

IN THE SUPREME COURT OF OHIO

ANNE L. HALL,

Appellant,

v.

BANC ONE MANAGEMENT CORP., et al.,

Appellees.

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Case No. 06-0703

**On Appeal from the
Franklin County Court of Appeals,
Tenth Appellate District**

REPLY BRIEF OF APPELLANT ANNE L. HALL

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INTRODUCTION

The issue on appeal is straightforward: **A prospective juror disqualified for cause by one of the express provisions of R.C. 2313.42(A)–(I) may not be rehabilitated by the trial court finding that he can be fair and impartial despite the statutory disqualification.** The trial court has the discretion to determine if the juror fits within the provisions set forth in R.C. 2313.42. If the trial court determines that the juror meets one of the provisions in R.C. 2313.42, the juror is not qualified to serve on the jury. The intent of the legislature and the common law is to provide and protect the concept of the **impartial** jury.

Trial by an impartial jury is the crowning masterpiece of our jurisprudence that developed from our long struggle for civil liberty and from the rich vibrant history of our common law. Trial by jury is justly prized as the cornerstone of our free institutions. “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Beacon Theatres, Inc. v. Westover* (1959), 293 U.S. 474. The process of trial by jury is not free from attack. The important questions facing trials by jury involve implementation, not homage to an abstract notion. Like all grand masterpieces, “the devil lies in the details.” Here, the impartiality of the jury is being placed at risk and jeopardized. Principal challenges require the removal of the juror once it is determined by the court that a criterion applies – the court has limited discretion. A trial court should not have the discretion to ignore the taint of partiality, to attempt to rehabilitate a per se biased juror and thereby risk the sanctity of the impartiality of the jury. Trial by an **impartial** jury must be preserved, not compromised.

The public policy of insuring that juries are fair and impartial should be fervently enforced by this Court since it is the last resort for the citizens of Ohio. It has been recognized

for centuries that a principal challenge does not allow for rehabilitation of the juror. The juror is presumed to be prejudiced and unable to fairly determine the factual issues. Here, the legislature got it right by specifically setting forth the principal challenges which make a juror unfit to serve on an impartial jury. If the statute is construed as it is written, the trial court's discretion is limited to determining whether the juror falls within one of the statutory provisions. R.C. 2313.42 provides that jurors **shall** be removed for cause upon a challenge for any of the listed reasons. It expressly provides that "each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court." Strict statutory construction should end there. There is no statutory provision for rehabilitation of a disqualified prospective juror because he utters to the court that he can be "fair and impartial" despite the statutorily mandated disqualification. Juror impartiality is simply too important to our judicial system to allow a clear statute to be ignored. The Ohio legislature determined that once a principal reason for challenge is established, the juror **shall** be dismissed to avoid any possibility of taint to the impartial jury.

ARGUMENT

Proposition of Law No. 1: A prospective juror disqualified for cause by one of the express provisions of R.C. 2313.42(A)–(I) may not be rehabilitated by the trial court finding that he can be fair and impartial despite the statutory disqualification.

A. Trial Courts Have Discretion To Determine Whether A Principal Challenge Has Been Established Pursuant To A Subsection Of R.C. 2313.42, Disqualifying The Prospective Juror.

In *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, this Court held that the "determination of whether a prospective juror should be disqualified for cause pursuant to R.C. 2313.42(J) is a discretionary function of the trial court." *Id.* R.C. 2313.42(J) provides that a juror should be challenged if "he discloses by his answers that he cannot be a fair and impartial juror or will not

follow the law as given to him by the court." This Court held in *Berk* that the trial court has discretion in determining whether the prospective juror falls within the enumerated provision of R.C. 2313.42(J) established by the legislature. Defendants' stretch that analysis to contend that the trial court's discretionary function extends to permit rehabilitation of a prospective juror, a concept which annihilates the intent of the statute in identifying specific instances in which prospective jurors shall be disqualified from serving. Such an extension of *Berk's* limited holding, regarding the application of trial court discretion in determining whether subsection (J) is established, is clearly erroneous and unintended by the legislature and this Court, even if some lower courts after *Berk* have fallen into the same faulty reasoning as being advanced here by Bank One.

The suggested analysis by defendants would make R.C. 2313.42 unnecessary and redundant since the next section of the Revised Code, Section 2313.43, is available to provide for challenges for cause under similar broad guidelines. Even if such a relaxed standard were to be applied, it was, and is, the legislature's intent that a challenge for cause "shall be . . . sustained if the court has any doubt as to the juror's being entirely unbiased."

Defendants also seek to rely on *Maddex v. Columber* (1926), 114 Ohio St. 178, which does not address the analysis required under R.C. 2313.42. As an initial matter *Berk* only cited to *Maddex* regarding a "for bias" analysis. Justice Sweeney stated that: "This court has previously observed that the decision to disqualify a juror *for bias* is a discretionary function of the trial court." The words "for bias" indicate that the *Berk* court considered the objection under R.C. 2313.42(J) being expressly based upon whether the prospective juror could be a "fair and impartial juror" was to be determined by the rule applicable to challenge "for favor" rather than

the rule applicable to a principal challenge, although the opinion does not expressly discuss the issue other than the above reference to the challenge under consideration being "for bias."

The distinction between a principal challenge and "for favor/bias" is important and reflects the intent of the legislature to embody the history and teachings of the common law. The United States Supreme Court, in *United States v. Wood* (1936), 299 U.S. 123, observed:

* * * Challenges to the polls were either "principal" or "to the favor," the former being upon grounds of absolute disqualification, the latter for actual bias. The government quotes the statements of early commentators from Fitzherbert to Hargrave, indicating that a principal challenge was not allowed in crown cases upon the ground that the prospective juror was a servant of the crown, and that a challenge for that reason, if permitted at all, was to the favor.
* * *

Indeed, the doctrine of implied or presumed bias has been recognized from our country's earliest days, and it remains firmly rooted. As Judge Kozinski aptly explained in 1998 for an en banc Federal Ninth Circuit majority:

Presumed bias dates back in this country at least to Aaron Burr's trial for treason, where Chief Justice Marshall, riding circuit, noted that an individual under the influence of personal prejudice "is *presumed* to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony." Marshall explained, "He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; *but the law will not trust him.*" *United States v. Burr*, 25 F. Cas. 49, 50, F. Cas. No. 14692g (D. Va. 1807) (emphasis added).

Dyer v. Calderon (C.A. 9, 1998), 151 F.3d 970, 984 (presuming bias where juror concealed that her brother was victim of similar crime). Implied bias can be traced all the way back to Sir Edward Coke's dictum in *Bonham's Case* that no man shall be judge in his own cause. See *Dr. Bonham's Case* (C.P. 1610), 77 Eng. Rep. 646, 652. Implied bias may indeed be the single

oldest rule in the history of judicial review. This rule is so deeply embedded in the fabric of our jurisprudence that everyone takes it for granted. This is precisely what the Supreme Court did in *Clark v. United States* (1933), 289 U.S. 1, 11, where the Court offered an obvious example of someone who would not be qualified to serve as a juror, it mentioned a relative of one of the parties: "If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different." *Id.* Such a juror, the Court said, would be a juror "in name only." *Id.* The Court there understood - as every court that has dealt with the question has understood - that prejudice must sometimes be inferred from the juror's relationships, conduct or life experiences, without a finding of actual bias. What is sought to be attained during voir dire is the choice of an impartial arbiter. The law does not trust self-serving declarations of impartiality.

Defendants speciously contend that the well-reasoned dissent by Judge Whiteside in the Court of Appeals in this case, and the Court in *Parusel v. Ewry* (Lucas Co., 2004), 2004 Ohio 404, fail to consider *Maddex*. Both consider the abbreviated analysis in *Maddex* and determine that it does not specifically address the issue or delineate its reasoning. *Maddex* discusses both section 11437, General Code (now R.C. 2313.42), and Section 11438, General Code (now R.C. 2313.43). *Maddex* is not wholly clear, but appears to be referring to the latter statute to which the abuse of discretion standard is applied. *See Id.* at 183. The limited analysis of *Maddex* does not address the issues presented here.

In *Maddex*, the Court deemed the "interest" of a taxpayer in a negligence action against a municipal corporation, not to constitute the type of "interest" within the scope of R.C. 2313.42(B) disqualifying a person from serving on a jury if that person has "an interest in the cause." *Id.* at 183. The *Maddex* decision may be based upon a determination that the "interest" of

the taxpayer was not of a nature included within the meaning of "interest" under R.C. 2313.42(B). The *Maddex* opinion made specific reference to decisions of other states defining the interest necessary to be included within the meaning of the "interest" disqualifying a person from serving on a jury in a cause. The *Maddex* opinion also states that "much is necessarily confided to the trial judge in the conduct of a trial, and in the interpretation of a statute showing the qualification of a juror, in determining whether or not he has an interest in the cause, such as would disqualify him." *Id.* at 183. Defendants refer to this Court as adding that "the consensus of opinion seems to be that, if a juror on inquiry should say that he has an interest by reason of which he would not be able to render a fair and impartial verdict, then he is thereby disqualified; but if his interest by reason of being a taxpayer is not such as would affect his verdict, and if, regardless of the fact of being a taxpayer, he could listen to the evidence and render a fair and impartial verdict, under the instructions of the court as to the law, then such proposed juror is not disqualified." *Id.* at 184. The Court initially found in this part of the opinion, that a taxpayer does not have an interest in the litigation and thus that taxpayers are not a class specifically excluded from serving on a jury by R.C. 2313.42. It then made a finding under R.C. 2313.43 that the juror could also be fair and impartial. If the first finding had been otherwise, the second one would have been unnecessary.

Because of the ambiguity and breadth of "interest" provided for in R.C. 2313.42(B) there has been substantial caselaw in developing what it involves. Defendants acknowledge that the extent of the interest is important and it should be determined whether the juror falls within the category of being interested in order to satisfy a principal challenge. *Morrow v. Hume* (1936), 131 Ohio St. 319; *The Dowd-Feder, Inc. v. Truesdell* (1936), 130 Ohio St. 530 (The purpose of the examination of a prospective juror upon his *voir dire* is to determine whether he has both the

statutory qualification of a juror and is free from bias or prejudice for or against either litigant.) *Morrow* and *Truesdell* are distinguishable to the issues here presented as the analysis is focused upon the appropriate examination of prospective jurors not upon the qualification of the jurors. Here, indeed, citizens, taxpayers, jurors and judges arguably all have an interest in the present litigation as it seeks to prevent discrimination. Determining whether a prospective juror has an "interest" is a discretionary decision of the trial court. It is the aim of the law to afford litigants an impartial tribunal and a fair trial.

The "interest" provision is distinguishable from the circumstances here, where Juror Stein was within a class that was specifically excluded by R.C. 2313.42 (E) and the facts established that he was in the class due to not only one child, but three children employed by the defendant while plaintiff was employed and two children employed by them at the time of trial. Criterion (E) specifically enumerates jurors with defined relationships that are to be disqualified pursuant to the principal challenge, similar to the enumeration of affinity in subpart (G). These subparts do not provide for an analysis of impartiality or rehabilitation as defendants advocate. Simply, predisposition is presumed; proof of actual bias need not be shown. Defendants fail to acknowledge that the court has "*for its purpose the securing to every litigant an unbiased jury.*" *Pavilonis v. Valentine* (1929), 120 Ohio St. 154.

The purpose of the legislature and the judiciary to secure an unbiased jury has been long protected and advocated by this Court. In *Dew v. McDivitt* (1876), 31 Ohio St. 139, the Court held in the first paragraph of its syllabus that "[o]n the trial of the validity of a challenge alleged against a juror, *other than a principal cause of challenge*, a sound discretion is allowed to the court." (Emphasis added.) The *Dew* court thus indicated that the principal challenge shall require disqualification since it is presumed that the juror is prejudiced. The abuse of discretion standard

applies to "the favor." The *Dew* court opinion in the first paragraph clearly stated that it was not contended that a principal challenge for cause existed and that the ground of the challenge was "for favor." As acknowledged by defendants, *Dew* precedes *Maddex*. *Dew* would be a precursor to the challenges provided by the legislature in R.C. 2313.42(J) and 2313.43 in which the abuse of discretion standard applies in determining whether the statutory provision is established.

Subsequent to the decision in *Dew*, this Court stated in *Lingafelter v. Moore* (1917), 95 Ohio St. 384, 387:

It is beyond question that the right of trial by jury guaranteed by the constitution carries with it by necessary implication **the right to a trial by a jury composed of unbiased and unprejudiced jurors**. This right being guaranteed, all courts are charged with the imperative duty of affording every litigant the opportunity of having his cause tried by an **impartial jury**. What was said by McIlvaine, J., in *Palmer v. State* (1885), 42 Ohio St. 596, at page 604, applies with equal force to juries in civil cases: "It must, however, be affirmed, that neither legislative discretion nor a discretion conferred by the legislature upon the court, can be allowed to detract one jot or tittle from the guarantee of the constitution that the accused shall be tried by an impartial jury."

Id. (emphasis added). The emphasis is on the impartial jury and any discretion afforded is not to diminish the purpose of obtaining an impartial jury. Here, unfortunately, the discretion created and advocated by defendants is being utilized to diminish the attainment of an impartial jury.

Furthermore, defendants' insinuation that a prospective juror disqualified by one of the express provisions of R.C. 2313.42 can be rehabilitated by a trial court finding that he can serve without bias despite the statutory disqualification is inconsistent with the express mandate of R.C. 2313.42 that "[e]ach challenge listed * * * shall be considered as a principal challenge[.]" Strict statutory construction precludes their argument. The discretion of the trial court does not extend beyond the factual finding under R.C. 2313.42. A principal challenge is one that disqualifies a juror for cause per se, and there is no issue remaining as to whether the

prospective juror is biased. "A 'principal cause of challenge' is so called because, if it be found true, it stands sufficient of itself, without leaving anything to the conscience or discretion of the triers, or it is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the juror." *Words and Phrases* (1971) 33A, at 291, citing *Reynolds v. United States* (1878), 98 U.S. 145. Thus, the discretion of the trial court rests only in whether a criterion set forth by the legislature or common law has been established to be true. If true – the juror is presumed to be prejudiced; disqualification of the prospective juror shall occur.

Defendants' citation to *Ohio v. Sims* (Allen Co., 1969), 20 Ohio App. 2d 329, attempts to cloud the issue presented here. *Sims* states that "the Ohio statute, Section 2313.42 (E), appears to be a codification of the common law, thus, historically, it was applicable only in the case of a private employer-employee relationship. Case law and logic also support this conclusion." *Id.* at 332. *Sims* considers the issue of defining the ambiguous principal challenge set forth in a provision as an "interest" in the case in litigation by stating:

'Prosecution' is a term of criminal law. It is descriptive of the means adopted to bring an accused to justice by due process of law. It is a proceeding in which the whole community, considered as a community in its social capacity, is involved. In this aspect society is designated or described as 'The State,' 'The People,' 'The Commonwealth.' The 'State,' etc, is acting simply as the instrument of the public in enforcing penal laws in order that society may be protected from infractions thereof.

"If appellant's insistences were extended to an ultimate rationale, each citizen of a State would be disqualified to serve as a juror in a criminal prosecution. What possible interest has a State employee, merely as such, different from that of any citizen who desires to see crime properly punished.

Defendants attempt to blur the issue presented by plaintiff while acknowledging that the ultimate goal of challenges for cause is to ensure the seating of a fair and impartial jury. The

statute clearly requires that once a principal challenge is established the prospective juror shall be disqualified. Sims highlight's the court's discretion in determining a provision by utilizing the common law. The cases validate that the trial court has discretion to determine if the factual elements of the statute are met. Once met, the prospective juror shall be disqualified.

The historically recognized discretion is limited to determining whether the prospective juror falls within one of the provisions set forth for a principal challenge. The trial court in this matter abused this discretion when it went beyond the provisions for a challenge for cause and attempted to rehabilitate a juror. The trial court has the duty to make every effort to ensure that an impartial jury is seated and shall exclude a juror for a principal challenge as set forth in 2313.42 (A)-(I). Juror Stein had three children that worked for Bank One. He expressed preconceived opinions that the elimination of positions at Bank One was done for business reasons and that the severance packages offered by the bank were fair. Here, Juror Stein had strong relationships and contact with his three children who worked for Bank One. His daughter was terminated as part of a reduction in force around the same time as plaintiff. Juror Stein was familiar with the terms of his daughter's separation from Bank One. Juror Stein also had one son who provided financial advice to him and as a direct result of that interaction Juror Stein had established financial relationships with the bank. Voir dire showed that this juror was biased toward one of the parties, or otherwise unsuitable, because he was not approaching the case without preconceived ideas regarding the facts of the case. *State v. Clink* (Ottawa Co., 2000), 2000 Ohio App. LEXIS 733 at *12.

Defendants suggest that there was no evidence of potential harm to Juror Stein's sons and thus no rational basis to validate any presumption of prejudice. There is no statutory or even common law requirement of a validation of bias or prejudice. Such an argument is completely

flawed and employs a new element to be grafted onto an otherwise clear statute. Presumed or even actual bias and prejudice do not require harm to the prospective juror or proof of harm. Bias and prejudice are based upon preconceptions. The evidence of the relationship between Juror Stein, his daughter and his two sons required his removal from the jury panel. Indeed, the examination of Juror Stein and his responses validated the presumption of prejudice. However, even if the examination had not revealed any bias, the statute provides as a matter of law that prejudice is to be presumed.

B. R.C. 2313.42 Provides That The Enumerated Challenges Shall Be Principal Challenges, Which Require The Removal Of A Prospective Juror.

- 1. R.C. 2313.42 provides that each challenge listed shall be considered a principal challenge and the validity tried to the court.**

Upon trial of a principal challenge, the only issue is whether the prospective juror is disqualified by the criteria set forth in the applicable division of R.C. 2313.42. Defendants argue that the statute does not provide that jurors challenged under these provisions shall be removed. A principal challenge presumes the prejudice of the juror and has for centuries disqualified the juror in pursuit of an impartial jury. A principal challenge does not require evidence of bias or favor but presumes because of the stated relationship that there is prejudice or bias. It is only under the provision of (J) in its codification of the common law “for favor” that a party, to fit a juror within that specific provision, must establish that the prospective juror cannot be fair or impartial. The court’s discretion is in whether the prospective juror has established by the evidence that he is unfair and impartial. If the Court in its discretion finds that provision (J) impartiality is established, the juror is disqualified. This is similar to every

other provision under R.C. 2313.42.

Thus, plaintiff does not argue that there is a different set of rules that apply to the provisions. Once a party establishes that the specific criterion of a provision exists, the juror shall be disqualified. It is the court's discretion as to whether the party has established the specific criterion delineated in the statutory provision which creates a presumed prejudice which results in disqualification.

In this case, the factual issue to be determined at the trial of the challenge was whether children of the prospective juror were employees of Bank One. Even if an abuse-of-discretion standard would be applied to that factual determination by the trial court, the result is that the prospective juror was disqualified by R.C. 2313.42(E) since the trial court found that children of the prospective juror were employed by defendant Bank One.

The plain meaning of R.C. 2313.42 is that after a determination by the trial court that a disqualification criterion of R.C. 2313.42 applies to a prospective juror then the only result that can ensue is disqualification of the prospective juror. It is error for the trial court to seat the disqualified juror on the panel and permit him to serve as a juror in the trial of the cause. The trial court has no discretion to seat a disqualified juror on the jury panel trying a cause. A principal challenge is one that disqualifies a juror for cause per se, and there is no issue remaining as to whether the prospective juror is biased. "A 'principal cause of challenge' is so called because, if it be found true, it stands sufficient of itself, without leaving anything to the conscience or discretion of the court, since it is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the juror." *Reynolds v. United States* (1878), 98 U.S. 145. In *State v. Howard* (1845), 17 N.H. 171, 191-192, the court aptly stated that the fact that all challenges are determined by the court, does not destroy the distinction

between principal challenges and challenges to the favor. Upon a principal cause of challenge, the court must only inquire into the truth of the facts alleged. Upon a challenge to the favor, the court is to determine whether the juror stands indifferent. *Id.* Here, subsection (J) codifies to the favor so the court determines for that specific provision whether the juror stands indifferent or impartial and whether he can be fair. In *Berk*, the trial court found that the disqualification criteria of R.C. 2313.42(J) did not exist. Here, the trial court found that the disqualification criteria of R.C. 2313.42(E) did in fact exist.

The statutory provisions (A)-(I) for principal challenges would be superfluous and unnecessary if the “for favor” analysis of fair and impartial in provision (J) is utilized in addition to determining if a mother, witness, party or in this case, the parent of the employee of a party, may be disqualified. Such an aberration of centuries of common law would only increase the risk of jury partiality and nullify the specific mandate of the Ohio legislature. The plain language of the statute does not provide for such a two step analysis or the application of provision (J) to all pre-existing provisions, and no amount of statutory construction can supply terms which are clearly not present in the statute as drafted.

Neither R.C. 2313.42 nor *Berk, supra*, provides, or even suggests, that once the trial court makes a determination that one or more of the disqualifying criteria of R.C. 2313.42 applies with respect to a prospective juror, the trial court can - then “rehabilitate” the disqualified prospective juror by “finding” that the juror can be fair and impartial despite the statutory disqualifications. Only division (J) of R.C. 2313.42 permits seating of a prospective juror solely because of a finding that the juror can be fair and impartial because the disqualification criteria division (J) of R.C. 2313.42 is that the prospective juror “cannot be a fair and impartial juror.” However, whether the prospective juror can be fair and impartial is not a criterion to be applied in

determining challenges under the other nine divisions of R.C. 2313.42. By statute, it has been determined, and it is presumed prejudicial, that a prospective juror who falls within the disqualifying criteria of R.C. 2313.42 cannot serve as a fair and impartial juror, without further inquiry. Putting it within the framework of this case, R.C. 2313.42(E) provides that a prospective juror who is the parent of an employee of a party cannot serve as a fair and impartial juror in the cause.

Even if provision (J) was the challenge for cause at issue in this matter or even if this Court decides to ignore the plain language and intent of the legislature in developing a new analysis or permitting rehabilitation, the trial court abused its discretion in seating Juror Stein on the jury. Juror Stein had preconceived beliefs regarding the facts at issue and proximate relationships to a party. A juror's ability to mouth that he can be fair and impartial does not result in automatic inclusion on a jury. In fact, reliance on juror statements would permit those with extreme biases and prejudices who intend to do harm, the ability to always sit on a jury. A challenge shall be sustained if there is any doubt as to the juror's being entirely unbiased. *See* R.C. 2313.43.

2. **The amendments to R.C. 2313.42 support that each challenge listed shall be considered a principal challenge, resulting in disqualification of the prospective juror if the validity of the provision is established.**

The legislature has not altered the substance of the plain language of R.C. 2313.42 in the last five amendments to the statute, except to add to the provisions establishing the principal challenges for cause. These amendments support the intent of the legislature in obtaining an impartial jury and maintain the disqualification mandated by the criteria, which presumes juror prejudice. The plain language codifies the common law of principal challenges which has been in existence since before the 1500's. A principal challenge by its very definition presumes

prejudice and requires disqualification. The legislature continues to protect the cornerstone of our judicial system – the impartial jury - with these designated principal challenges. The legislature has made no attempt to destroy these provisions, but has instead sought to add to the provisions of recognized instances where prejudice and bias shall be presumed.

The codification of the common law “for favor” analysis into R.C. 2313.42 is intended to protect the impartial jury. It was not intended to redefine the centuries old principal challenge or to alter the analysis or discretion of the trial court. If a challenge exists and is shown to meet the criteria of any specific provision of 2313.42, the juror is disqualified because he is presumed to be prejudiced. This analysis especially holds true with subsection (J), since a prospective juror who can not be fair and impartial would be presumed to be prejudiced and should be disqualified. The legislature has made specific the statutory grounds for disqualification by codifying what constitutes a principal challenge for cause.

C. Public Policy Requires That Prospective Jurors Who Meet the Statutory Provision For A Challenge For Cause Under Subsection (E) Be Disqualified.

Fair and impartial jurors are the cornerstone of the jury system. The cornerstone should not be chipped away; the cornerstone of jury impartiality should be bolstered and supported by this Court’s decisions. For centuries, the common law has recognized that there are specific criteria by which juror bias is presumed. Jury impartiality is protected from these relationships in which juror prejudice is presumed to occur. The uncorroborated judicial discretion advocated by defendants, and unsupported in the common law, will only diminish jury impartiality. Defendants suggested desecration of centuries of common law, by requiring actual bias for a principal challenge, obliterates the legislature’s intent and the plain language of R.C. 2313.42.

Defendants argue that the relationships specifically designated by the legislature may be too remote to potentially cause bias for or against either party. Judicial error in this determination abolishes the impartiality of the judiciary and destroys the public's trust in the judicial system. There is no upside to creating such unsupported judicial discretion. Indeed, by eviscerating the plain language of the statute and revising the statute to include rehabilitation of prospective jurors, defendants only increase the cost of litigation, length of time for voir dire, the likelihood of appeals and the diminution of public confidence in the impartiality of the judiciary.

Defendants stretch to create scenarios in which some measure of discretion should be afforded to the trial judge in determining whether a provision of R.C. 2313.42 is applicable. Simply, such scenarios support the concept that the plain language of the statute should be upheld by the judiciary. Otherwise, the trial judge will be required to try the validity of each challenge and determine without any guidance each new factual situation presented by a prospective juror. No one can predict all the factual situations that may arise, however after centuries of jurisprudence there are relationships for which there is a presumed prejudice which disqualifies a prospective juror.

Permitting trial judges to determine actual bias and to rehabilitate jurors will result in persons with impermissible loyalties and preconceived judgments to be seated on juries. Instead of disqualifying jurors with presumed prejudices, the judge moves forward with a mini-trial in which the juror is placed in an untenable position of either admitting prejudices and preconceived notions or not voicing those proclivities and biases of which he may or may not be aware because of his experiences and relationships. A trial judge's own docket, perceptions and/or prejudices may permit a biased or partial juror to be seated tainting the entire process. Equivocations, posture and facial expression cues evidencing partiality, if even present, witnessed by counsel

would not be afforded any weight as the discretion would rest completely with the judge's determination. Juror assurances should not disembowel the common law and a presumption of bias that protects the impartiality of the jury.

R.C. 2313.42 should be bolstered by this Court's decision by providing clear direction to the lower courts. Once a prospective juror falls within an enumerated provision of R.C. 2313.42, the prospective juror is disqualified. This certain and consistent application will ensure a fair and impartial jury. Parties, whether plaintiff or defendant, in civil or criminal litigation, seek a fair and impartial jury. Our founding fathers fought to obtain a society premised on a judicial system that has at its very foundation an impartial jury. Application of the plain language of this statute will ensure that all litigants, their counsel, and the courts do not believe that justice in the selection and seating of jurors depends upon the particular judge sitting in a particular court. The statute expressly prohibits a juror who satisfies one or more of the presumed and statutory biases in subsections (A) through (E) from serving on that particular jury. A judge does not have the discretion to override the specific legislative provisions set forth in R.C. 2313.42 based upon his own experiences. The lower courts should be directed to follow the intent of the legislature and protect the impartiality of the jury. This Court must guide our lower courts so that everyone in the court system is provided an objectively fair and impartial jury.

The very nature of the principal challenge is that because of the relationship to a party, a potential juror is irrefutably presumed to be biased and is excluded for cause from sitting on the jury. Thus, the nature of the disqualification by statute makes the potential juror one who cannot be rehabilitated by asking if they can be fair and impartial or by determining that a relationship is "remote." The statutory categories of irrefutably disqualified jurors under R.C. 2313.42 include: felons (A); those with a financial stake in the case (B); those with a lawsuit pending against a

party (C); a former juror in the same case (D); someone related to an employer or lawyer in the case (E); a witness (F); a relative of the parties or their lawyers in the same case (G); or another case (H); or one who has been a special juror in another case in the preceding 12 months (I). The only challenge under R.C. 2313.42 which involves significant discretion outside the per se disqualification in (A)-(I) is subparagraph (J), which allows a court to disqualify a juror who, from questioning, shows that he cannot be fair and impartial or will not follow the law. It does not even require an analysis of whether the relationship is remote, but focuses on the essence of the judicial system, fairness and impartiality. Only in weighing challenges under R.C. 2313.42(J) and 2313.43 (suspicion of prejudice or partiality) does a court exercise significant discretion in determining if a potential juror meets the criterion of those general provisions and thus, should be disqualified.

Next to securing a fair and impartial trial for parties, it is important that the parties should believe that they have had such a trial; anything that tends to impair their belief in this respect must seriously diminish their confidence and that of the public generally in the ability of the state to provide impartial tribunals for dispensing justice between its citizens. In fulfilling these expectations, R.C. 2313.43 states: “* * * The validity of any challenge shall be determined by the court and be sustained if the court has any doubt as to the juror’s being entirely unbiased.” Here, the advocated creation of judicial discretion and rehabilitation of jurors by defendants does not eliminate doubt in our judicial system; the eradication of the plain language of R.C. 2313.42 creates inconsistency, cracks in our impartial judiciary in which bias and prejudice may take hold and wreck the public confidence in our jury system.

CONCLUSION

This Court should hold that a prospective juror disqualified for cause by one of the express provisions of R.C. 2313.42(A)–(I) may not be rehabilitated by the trial court finding that he can be fair and impartial despite the statutory disqualification. The principal challenges set forth in R.C. 2313.42 shall be granted by a trial court and the juror automatically disqualified if the juror falls within one of the enumerated provisions. The juror is presumed at law to be biased. The juror disqualification rulings of the trial and appellate court should be reversed and the case remanded for further proceedings and a trial by an impartial jury.

Respectfully submitted,



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PROOF OF SERVICE

This is to certify that a copy of the foregoing Reply Brief of Appellant Anne L. Hall was this 15th day of November, 2006 sent by first class U.S. mail upon counsel for defendants-appellees, Robert M. Kincaid, Jr., Baker & Hostetler, LLP, 65 East State Street, Suite 2100, Columbus, Ohio 43215



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APPENDIX

PAGE

CONSTITUTIONAL PROVISIONS & STATUTES:

Ohio Revised Code Section 2313.42	1
Ohio Revised Code Section 2313.43	3

§ 2313.42. Causes for challenge of persons called as jurors; examination under oath

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. A person is qualified to serve as a juror if he is an elector of the county and has been certified by the board of elections pursuant to section 2313.06 of the Revised Code. A person also is qualified to serve as a juror if he is eighteen years of age or older, is a resident of the county, would be an elector if he were registered to vote, regardless of whether he actually is registered to vote, and has been certified by the registrar of motor vehicles pursuant to section 2313.06 of the Revised Code or otherwise as having a valid and current driver's or commercial driver's license.

The following are good causes for challenge to any person called as a juror:

- (A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;
- (B) That he has an interest in the cause;
- (C) That he has an action pending between him and either party;
- (D) That he formerly was a juror in the same cause;
- (E) That he is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;
- (F) That he is subpoenaed in good faith as a witness in the cause;
- (G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;

(H) That he or his spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

(I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months;

(J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.

Each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court.

HISTORY: GC § 11419-51; 114 v 193(207); 117 v 72; Bureau of Code Revision, 10-1-53; 127 v 419 (Eff 9-9-57); 133 v H 104 (Eff 9-12-69); 140 v H 183 (Eff 10-1-84); 143 v H 381. Eff 7-1-89.

§ 2313.43. Challenge of petit juror

In addition to the causes listed under section 2313.42 of the Revised Code, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render him at the time an unsuitable juror. The validity of such challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased.

HISTORY: GC § 11419-52; 114 v 193(208); Bureau of Code Revision. Eff 10-1-53.