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THE SUMMARY JURY TRIAL: WHO WILL SPEAK FOR THE JURORS?

_Hume v. M & C Management_¹

I. INTRODUCTION

Since its inception in 1980, the summary jury trial has received much attention in the scholarly journals and the courts. Most of the arguments and litigation center around the impact of the summary jury trial on the parties or their lawyers. One issue which has gone almost untouched is the authority of the courts to empanel the advisory jury; the backbone of the entire procedure. In _Hume v. M & C Management_,² the court addressed its authority to require citizens to serve as jurors in this alternative method of dispute resolution.

II. THE CASE

_Hume v. M & C Management_ is a relatively simple case on its face, which makes the judge's decision even more interesting. On November 13, 1987, Cynthia Hume filed suit in the Northern District of Ohio against M & C Management. She alleged that M & C violated the "Fair Housing Act"³ by discriminating against her because of her sex.⁴ After fruitless attempts at settlement, the parties filed a joint motion with the court on February 13, 1989, asking that a summary jury trial be held "in accordance with the procedures established by Judge Lambros of this court."⁵ Although judges in the district commonly use the summary jury trial, Judge Frank J. Battisti denied the joint motion. He ruled that Congress has not given federal judges the authority to summon citizens to serve as jurors in summary jury trials.⁶

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2. Id.
3. Id. at 507. See also 45 U.S.C. §§ 3601-3631.
III. LEGAL BACKGROUND

A. The Summary Jury Trial

Judge Thomas D. Lambros, also of the Northern District of Ohio, developed the summary jury trial (SJT) in 1980. The SJT is a settlement tool which occurs just before the scheduled trial. It allows the parties to present an abbreviated version of their case to a jury in a trial-like setting and receive a non-binding verdict. Since its invention in 1980, many judges have utilized and proclaimed the virtues of the SJT. Judge Bertelsman of the Eastern District of Kentucky called the summary jury trial "one of the few truly original developments in civil procedure since 1938." However, some question the actual results of the summary jury trial as well as the legal foundations for its implementation.

The summary jury trial helps overcome the uncertainty of how a jury will rule on damages, viewed as the main bar to settlement in many cases. Judge Lambros suggests that the best cases for summary jury trial are those in which (1) there is a difference of opinion in how the jury will rule on damages, (2) there is a difference of opinion on how the jury will rule on certain issues such as reasonable care, (3) the parties have an unrealistic view of their chances of success on the merits, or (4) the parties have a strong desire to "have their day in court."

The procedures for summary jury trial are flexible and vary from judge to judge. Often, the court will suggest or even order that the parties use a summary jury trial. In other cases, the parties will make a joint motion to try the case in front of a summary jury. The decision on whether to use summary jury trial is made during the final pre-trial conference. Before the trial begins, the

7. Lambros, supra note 5, at 461.
8. Id. at 469.
9. It is hard to say exactly how many summary jury trials are being held since they usually end in settlement and therefore are not reported. In 1984, Judge Lambros was able to point to at least twelve federal judges who were utilizing the SJT including: Judges Batin in Montana, McNaught in Massachusetts, Conaboy and Shapiro in Pennsylvania, West in Oklahoma, Ensten, Hillman, Miles and Nesblatt in Michigan, Spiegel in Ohio, Carrigin in Colorado and Gonzalez in Florida. Lambros, supra note 5, at 477.
12. Lambros, supra note 5, at 469.
14. The Seventh Circuit has ruled that judges may not force the parties to participate in SJTs against their will. Strandell v. Jackson County, 838 F. Supp. 884 (7th Cir. 1988). However, at least one judge outside of the Seventh Circuit continues to implement mandatory SJT. McKay, 120 F.R.D. 43.
15. The case at hand is, of course, such an example.
16. Lambros, supra note 13, at 287.
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judge should be sure that all discovery is complete and that all motions are resolved.\textsuperscript{17} This step ensures that the facts presented at a summary jury trial are substantially the same as the facts the parties will introduce at trial.\textsuperscript{18}

Judge Lambros recommends that the judge who will actually try the case preside over the summary jury trial to improve her understanding of the issues and facilitate accurate discussion of the testimony and legal issues.\textsuperscript{19} However, not all judges choose to preside at the summary proceedings.\textsuperscript{20}

On the day of the summary jury trial, the court orders the clerk to draw a panel of jurors from the district's jury pool.\textsuperscript{21} Judge Lambros has ten jurors drawn and uses six of those for the trial, but the number of jurors varies among districts.\textsuperscript{22} Those jurors will fill out a questionnaire and proceed through a normal voir dire process.\textsuperscript{23} Many courts limit the jurors for an SJT to those that have not been selected for regular jury duty,\textsuperscript{24} while others take the juries from the regular venire panel.\textsuperscript{25} A summary jury trial is not open to the public.\textsuperscript{26}

The judge instructs the jury as in a normal trial. At this point, some judges tell the jurors that their verdict will not be binding upon the parties.\textsuperscript{27} However, this procedure varies with judges, and some never tell jurors that their verdict is not binding, a practice which gives rise to concern.\textsuperscript{28}

Each party's attorney gives an abbreviated version of her case.\textsuperscript{29} The presentations include a summary of the issues and the testimony of each side's witnesses.\textsuperscript{30} The rules of evidence are not in effect, and objections are strongly

\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 288.
\textsuperscript{20} Judge McNaught in Massachusetts allows his clerk to preside over the summary jury trial, while he sits as a juror. Levin & Golash, Alternative Dispute Resolution in Federal District Courts, 37 FLA. L. REV. 29, 38-39 (1985).
\textsuperscript{21} Lambros, supra note 13, at 288. Lack of reporting makes it difficult to say whether all courts follow the same procedures for selecting a jury. The only published guidelines for the SJT are found in Judge Lambros' handbook for conducting SJTs. Lambros, supra note 5, at 477.
\textsuperscript{22} The number of jurors used varies significantly between districts. Judge McNaught in Massachusetts requires only 5 jurors, Levin & Golash, supra note 20, at 38, while Judge Iverson in Minnesota used twelve jurors in one case. Bixler by Bixler v. J.C. Penney Co., 376 N.W.2d 209, 214 (Minn. 1985). Judge Lambros recommends six. Lambros, supra note 13, at 288.
\textsuperscript{23} Lambros, supra note 5, at 470.
\textsuperscript{24} Judge Lambros points out that this "recycling" of challenged or stricken jurors is an important aspect of the economic advantages to summary jury trial since the juror who has shown up for jury duty only to be excused for cause or on a peremptory strike has already been paid for her time. Id. at 473.
\textsuperscript{25} Id.
\textsuperscript{26} Lambros, supra note 5, at 471. This suggestion was upheld by the Sixth Circuit in Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d. 900 (6th Cir. 1988).
\textsuperscript{27} Lambros, supra note 13, at 289.
\textsuperscript{28} Posner, supra note 11, at 386.
\textsuperscript{29} The length of time allowed for presentation also varies. Lambros, supra note 5, at 475.
\textsuperscript{30} Id. at 468.
discouraged. Each side is limited in the time they may use; Judge Lambros recommends one hour each. The jury is then asked to render an advisory verdict. The verdict is not binding unless the parties have stipulated to that effect, and in many cases the verdict need not be unanimous.

An important aspect of the summary jury trial is the level of interaction normally allowed between the judge, jury and parties. Some view this interaction as the most important part of the summary jury trial because it promotes a higher level of involvement in the decision making process by the community, thereby promoting a more democratic process. The summary jurors usually return their verdict in the form of a response to specific interrogatories and discussion of their decision is allowed once they have rendered a verdict. After the summary jury trial, the judge holds a post-trial conference to encourage settlement.

Judge Lambros believes that the Federal Rules of Civil Procedure provide a strong foundation for the SJT. He feels the procedure is especially consistent with the mandate of Rule 1, that the Rules be construed to promote "the just, speedy, and inexpensive determination of every action." In justifying the summary jury trial process, Judge Lambros depends heavily upon Federal Rules of Civil Procedure 16 and 11. Those rules provide for pre-trial conferences and encourage settlement through extra-judicial procedures.

Perhaps the most important distinction between the summary jury trial and other methods of alternative dispute resolution is the use of the jury. While Judge Lambros has recognized that Rule 39(c) does not specifically provide for the use of jurors in the summary jury trial, he has relied upon its provision for the use of advisory juries as the authority for empaneling a summary jury.

Lambros argues that the purpose of the rule is to allow the parties to present the case to a jury and the summary jury trial fulfills that purpose.

31. Lambros, supra note 13, at 289.
32. Id. at 289.
33. Id.
34. Id. Some judges, however, require unanimity. See Nat'l L. J., June 10, 1985 at 1, col. 4.
36. Id.
37. Lambros, supra note 13, at 289.
38. Id. at 290.
39. Id. at 287.
40. FED. R. CIV. P. 1.
41. Id.
42. Lambros, supra note 5, at 469.
43. Id. at 468.
44. FED. R. CIV. P. 39.
45. Lambros, supra note 5, at 485.
46. Id.
47. Id.
Minnesota Supreme Court has also apparently made the analogy, in dicta, by referring to the jury in a summary jury trial as an advisory one.\(^{48}\)

**B. The Use of Juries**

The use of jurors in courts of law has ancient roots. The United States Constitution preserves the right to a jury trial in the sixth and seventh amendments.\(^{49}\) The courts interpret this right using a historical test which looks to common law practices as they existed when the Constitution was adopted.\(^{50}\) Courts enjoyed the power to empanel a jury at the time the Constitution was adopted\(^{51}\) and Congress has re-enforced that authority by statute.\(^{52}\) Jury service is considered by the courts to be an obligation inherent in citizenship.\(^{53}\) Refusal to serve as a juror is punishable as contempt of court.\(^{54}\)

Congress has adopted special statutes governing the use and selection of jurors.\(^{55}\) The Jury Selection and Services Act of 1968, 28 U.S.C. sections 1861-1878, provides for selection of jurors and prohibits discrimination in jury selection.\(^{56}\) The Supreme Court has consistently ruled that the constitutional right to a jury trial depends heavily upon the empaneling of a representative cross-section of the community.\(^{57}\) There is at least an implication that part of the duty to serve arises from the need to compel attendance of jurors from various backgrounds to ensure that the parties receive a fair trial.\(^{58}\) However, the courts have interpreted the Jury Selection and Services Act as giving discretionary power to clerks to summon jurors.\(^{59}\) The Act does not mandate that officers of the court compel the attendance, or compliance, of unwilling jurors.\(^{60}\)

Federal Rule of Civil Procedure 39 also governs the use of jurors in federal courts. Section (c) of Rule 39 specifically permits the court to call an advisory jury.\(^{61}\) The rule reflects an awareness of the courts' historical need for community input since the chancellor in the pre-Constitution courts of equity enjoyed the authority to empanel an advisory jury in cases requiring application of community

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48. *Bixler*, 376 N.W.2d at 214.
49. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). See also U.S. CONST. amends. VI and VII.
52. Id.
56. Id.
57. *Theil*, 328 U.S. at 220.
58. *Duncan*, 391 U.S. at 156.
60. Id.
61. FED. R. CIV. P. 39.
standards. 62 Judges have historically used advisory juries in cases that would not be triable as of right to a jury, 63 but need the input of the community; 64 Rule 39 codifies that practice. The courts have interpreted Rule 39 rather broadly, especially when a party has unintentionally waived its right to a jury trial. 65

IV. THE INSTANT DECISION

Although there are various methods for implementing summary jury trials, Judge Battisti uses the procedures as outlined by Judge Lambros to explain and examine the SJT. 66 While he assumes, arguendo, that the summary jury trial promotes settlement, 67 he argues that the legislature has not authorized the empaneling of a jury for settlement purposes. 68

Judge Battisti virtually ignores the advisory jury, only mentioning it briefly in his opinion. 69 He relies primarily on the Jury Selection and Services Act of 1968 70 as the authority for calling juries into federal courts, 71 but points out that the statute refers only to grand and petit juries. 72 The court rejects an interpretation of the statute which would include summary juries in the definition of petit juries. 73 Summary juries, contends Judge Battisti, are easily distinguished from petit juries since a petit jury is defined as the jury for trial of a case. 74 Additionally, Judge Battisti distinguishes summary juries from petit juries by relying on the differences in rules of evidence and presentations that the parties make to the two bodies. 75 He points out that a summary jury verdict is not binding 76 and that this aspect firmly distinguishes the summary jury trial from the jury discussed in the seventh amendment to the Constitution. 77 Judge Battisti holds that the federal courts lack power to require individuals to serve as summary jurors absent Congressional enactment. 78 Finally, the Judge indicates his belief that empaneling a summary jury absent Congressional authority raises

63. Id.
64. In 1975, the Missouri Supreme Court held that trial courts must use an advisory jury when deciding certain types of obscenity claims. McNary v. Carlton, 527 S.W.2d 343, 348 (Mo. 1975) (en banc) (emphasis added).
67. Id. at 508 n.3.
68. Id. at 508.
69. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id. at 509 n.12.
78. Id. at 510.
issues under the fifth and thirteenth amendments given the coercive aspect of jury service.\(^79\)

In an interesting footnote to his opinion, Judge Battisti addresses the policy implications of empaneling a summary jury.\(^80\) He argues that summary jury trial may "compromise the integrity of the jury system\(^81\) because the jurors may become less conscientious about their duties if they learn that some verdicts are not binding.\(^82\) Judge Battisti further argues that use of the jury panel to call summary jurors affects the judgment of jurors in "real" trials and that the use of jurors in a summary jury without the jurors' knowledge raises ethical considerations about the propriety of using individuals in an experimental setting without their knowledge or consent.\(^83\)

V. ANALYSIS

A. The Authority of the Court

The judge in this case obviously opposes the use of the summary jury trial.\(^84\) Nevertheless, his decision raises a question which the case law has yet to address. If the federal courts lack authority to summon jurors for summary jury duty, parties wishing to use the procedure will be forced to find voluntary, perhaps privately paid, jurors.\(^85\) Such a development would likely spell the death of the summary jury trial in federal court. There would be no real economic advantage to electing the SJT over a regular trial. There would also be many procedural problems arising from private parties trying to draw a jury, such as how to ensure that a random sample of the potential jurors is drawn even when some of them do not respond to requests to serve or refuse to participate once contacted.

As previously noted, Judge Battisti's decision focuses primarily on 28 U.S.C. section 1861, the Jury Selection and Services Act.\(^86\) The Act empowers judges to summon citizens for jury service but, explicitly does not mention summary, or even advisory, juries. Judge Battisti's analysis of the distinction between petit and summary jurors appears, on its face, to be without fault given the commonly accepted definition of a petit jury.\(^87\)

The Jury Selection and Services Act is not the only place where Congress discusses the use of juries in the federal court system. Federal Rule of Civil

\(^{79}\) Id.

\(^{80}\) Id. at 508 n. 4.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) See id. at 508 n.3, referring to the SJT as "an unenlightened step backwards" toward an era "which stifled the candid exposition of the merits".

\(^{85}\) This is Judge Battisti's suggestion. Id. at 510 n.15.


\(^{87}\) Id.
Procedure 39 governs the right to trial by jury. Subsection (c) specifically provides: "[i]n all actions not triable of right by a jury the court . . . may try any issue with an advisory jury." Some commentators and at least one court have analogized the summary jury to the advisory jury authorized in Rule 39. On the other hand, by its own terms the rule only applies to actions not triable of right by a jury. The requirement that courts use advisory juries only in actions not otherwise triable of right by jury would defeat the purpose of summary jury trials because the sole purpose for using the SJT is to determine the amount of damages a jury will award should the case go to trial.

A final possible authority for the empaneling of the summary jury lies in the inherent powers of the court. It has long been recognized that the courts have certain powers outside the specific authority given them by Congress. At least one court has claimed that the power to order a summary jury trial is entirely within the inherent powers of the court. The Supreme Court has upheld the power of the federal courts to make their own local rules even without specific Congressional authorization so long as those rules are not "basic procedural innovations." In Colgrave v. Battit, the Supreme Court defined basic procedural innovations as "those aspects of the litigatory process which bear upon the ultimate outcome of the litigation." Given that definition, one might argue that a local rule allowing for the empaneling of a summary jury does not affect the litigatory process at all. It is a settlement tool, and therefore meets the Supreme Court's test for local rules that are within the definition of inherent powers.

B. Some Practical Considerations

One of Judge Battisti's underlying concerns is compelling citizens to help the parties settle. Coercion is probably the only aspect of service on a summary jury trial which raises questions of congressional or constitutional authority. In practice, jury service is not nearly as coercive as Judge Battisti's rhetoric indicates. As previously discussed, the law does not require courts to compel

88. FED. R. CIV. P. 39.
89. Id.
90. Note, supra note 35, at 1368.
91. Bixler, 376 N.W.2d at 214.
92. Lambros, supra note 13, at 286.
94. McKay, 120 F.R.D. 43.
95. Cogrove, 413 U.S. 149.
96. Id. at 164 n. 23.
97. Judge Battisti's district has a local rule which authorizes the use of the SJT at the judge's discretion. Lambros, supra note 5, at 489.
98. Judge Battisti goes so far as to analogize requiring service as a summary juror with requiring citizens to serve as "handservants for [the judge], lawyers or litigants." Hume, 129 F.R.D. at 510.
the attendance or service of reluctant jurors.\textsuperscript{99} A survey of the cases reveals few instances in which the court punished a juror for unwillingness to serve.\textsuperscript{100}

Even if Judge Battisti is right in his assertion that courts may not require citizens to serve on summary juries, a voluntary program might reach the same end. In districts such as Judge Battisti's, where the court selects summary jurors from those who have been part of the venire, but were not chosen for jury service,\textsuperscript{101} there would appear to be an opportunity to take volunteers for an SJT. Those who have appeared for voir dire have probably already made plans to set aside their day to administer justice. They have been paid and recognized as qualified jurors. With the proper appeal, a judge might convince many in the panel to volunteer to serve on the summary jury. Even if some jurors decline to serve, their absence would not defeat the advantages of the SJT. After all, the summary jury would still consist of citizens who have been drawn at random, although the opting out of certain jurors jeopardizes the randomness to a certain extent.\textsuperscript{102} Even so, since the decision of the summary jurors is not binding on the parties or the court, the need for a scientifically random sample of citizens compelled into service is not nearly as strong.

\section*{VI. Conclusion}

Everyone agrees that the SJT is a major innovation in dispute resolution. It will obviously take some time for the judicial system to work out all the considerations involved. Until such a time, there will be judges, such as Judge Battisti, who are not comfortable with the SJT. While it is clearly in the discretion of any judge to deny the use of the procedure, it is time that Congress considers some of the issues that the instant decision raises. As long as the current ambiguity in the rules remains, there will be room for various interpretations and decisions which certainly lead to disparate results, or even disparate rights, among, or in this case within, judicial districts. If Congress feels that the summary jury trial is an important enough innovation to justify the conscription of citizens for service as jurors, it needs to codify that belief.

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\textsuperscript{99} See generally Armsbury, 408 F. Supp. 1130.

\textsuperscript{100} The author could find only two instances in the last 20 years of contempt for failure to serve. United States v. Hillyard, 52 F. Supp. 612, 612 (E.D.Wash. 1943) and \textit{Joye}, 90 F.R.D. 351.

\textsuperscript{101} See supra note 22.

\textsuperscript{102} Given the fact that clerks are not required to compel everyone to attend the venire, any jury is subject to charges that it is not entirely random. See generally Armsbury, 408 F. Supp. 1130.