JURY CHALLENGES FOR CAUSE AND PRESERVING THE RECORD

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INTRODUCTION

Georgia's trial system provides for two types of strikes during the voir dire process – peremptory strikes and strikes for cause. Peremptory strikes are limited, and, as such, the key to obtaining a jury that is as fair and impartial as possible rests in council's ability to effectively convince the trial judge that certain jurors should be removed for cause. As most of us know, however, this is often not an easy task: jurors tend to keep their true feelings on a given subject to themselves; trial judges sometimes impose limitations on council's questioning of potential jurors; and courts often seem reluctant to let too many jurors off for cause – as if there is something wrong with that.

Recognizing the importance of strikes for cause, our firm has recently started filing a brief with the court prior to trial in order "remind" the court, for lack of a better term, of the law surrounding strikes for cause. We also have engaged judges in discussions of the law governing voir dire and strikes for cause during the pre-trial conference or at some other appropriate time prior to trial so that this body of law will be "top of mind" at the start of trial.

In this paper I have attempted to summarize many of the important legal principles that govern voir dire, and strikes for cause generally. It is my hope that you will be able to use this material in a practical manner during your next trial to obtain the fairest possible jury for your client.

I. BASIC "BIG PICTURE" PRINCIPLES

Several current basic principles govern the decision of whether to strike a prospective juror for cause upon motion by either party during the jury selection process. They include:

- Neither party has a right to have any particular person on their jury;
- Trial courts should err on the side of dismissing, rather than trying to rehabilitate, biased jurors;
- If any doubt exists, trial courts should use their discretion to remove potential jurors even when the question of impartiality is a very close call; and
- Jurors must be free from even a suspicion of prejudgment as to any issue or of bias or partiality or outside inferences.

The legal authority for these principles is set forth below.

II. LEGAL AUTHORITY

A. COMMON LAW GROUNDS FOR STRIKING JURORS

The common law set out two primary conditions under which prospective jurors were to be stricken. Jurors were to be stricken (1) for "principal cause," i.e., when they had an interest in the case or had a relationship with a party to the case, and (2) for "favor," i.e., when "circumstances rais[ed] a suspicion of the existence of actual bias in the mind of the juror for or against the party, as for undue influence, or prejudice." Mitchell v. State, 69 Ga. App. 771, 26 S.E.2d 663, 668 (1943).

The Georgia Court of Appeals offered this explanation of the difference between a strike for "principal cause" and one for "favor":

> [A]n opinion finally and fully made up and expressed, which the juror admits could not be changed by evidence, and nothing appearing to the contrary, would subject the juror to a challenge **for principal cause**; for the juror could be conclusively presumed from partiality to be incapacitated to serve **as a matter of law**. But an imperfect or hypothetical opinion, or one based only on rumor or report, which might or might not yield to the evidence in the case, under the rules of law given in the charge by the court, would not be a cause for a principal challenge, for there would not be a conclusive presumption of law that the juror was disqualified; **but the juror would be subject to a challenge for favor on account of partiality**, and such challenge would raise the **question of fact** as to the competency of the juror which would be **determined by the judge** sitting as a trior.

Mitchell, 26 S.E.2d at 668 (emphasis added).

B. MODERN RULES REGARDING STRIKING JURORS FOR CAUSE

Most of the common law principles governing jury strikes have been codified. The Georgia Code guarantees every party the right to "demand a full panel of 24 competent and **impartial** jurors from which to select a jury." O.C.G.A. § 15-12-122(b) (emphasis added). See also O.C.G.A. § 15-12-123(b). Other Code provisions essentially codify the common law rules requiring jurors to be stricken for "cause" or for "favor."

1. Courts Strike Jurors With a Relationship to One of the Parties

O.C.G.A. § 15-12-135 provides parties with the right to strike jurors for reasons once referred to as "principal cause." Jurors "shall be disqualified to act or serve in any case or matter when such jurors are related by consanguinity or affinity to any party interested in the result of the case or matter within the sixth degree as computed according to the civil law." Id.

For example, "a juror who is related to a stockholder is incompetent to serve as a juror on the trial of an action against the company . . . though this relationship be unknown to the juror." Pickering v. Wagnon, 91 Ga. App. 610, 86 S.E.2d 621, 624 (1955)

(plaintiff used a peremptory strike to remove a juror; after the trial it was discovered that the prospective juror was married to a State Farm policyholder, State Farm being the insurer in the case; the Court of Appeals held that the denial of the right to 24 impartial jurors was "harmful error").

Likewise, "[p]erhaps the one fact that can be assumed is that relatives or employees will be biased one way or the other," so "it is essential to rule that regardless of any presumption employees should be held incompetent to serve as a juror in a case in which the employer is a party." Seaboard Coast Line R.R. Co. v. Smith, 131 Ga. App. 288, 290-91, 205 S.E.2d 888, 890-91 (1974). In fact, courts should strike prospective jurors when one of the parties is the person "on whom the prospective juror's continued employment depend[s]." Carr v. Carr, 240 Ga. 161, 162, 240 S.E.2d 50, 51 (1977) (error not to disqualify prospective juror where sole stockholder of the company for which the juror worked was a party to the case).

2. Courts Strike Jurors Who are Inclined to One Point of View Over Another

O.C.G.A. § 15-12-134 provides parties with the right to challenge jurors for reasons once called "favor":

> In all civil cases it shall be good cause of challenge that a juror has expressed an opinion as to which party ought to prevail or that he has a wish or desire as to which shall succeed. Upon challenge made by either party upon either of these grounds, it shall be the duty of the court to hear the competent evidence respecting the challenge as shall be submitted by either party, the juror being a competent witness. The court shall determine the challenge according to the opinion it entertains of the evidence adduced thereon.

When circumstances suggest bias, the court should take judicial notice that in all probability bias does exist:

> [U]pon the discovery of facts which . . . evince good reason for interest or bias in the case, the court will take judicial knowledge of the fact that in all human probability the influence disclosed would operate upon the juror and move him to act in accord therewith . . .. When, according to universal human experience, the inherent probabilities of the circumstances by which the juror is environed and to the influence of which he is to be subjected compel the conclusion, in accord with the court's judicial knowledge, that the juror will naturally be affected by his interest, it cannot be held, as a matter of law, that the juror . . . is qualified to sit in, an impartial trial as guaranteed by the Constitution . . ..

Cambron v. State, 164 Ga. 111, 137 S.E. 780, 781 (1927) (citing Temples v. Central of Ga. Ry. Co., 15 Ga. App. 115, 82 S.E. 777, 778-80 (1914)).

C. KIM V. WALLS – TRIAL JUDGES SHOULD DISMISS POTENTIALLY BIASED JURORS RATHER THAN TRY TO REHABILITATE THEM

Georgia's appellate courts recently evaluated the practice of juror "rehabilitation" whereby trial judges used a loaded and leading "rehabilitation" question to retain jurors who had revealed a bias or leaning to one party over the other. Though the wording may be slightly altered depending on the case, the essence of the magical "rehabilitation" question from the trial judge to the potential juror was as follows: "Isn't it true that you can set aside your bias or leaning to X party and render a true and fair verdict based upon the evidence and the charge given by the Court?" Not surprisingly, most potential jurors, who are intimidated by the process and the Court, and who are put on the spot in open court, would yield despite their true feelings and answer, "yes" to the leading "rehabilitation" question. When confronted with this situation, the Court of Appeals noted that the "rehabilitation" question had become "something of a talisman relied upon by trial and appellate judges to justify retaining biased jurors." Walls, 250 Ga. App. at 259, 549 S.E.2d at 799.

Walls admonished trial judges against the further practice of rehabilitating potentially biased jurors: "[a] trial judge **should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors** because, in reality, the trial judge is the only person in the courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury." 250 Ga. App. at 260, 549 S.E.2d at 799 (emphasis added). Contrary to and as opposed to rehabilitation, "**the better practice is for judges simply to use their discretion to remove such partial jurors, even when the question of a particular juror's impartiality is a very close call**." Id. (emphasis added).

The Georgia Supreme Court affirmed the Court of Appeals' decision in Kim v. Walls, 275 Ga. 177, 563 S.E.2d 847 (2002). [1] The Court initially noted that the paramount goal of voir dire is to ensure the selection of a fair and impartial jury:

> Running through the entire fabric of our Georgia decisions is a thread which plainly indicates that the broad general principle intended to be applied **in every case** is that **each juror shall be so free from either prejudice or bias as to guarantee the inviolability of an impartial trial** . . .. **[I]f error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors.**

Kim, 563 S.E.2d at 849 (emphasis added) citing Cambron v. State, 164 Ga. 111, 113-114, 137 S.E. 780 (1927). See also Brown v. Columbus Doctors Hospital, Inc., 277 Ga. App. 891, 627 S.E.2d 805, 806 (2006). The Court then affirmed the trial court's vitally important duty when a potential juror has a relationship to a party that is either close or subordinate, or one that suggests bias:

[1] The Supreme Court disapproved of the Court of Appeals' opinion to the extent that it could be read to create a per se rule requiring the exclusion of an entire class of jurors who have an employment relationship with a party to the lawsuit. Walls, 563 S.E.2d at 850.

> … **the trial court must do more than "rehabilitate" the juror through the use of any talsimanic question**. The court is statutorily bound to conduct voir dire adequate to the situation, whether by questions of his own or through those asked by counsel.... To assist the court in accomplishing this task, counsel should be given the "broadest of latitude" in questioning prospective jurors who have expressed an interest or bias.

Kim, 563 S.E.2d at 849 (emphasis added). Appellate decisions after Kim have made clear that "[n]either counsel nor the court may browbeat the juror into affirmative answers to rehabilitative questions by using multiple, leading questions." Clack-Rylee v. Auffarth, 273 Ga. App. 859, 616 S.E.2d 193, 195 (2005) citing Doss v. State, 264 Ga. App. 205, 211, 590 S.E.2d 208 (2003). Instead, the Court must conduct its own inquiry, either through its own questioning or allowance of questions by counsel, sufficient to evaluate the potential juror's fairness and impartiality. Clack-Rylee, 616 S.E.2d at 196 citing Remillard v. Longstreet Clinic, 267 Ga. App. 230, 231, 599 S.E.2d 198 (2004).

D. VOIR DIRE PROCEDURES

1. Role of the Trial Court

Trial judges have the duty and broad discretion to ensure the impartiality of jurors: "[T]rial courts have broad discretion to evaluate and rule upon a potential juror's impartiality, based upon the 'ordinary rules of human experience,' and a trial court may only be reversed upon a finding of a 'manifest abuse' of that discretion." Brown v. Columbus Doctors Hospital, Inc., 277 Ga. App. 891 (2006) citing Kim, 275 Ga. at 178.

If the court has even a suspicion that a particular prospective juror would not be impartial, the juror should be stricken. In such cases, the party opposing the motion to strike for cause has no ground for complaint, because: "'**A party to a lawsuit has no vested interest in having any particular juror to serve**; he is entitled only to a

legal and impartial jury.'" Morris, 183 Ga. App. at 500, 359 S.E.2d at 245 (quoting Hill v. Hosp. Auth. of Clarke County, 137 Ga. App. 633, 636, 224 S.E.2d 739, 742 (1976).

2. Role of Counsel

Although the judge determines whether a particular juror should be stricken for cause, counsel plays a critical role in the decision process through voir dire: "counsel for either party shall have the right to inquire of the individual jurors examined touching any matter or thing which would illustrate any interest of the juror in the case, including any opinion as to which party ought to prevail, the relationship or acquaintance of the juror with the parties or counsel therefor, **any fact or circumstance indicating any inclination, leaning, or bias** which the juror might have **respecting the subject matter** of the action or the counsel or parties thereto, and the religious, social, and fraternal connections of the juror." O.C.G.A. § 15-12-133 (emphasis added). Counsel are entitled to have the jurors placed "in the jury box in panels of 12 at a time, so as to facilitate their examination by counsel." O.C.G.A. § 15-12-131.

In keeping with the importance placed on providing the parties with a fair jury, courts find that a party should not have to use his peremptory strikes to eliminate a juror who should have been stricken for interest or for favor:

> Parties should not be required to use their strikes in an effort to remove disqualified jurors. (Citations omitted). Let there be no thumb on the scale when the jury weighs the evidence! (Citations omitted).

Jones v. Cloud, 119 Ga. App. 697, 707, 168 S.E.2d 598, 605-06 (1969); see also Parisie v. State, 178 Ga. App. 857, 859, 344 S.E.2d 727, 729 (1986) ("[w]here a defendant uses all of his peremptory challenges before a jury is struck and is forced to use a peremptory challenge on a juror who should have been stricken for cause, the error is harmful and requires reversal").

3. Role of Prospective Jurors

Like the Court and counsel for the parties, the jurors themselves have a role in the process of striking jurors for cause. Jurors are expected to give truthful answers to voir dire questions, and when they fail to do so with respect to a matter that bears upon their interest, bias, or partiality, a motion for new trial on the ground of such untruthfulness should be granted. As the Court of Appeals has noted:

> Whether he would have used such peremptory strike or would have permitted such juror to serve rather than some other person who he felt would not give him a fair trial presents no issue here for . . . the defendant had the right to the information and the right to make a choice with it.

Glover v. Maddox, 100 Ga. App. 262, 266, 111 S.E.2d 164, 167-68 (1959) (reversing for failure to grant a new trial). "The primary way to arrive at the selection of a fair and impartial jury is through voir dire questioning. Therefore, when a litigant asks a potential member of his trial jury a question he has a right to get a truthful answer." Pierce v. Altman, 147 Ga. App. 22, 23, 248 S.E.2d 34, 35 (1978).

III. CONCLUSION

As can be readily seen by the above, the law governing voir dire is expansive and historic. It is worthwhile to review this body of law yourself, and with the Court if appropriate, before each and every trial experience. Your knowledge of these principles and ability to cite them to the trial judge will, in our experience, enhance you chances of having jurors removed for cause, and improve your ability to obtain a truly fair and impartial jury for your client.