingly, we affirm the trial court's denial of the motion for new trial."

An objection to a juror's misrepresentation or nondisclosure during *voir dire* can be waived if not raised when discovered during trial. In Companioni v. City of Tampa, So.2d (Fla. 2nd DCA 2007) the court noted:

> We also note that we are not concerned here with a case in which the party seeking a new trial had knowledge of a fact disqualifying a juror and failed to assert it until after the verdict. Under such circumstances, the absence of a timely challenge to the juror results in a waiver. *See* Willacy v. State, 640 So.2d 1079, 1082-83 (Fla.1994); Porter v. State, 160 So.2d 104, 109 (Fla.1963).

It is advisable to move to interview the jurors whenever nondisclosure, misrepresentation or juror misconduct is suspected. See e.g. Taylor v. Magana, 911 So.2d 1263 (Fla. 4th DCA 2005); Davis v. Cohen, 816 So.2d 671 (Fla. 3rd DCA 2002); and Leavitt v. Krogen, 752 So.2d 730 (Fla. 3rd DCA 2000).

VII. PRESERVING THE RECORD ON APPEAL

A. ALL PEREMPTORY CHALLENGES MUST BE EXHAUSTED AND ADDITIONAL PEREMPTORY CHALLENGES REQUESTED.

The use of peremptory challenges and challenges for cause are two of the tools afforded parties and judges, in the context of a jury trial, to obtain a fair and impartial panel of jurors. Somerville v. Ahuja, 902 930 (Fla. 5th DCA 2005). It is reversible error to require a party to exhaust all of that party's peremptory challenges against prospective jurors who should have been excused for cause, and thereby force that party to accept on the jury a person the party identifies and states they would have exercised a peremptory strike against, had they been granted an additional peremptory strike, or had they had an additional strike remaining. Id.

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., 527 So.2d 922 (Fla. 4th DCA 1988); Connors v. Sears, Roebuck & Co., 721 So.2d 418 (Fla. 4th DCA 1998).

It is 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. 4th DCA 1990); Jenkins v. Humana of Florida, Inc., 553 So.2d 201 (Fla. 5th DCA 1989).

B. THERE MUST BE A RECORD OF WHY A JUROR SHOULD HAVE BEEN EXCUSED.

Of course, questioning must be specific and clear in order to build a record upon which an appellate court can determine if a juror should have been excused for cause To preserve for appellate review the refusal to grant a challenge for cause, "[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." Griefer v. DePietro, 625 So.2d 1226, 1228 (Fla. 4th DCA 1993).

C. PARTY OBJECTING TO JUROR MUST RENEW OBJECTION TO THE FINAL COMPOSITION OF THE JURY.

To preserve an issue on appeal, counsel must object to the jury as finally composed. Ter Keurst v. Miami Elevator Co., 486 So.2d 547 (Fla.1986). 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. 3rd DCA 1991); Taylor v. Public Health Trust, 546 So.2d 733 (Fla. 3rd DCA 1989); Melara v. Cicione, 712 So.2d 429 (Fla. 3rd DCA 1998).

Regardless of what the grounds of a challenge may be, the objection to the challenged juror must be renewed before the jury is sworn. See Zack v. State, 911 So.2d 1190 (Fla. 2005); Farina v. State, 937 So.2d 612 (Fla. 2006); Carratelli v. State, 915 So.2d 1256 (Fla. 4th DCA 2005); Melbourne v. State, 679 So.2d 759 (Fla. 1996); Milstein v. Mutual Sec. Life Ins. Co, 705 So.2d 639 (Fla. 3rd DCA 1998); Melara v. Cicione, 712 So.2d 429 (Fl. 3rd DCA 1998); Couch v. Dunn Ave. Shell, Inc., 803 So.2d 803 (Fla. 1st DCA 2001); But compare Gootee v. Clevinger, 778 So.2d 1005 (Fla. 5th DCA 2000).

D. MOVE TO INTERVIEW JURORS WHERE JUROR MISCONDUCT IS SUSPECTED

If juror misconduct, including nondisclosures or misrepresentations during jury selection is suspected, it is advisable to move for a jury interview pursuant to Rule 1.431,

Fla. R. Civ. P. See e.g. Companioni v. City of Tampa, So.2d (Fla. 2nd DCA 2007). The motion must be served within ten (10) days of the verdict, unless good cause is shown. Rule 1.431, Fla. R. Civ. P.

The motion and supporting affidavits must set forth a legally sufficient reason to interview the jurors, not matters that inhere in the verdict. Hackman v. City of St. Petersburg, 632 So.2d 84 (Fla. 2nd DCA 1993). Mere speculation and conjecture is insufficient. Id. See also, Johnson v. State, 841 So.2d 349 (Fla. 2002). An accompanying letter from a juror is not enough. The factual allegations must be sworn. Travelers Ins. Co. v. Jackson, 610 So.2d 680 (Fla. 5th DCA 1992).

Improperly contacting a juror without leave of court waives any right to seek a new trial on this basis. Walgreens Inc. v. Newcomb, 603 So.2d 5 (Fla. 4th DCA 1992), *rev. denied* 613 So.2d 7 (Fla. 1993). Further, if a discovery of information is made during trial that should disqualify a juror, a motion for mistrial must be made at that time or the issue is waived. Lucas v. Mast, 758 So.2d 1194 (Fla. 3rd DCA 2000).