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Peremptory Challenges—How Many?

By

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How often does the plaintiff's attorney face the following scenario? You are representing a husband and wife who are plaintiffs in a tort action. Assume, for our purposes here, that the wife was injured in an automobile wreck. The husband, not involved in the collision, brings a claim against the wrongdoer for loss of services and loss of consortium. According to most defense lawyers, the husband's claim is, therefore, "derivative" to his wife's claim.

Prior to commencement of jury selection, the defense attorney says to the trial court: "Of course, your Honor, you are only going to allow the plaintiffs four (4) peremptory challenges because the husband's claim in this case is derivative to that of his wife. Right?"

Or, defense counsel may use the old tactic of "identical interest" as follows: "Of course, your Honor, you are going to allow the plaintiffs only four (4) peremptory challenges because their interests are identical. Right?"

The proper response by the trial court should be, "Wrong." Regrettably the converse is usually true; the trial court says, "Right;" and dual plaintiffs routinely do not enjoy the right to exercise eight (8) peremptory challenges as that right is contemplated by the law.

T.C.A. Section 22-3-105 provides:

"Peremptory Challenges—Effect of consolidation of cases.—(a) Either party to a civil action may challenge four (4) jurors without assigning any cause. (b) In the event there is more than one party plaintiff or more than one party defendant in a civil action, four (4) additional challenges shall be allowed to such side or sides of the case; and the trial court shall in its discretion divide the aggregate number of challenges between the parties on the same side which shall not exceed eight (8) challenges to the side regardless of the number of parties. Even when two (2) or more cases are consolidated for trial purposes, the total challenges shall be eight (8), as herein provided. . . ."

This statutory scheme nowhere indicates that two party plaintiffs, whose interests are "identical" or "derivative," are entitled to only four (4) peremptory challenges.

The statute states simply and plainly that if there is more than one party plaintiff in a civil action, four (4) additional challenges shall be allowed to that side, not to exceed a total of eight (8) challenges.

From where, then, does the continued assertion of "identical interests" and "derivative claims" come, and why do trial courts continue to inform the plaintiffs' attorney that defense counsel is correct?

The answer lies in the few court opinions rendered on the subject under prior law. (The statute was altered substantially in 1955 to its present day form as reflected in the previously quoted statute.) Prior to 1955, the Code of 1932 Section 10019 provided: "Either party to a civil action may challenge two jurors without assigning any cause." [Emphasis added.] In the next section, Code Section 10020, it was provided that in criminal cases, "each defendant" shall be entitled to the number of challenges available to a single defendant.

"Trial courts continually abuse the rights of plaintiffs by ignoring T.C.A. Section 22-3-105."

Case histories indicate that prior to 1955 there was a long established difference in the practice concerning peremptory challenges in civil cases in contrast to peremptory challenges in criminal cases. The courts had interpreted the old statutes as meaning that in any civil case each side had only two (2) peremptory challenges—regardless of the number of party plaintiffs or defendants. But in criminal cases each defendant could have two (2) peremptory challenges. In *Blackburn v. Hayes*, 44 Tenn. 227, 230 (1867), the Tennessee Supreme Court said:

"It will be observed that there is a difference in the language of the Act giving the right to challenge in criminal and civil cases. In criminal cases the right is given to each party. In criminal causes, though the defendants are tried jointly, yet the judgment may be widely different. In civil actions the judgment is joint; they are sued jointly."

"We are, therefore, of the opinion, in civil cases, each party to the suit, whether comprising one or more plaintiffs, is entitled to but two peremptory challenges."

"The Act of 1805, allowing but two challenges in civil cases, was carried into the Code, and is embraced in Section 4012. The long established practice has been to allow but two challenges in civil

cases, and we are unwilling, at this time, after so long an acquiescence by the profession, to change the construction that has been given to that Act.”

So the old Code Section 10019 language of, “Either party to a civil action may challenge two jurors . . .”, led attorneys representing parties in litigation and the courts to the conclusion that the Tennessee Legislature meant “either side may challenge two jurors preemptorily.”

The statute was amended in 1955 with the addition of sub-section (b), which stated “In the event there is more than one (1) party plaintiff . . . four (4) additional challenges shall be allowed to such side . . .”

In view of T.C.A. Section 22-3-105, there appears to be no authority for a trial court to limit two plaintiffs to only four (4) preemptory challenges.

Trial courts continually abuse the rights of plaintiffs by ignoring T.C.A. Section 22-3-105. For defense attorneys to be permitted the advantage of eight (8) preemptory challenges when there are two defendants while two plaintiffs are allowed only four (4) preemptory challenges is not fair.

“The misconception that dual plaintiffs should be allowed only four (4) preemptory challenges because their interests are allegedly derivative needs to be put to rest.”

This author has succeeded in convincing some trial courts to permit a husband and wife plaintiff team to exercise eight (8) preemptory challenges. Trial tactics to overcoming the adverse “long established practice” of limiting two plaintiffs to but four (4) preemptory challenges include: (1) Cite to the trial court the language contained in T.C.A. Section 22-3-105. (2) Remind the trial court that the statute does not contain any language whatsoever about “identical interests” or “derivative claims.” Prior cases interpreting old statutes are irrelevant. (3) Argue to the Court that in any event there is nothing “identical” about the claims; the only thing identical about their claims is they both want to win; but, they each have their own claim. (4) If the interests of the plaintiffs are identical, then so are the interests of these defendants—the defendants both want to win also. (5) It simply is unfair to construe this statute to mean that two defendants can have eight (8) preemptory challenges but these two plaintiffs can only have four (4).

Incidentally, in cases where the writer has been successful in obtaining eight (8) preemptory challenges for two plaintiffs in the so-called

“identical interest” situation, no issue as to any alleged error of the trial court has been raised upon appeal. T.C.A. Section 22-3-105 is unambiguous, and defense attorneys recognize that when it is brought to their attention.

The misconception that dual plaintiffs should be allowed only four (4) preemptory challenges because their interests are allegedly identical or allegedly derivative needs to be put to rest. We need to demand all the preemptory challenges to which our clients are entitled.



ABOUT THE AUTHOR . . .

Randy Kinnard is a Nashville lawyer and TTLA member who specializes in representing plaintiffs in medical malpractice cases. He is a 1967 graduate of the United States Military Academy and a graduate of Memphis State University School of Law, where he served on the Law Review. He recently obtained a \$253,000.00 jury verdict for a widow in Smithville, Tennessee, in a medical malpractice case, which was the largest jury verdict in DeKalb County history.