Supreme Court of Ohio Clerk of Court - Filed December 24, 2024 - Case No. 2024-0872

IN THE SUPREME COURT OF OHIO

CASE NO. 2024-0872

The STATE OF OHIO,
Plaintiff-Appellee,

-vs-

TODD JEFFREY ROGERS,
Defendant-Appellant.

ON APPEAL FROM THE TWELFTH DISTRICT COURT OF APPEALS
CASE NO. CA2023-08-063

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals receive justice and wrongdoers are held accountable. OAJ comprises approximately one thousand five hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and promote public confidence in the legal system.

OAJ submits this brief out of concern that a ruling in this appeal could negatively impact the standards for empaneling a jury in civil disputes and for appellate review of a trial court's decisions on which citizens will or will not sit on such a jury. Although the General Assembly has set forth generally applicable standards in R.C. Chapter 2313 for seating a jury in civil and criminal matters, none of the parties to this dispute have discussed or even referenced them in the opening and answering merit briefs. It is also noteworthy that this Court recently accepted similar but better-phrased propositions of law in *Estate of Price v. Kidney Care Specialist, LLC*, S.Ct. Ohio No. 2024-1737. Yet the two appeals were not held for each other.

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OAJ's concern is that a loosened standard for addressing admissions of juror bias could negatively impact anyone in the justice system—it is just a question of who draws a juror with bias toward the class of litigants to which they belong in any given case. It is just as conceivable that a biased juror ends up hearing and deciding a crime-victim's civil claims—dismissive of those seeking a full and meaningful civil remedy from the start—as it is that one with the opposite bias ends up on the jury that will determine whether a crime was committed by the same tortfeasor. For those reasons, OAJ asks this Court to

follow the plain direction of the legislature, which plainly sought to limit the ways in which expression of potential juror bias could be ignored.

STATEMENT OF THE CASE AND FACTS

OAJ defers to the statement of the case and facts offered in the briefs filed by the parties without expressly agreeing with either of them on any disputed matter.

ARGUMENT

On September 3, 2024, this Court accepted two propositions of law for review:

> **PROPOSITION OF LAW I: GENERAL CONFIRMATIONS FROM A GROUP OF PROSPECTIVE JURORS THAT THEY WILL APPLY THE LAW DO NOT REHABILITATE OR OTHERWISE DISPEL A PARTICULAR PROSPECTIVE JUROR'S EXPRESSIONS OF PARTIALITY.**
>
> **PROPOSITION OF LAW II: FOR A PROSPECTIVE JUROR TO BE REHABILITATED, THE PROSPECTIVE JUROR MUST INDIVIDUALLY AFFIRM THAT HE CAN BE IMPARTIAL.**

Memorandum in Support of Jurisdiction of Appellant Todd Jeffrey Rogers filed June 12, 2024, p. 7; 09/03/2024 Case Announcements, 2024-Ohio-3313, p. 3. For the following reasons, this Court should issue a ruling accounting for the plain terms of R.C. 2313.17 or hold this matter for briefing and a decision in *Estate of Price v. Kidney Care Specialist, LLC*, S.Ct. Ohio No. 2024-1737.

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I. THE GENERAL ASSEMBLY ENACTED A PRINCIPAL CHALLENGE STATUTE.

Although neither of the parties referenced it, R.C. 2313.17 regulates voir dire of "[a]ny person called as a juror for the trial of any cause." *R.C. 2313.17(A)*. The basic qualifications for jury service are attaining "eighteen years of age or older," living as "a resident of the county" where jury service occurs, and having the capacity to be "an elector." *Id.* The provision goes on to define nine different categories of "good causes for challenge to any

person called as a juror" in subsection (B). *R.C. 2313.17(B)*. And calling down a term of legal art, the General Assembly directed that "[e]ach challenge listed in division (B) of this section shall be considered as a <u>principal challenge</u>, and its validity tried by the court." (Emphasis added.) *R.C. 2313.17(C)*. One of the enumerated principal challenges becomes available if "the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court." *R.C. 2313.17(B)(9)*.

So, what is a principal challenge? And what does lodging one mean in practical terms for the process of jury selection? Writing for a 6-1 majority, Associate Justice Terrence O'Donnell once described the history behind principal challenges:

> At common law, jurors could be challenged propter affectum "because some circumstance, such as kinship with a party, render[ed] the potential juror incompetent to serve in the particular case." Black's Law Dictionary (8th Ed.2004) 245. Challenges propter affectum took two forms: principal challenges and challenges to the favor. 2 Blackstone, Commentaries on the Laws of England, *363. <u>A principal challenge is one "where the cause assigned carries with it prima facie evident marks of suspicion either of malice or favor * * *, which, if true, cannot be overruled, for jurors must be omni exceptione majores " (above all challenge).</u> Id. Thus, where a party establishes the existence of facts supporting a principal challenge, this finding "result[s] in automatic disqualification," and <u>no rehabilitation of the potential juror can occur</u>. Black's Law Dictionary at 245. Blackstone sets forth several basic principal challenges in his Commentaries, including instances where "a juror is of kin to either party within the ninth degree," where a potential juror "has an interest in the cause," or where the potential juror "is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him." 2 Blackstone *363.
>
> In contrast to principal challenges, challenges to the favor permit a party to assert a challenge for cause when no principal challenge exists, but when the party "objects only some probable circumstances of suspicion, as acquaintance and the like." Id. When a party asserted a challenge to the favor, Blackstone indicates, triors—"two indifferent persons named by the court" for the purpose of determining whether a potential

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> juror can be impartial—would then decide whether to seat the juror. (Emphasis added.)

Hall v. Banc One Mgt. Corp., 2007-Ohio-4640, ¶ 28-29. This Court historically respected the difference between principal challenges and challenges to the favor by limiting the "discretion" that is "allowed to the court" to the latter category. *Dew v. McDivitt*, 31 Ohio St. 139 (1876), paragraph one of the syllabus. Such discretion extends only to those juror challenges "other than a principal cause of challenge." *Id.* The "absolute disqualification" of a principal challenge "deprives the trial court of any ability to rehabilitate the potential juror." *Hall*, 2007-Ohio-4640, at ¶ 33.

These rules have always been premised upon legislative action in Ohio, as the opinion in *Dew* relied upon an "act relating to juries, passed April 26, 1873." *Dew*, 31 Ohio St. at 141. In the 1870s, as now, a challenge "on suspicion of prejudice against, or partiality for, either party," was still a challenge to the favor rather than a principal challenge. *Id.*; *R.C. 2313.17(D); Lingafelter v. Moore*, 95 Ohio St. 384 (1917). But when a juror expresses a more generalized opinion reflecting partiality or bias not aimed at a particular party, thus raising concern that they "cannot be a fair and impartial juror or will not follow the law as given to the person by the court," that has been the statutory basis of a principal challenge for decades. *R.C. 2313.17(B)(9); see former R.C. 2313.42(J); but see Hall*, 2007-Ohio-4640, at ¶ 40-45 (Lanzinger, J., dissenting) (criticizing the majority for "purporting to rest on the words of the statute" while arguing that "the statute listing 'good causes for challenge,' has been read to allow a trial court discretion to determine whether a juror may be seated when a principal challenge is made" notwithstanding the statute's delineation of principal challenges). Subsection (J), which added that language to the principal challenge statute, was added to former R.C. 2313.42 effective September 12, 1969. *133 Ohio Laws 1857-1859.*

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Since there can be no discretion to deny a principal challenge under the long-understood standards applicable to them, there appears to be little for this Court to do in a case like this one. There is a statute saying with plain text that general concerns of bias, rather than those directed at a particular party, support a principal challenge. *R.C. 2313.17(B)(9) and (C)*. That is a legislative value judgment about how cautious trial judges should be about potential bias and whether rehabilitation should be available at all. This Court's civil rules even reference these "challenges for cause provided by law," thus respecting that for-cause challenges are a substantive matter that may be regulated by law. *Civ.R. 47(C)*. While the criminal rules lack a similar reference, there is no reason to think that addressing juror bias and partiality is any less a matter of substantive law when a person's liberty is at issue. The general assembly's role in regulating voir dire has not come into doubt as this Court has examined R.C. Chapter 2313 in past decades and centuries, so why would that body of law apply any less now?

In this case, the parties do not appear to dispute that concerns of juror bias were not directed specifically at the defendant. They were more generally framed by reference to the whole group of people accused of certain kinds of crimes and hauled into court to face such charges. The same kind of concern should arise if a prospective juror lacks an opinion about a specific large corporate defendant but expresses negative views of large corporations in general and admits such opinions may factor into their decision-making process. The General Assembly plainly sought to prohibit rehabilitation of those expressing generalized partiality or bias without respect to the details of the particular proceeding during which such feelings are admitted. *R.C. 2313.17(B)(9) and (C).*

While a statute does not need to utilize the best possible strategy to achieve some legislative goal, the principal challenge statute actually makes quite a bit of sense. When a

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juror has feelings about a particular party to a case, it makes sense to inquire further about the details before making a decision on a for-cause challenge. But the General Assembly wisely decided that the parties to a case should not have to worry that a verdict was the result of general bias against or partiality toward whole groups of people or categories of organizations. Why would a physician, police officer, public official, or citizen accused of a crime have to overcome the opinions that some in society hold about them or their work before they get the even-handed justice to which they are already entitled?

Still, discretion can only get a trial court so far, even if rehabilitation of a potentially biased juror is legally permissible. As this Court made clear in *Lingafelter*, the General Assembly added text to the law governing challenges to the favor in 1902, thereafter requiring such challenges "'shall be sustained if the court has any doubt as to the juror being entirely unbiased.'" *Lingafelter*, 95 Ohio St. at 388-389, quoting *General Code, Section 11438*, 95 Ohio Laws 308. In that instance, the challenged juror "stated that he was a depositor in a certain bank and had a feeling on the subject against Lingafelter one of the plaintiffs in error, and that whether the case being tried had anything to do with the bank failure or not he would still have a feeling against him, and, further, that in starting into the trial of the case he could not get that feeling out of his mind." *Id.* at 390. The trial court even tried to rehabilitate the juror at issue, which looked much like modern efforts to do the same:

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> The Court: The court wishes to know whether you could hear the evidence that will be submitted to you in this case and, under the charge of the court, and, after the charge of the court, render a fair and impartial verdict?
>
> A. I would do that after I took an oath to that effect; yes, sir.
>
> Q. Could you do that?
>
> A. Yes, sir; I could do that.

> Q. You could lay aside any prejudice you might have against Mr. Lingafelter and render your verdict upon the evidence and upon the evidence alone?
>
> A. Yes, sir.
>
> The Court: I will overrule the challenge.

Id. at 386. Applying an abuse of discretion standard under the new law, and even with the attempt to rehabilitate, this Court held that any discretion had been abused:

> We are of the opinion that but one conclusion could have been legally drawn from the undisputed facts, and that is that Cooperrider was a biased juror. Under the provisions of section 11438 it is mandatory upon the court to sustain a challenge if it has any doubt as to the juror being entirely unbiased. For the trial court to hold that there was no doubt as to Cooperrider being entirely unbiased, after he had admitted that he was, was a manifest abuse of discretion; and to overrule the challenge of plaintiffs in error after their peremptory challenges had been exhausted, thereby denying them their constitutional right to an impartial jury, warrants a reversal of the judgment below. (Emphasis added.)

Id. at 390-391.

Little has changed with juror bias since the *Lingafelter* decision was issued in 1917, and yet it seems more and more common that the abuse-of-discretion standard is used as a way out of reversing similarly problematic attempts at juror rehabilitation. This Court should simply draw the same line it has in past decisions, which reflected that honest admissions of bias are too much to rehabilitate in the typical case. In this regard, a court reporter's indication that the whole group of jurors answered general questions about following the law or deciding a case without partiality or bias are worth little. If that is all that this Court requires to rehabilitate a juror's express bias, voir dire will become a game of "gotcha" rather than an honest system for finding out who can be fair and who cannot.

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II. THE COURT'S PROCEEDING IN 2024-1737 IS A BETTER VEHICLE FOR SIMILAR ISSUES.

Importantly, on November 26, 2024, this Court accepted another similar appeal in *Estate of Price v. Kidney Care Specialist, LLC*, S.Ct. Ohio No. 2024-1737. *11/26/2024 Case Announcements*, 2024-Ohio-5529, p. 5. Two propositions of law were accepted:

> **PROPOSITION OF LAW NO. 1: WHEN A PROSPECTIVE JUROR DISCLOSES THAT HE OR SHE CANNOT BE A FAIR AND IMPARTIAL JUROR OR WILL NOT FOLLOW THE LAW AS GIVEN BY THE COURT, THE JUROR MAY NOT BE REHABILITATED AND MUST BE DISQUALIFIED UNDER R.C. 2313.17(B)(9) (*Berk v. Matthews* revisited).**
>
> **. . .**
>
> **PROPOSITION OF LAW NO. 2: WHEN A PROSPECTIVE JUROR DISCLOSES THAT IF SELECTED HE OR SHE WILL NOT FOLLOW THE LAW AS GIVEN BY THE COURT, THE JUROR MAY NOT BE REHABILITATED AND MUST BE DISQUALIFIED UNDER R.C. 2313.17(B)(9) (*Hall v. Bank One* clarified).**

Memorandum in Support of Jurisdiction of Appellants Cynthia Price and the Estate of Harold Gene Price filed September 30, 2024, p. 8, 11.

The dispute in *Estate of Price* presents a far better vehicle for considering Ohio's standards for prospective juror rehabilitation. There, the issues are at least framed in terms of the binding statutory framework and this Court's past decisions about what the text of the law means and how it applies. It is already somewhat of an aberration that this Court did not hold one of these cases for a decision in the other given the significant overlap between the propositions of law offered. *S.Ct.Prac.R. 7.08(B)(2)*. But it is not too late for this Court to turn its attention to the appeal that fully encapsulates the issue of juror rehabilitation under Ohio law by holding this case for briefing and a decision in *Estate of Price*. Even coordinating arguments would help avoid inconsistent rulings.

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As it stands, the parties to this dispute have largely offered policy arguments about what would make for a good rehabilitation rule rather than the statutes that set forth the existing rules for Ohio. *Merits Brief of Appellant Todd Jeffrey Rogers filed November 4, 2024 ("Rogers Brief"), p. 16-26*; *Appellee's Merit Brief filed December 20, 2024 ("State's Brief"), p. 4-31*. Such policy arguments belong in a legislative committee room, not this forum. *Kaminski v. Metal & Wire Prods. Co.*, 2010-Ohio-1027, ¶ 61 ("it is not the role of the courts to establish their own legislative policies or to second-guess the policy choices made by the General Assembly"). For a very long time, the issues raised in this jurisdictional appeal have been controlled by statute, and it would be odd to issue a ruling without any briefing about the statutory scheme.

Moreover, the parties to this case have the issues profoundly confused. At the very least, the General Assembly made a distinction between concerns that a "person cannot be a fair and impartial juror" in general, classifying that as a principal challenge for which there can be no rehabilitation, *R.C. 2313.17(B)(9) and (C)*, and a challenge based upon "suspicion of prejudice against or partiality for either party," which could conceivably be rejected due to adequate rehabilitation. *R.C. 2313.17(D)*. The State's arguments are consistently phrased in terms of "actual bias" against Defendant Rogers in particular, which would be the best statutory reason to permit rehabilitation in the face of a challenge to the favor under R.C. 2313.17(D). *See, e.g., State's Brief, p. 15-16*. Yet the State made no such argument. Meanwhile, Defendant Rogers relies on the prospective juror's concern that "people don't wind up here from not doing anything," which is not directed at any particular party, and which only makes sense as a principal challenge for which there can be no rehabilitation under R.C. 2313.17(B)(9) and (C). *Rogers Brief, p. 15-16*. And yet Rogers also failed to make the best argument he had available within the long-standing statutory framework.

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While the adversarial process typically "sharpens the presentation of issues," *Baker v. Carr*, 369 U.S. 186, 204 (1962), the bulk of the issue somehow escaped in this case.

CONCLUSION

For all the foregoing reasons, this Court should issue a ruling accounting for the plain terms of R.C. 2313.17 or hold this matter for briefing and a decision in *Estate of Price v. Kidney Care Specialist, LLC*, S.Ct. Ohio No. 2024-1737.

Respectfully Submitted,

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I certify that a copy of the foregoing **Amicus Brief** has been served by e-mail on December 24, 2024, upon:

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