IN THE SUPREME COURT OF OHIO

THE ESTATE OF HAROLD GENE PRICE BY AND THROUGH ITS ADMINISTRATOR CYNTHIA PRICE, *et al.*,	:	Case No. 2024-1373
Plaintiffs-Appellants,	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District Case No. CA 029951
vs.	:	Case No. 24CA000001
KIDNEY CARE SPECIALISTS, LLC, *et al.,*	:	
Defendants-Appellees.	:	

BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS, SUBMITTED ON BEHALF OF APPELLEES KETTERING PHYSICIAN NETWORK AND LATHA VENKATESH, M.D.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION

The Ohio Association of Civil Trial Attorneys ("OACTA") is an organization of attorneys and corporate executives who defend civil lawsuits and manage claims on behalf of individuals, corporations and governmental entities. The issues presented by this appeal concern OACTA and its members who are routinely involved in litigation – including selecting a jury. Appellant's request to this Court, that it find R.C. 2313.17(B)(9) to be a principal challenge where a juror must be immediately excused, causes significant impediments to the practice of law and the trial process.

Appellant's request is, first and foremost, legally incorrect. Twice this Court has been asked if the determination of whether an individual can serve as a fair and impartial juror is a subjective analysis where the trial court enjoys full discretion. *Berk v. Matthews*, 53 Ohio St.3d 161 (1990); *Hall v. Banc One Mgt. Corp.*, 2007-Ohio-4640. Twice this Court has responded in favor of the trial court's discretion. Appellant asks this Court to reverse those decisions, based upon language in this Court's *Hall* decision, made in dicta. Appellant suggests that this dicta, commenting on R.C. 2313.17(B)(9) in its previous iteration, means this Court has been wrong all along in granting discretion to the trial court on juror rehabilitation. To Appellant, all challenges are principal challenges.

But Appellant overlooks both the reasoning of this Court in *Berk* and *Hall* and the problems Appellant's interpretation creates for the judicial process. In both *Berk* and *Hall,* this Court recognized that the trial court is in the best position to evaluate a juror's fairness or impartiality where the trial court is present for voir dire questioning and can observe a potential juror in person. The trial court has a front row seat to the myriad of unspoken human communication including personality, emotion and body language.

Appellant's interpretation also belabors the trial process in a way that is impractical given the vast number of cases funneling through Ohio courts. If *any* bias is a principal challenge and *no* juror can be rehabilitated, then selecting a jury becomes a process that takes weeks, not days. Moreover, Appellant's interpretation also places a decided favoritism into the trial process. Under Appellant's interpretation, there is a distinct advantage for the first party questioning a potential juror where, if any bias arises, the second party fails to have any opportunity to question the juror at all. It is impractical to expect the jurors of a diverse state like Ohio to come to the courtroom without any preconceptions, prior experiences or potential prejudices. But most dangerously, Appellant's interpretation asks this Court to take what is supposed to be the most egalitarian process in the world and skew it in favor of whomever questions the jurors first.

For these reasons, OACTA urges this Court to affirm the finding by the Second District Court of Appeals.

II. STATEMENT OF THE CASE AND FACTS

Amicus OACTA fully adopts the Statement of the Case and Facts in the Merit Brief of Appellees Kettering Physician Network and Latha Venkatesh, M.D.

III. APPELLANT'S PROPOSITIONS OF LAW AND SUPPORTING ARGUMENT

> **Appellant's 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).

Appellant's first proposition of law urges this Court to revisit *Berk*, arguing that the "plain language" of R.C. 2313.17(B)(9) and (C) is "irreconcilable" with the holding in *Berk*. *See* Appellant's Merit Brief at p. 11. But Appellant is hand-picking the language in its favor from the statute.

R.C. 2313.17(B)(1-8) identifies the objective principal challenges that disqualify a juror for cause:

> (1) That the person has been convicted of a crime that by law renders the person disqualified to serve on a jury;
>
> (2) That the person has an interest in the cause;
>
> (3) That the person has an action pending between the person and either party;
>
> (4) That the person formerly was a juror in the same cause;
>
> (5) That the person 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;
>
> (6) That the person is subpoenaed in good faith as a witness in the cause;
>
> (7) That the person is akin by consanguinity or affinity within the fourth degree to either party or to the attorney of either party;
>
> (8) That the person or the person's 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 any such party to another such action.

See R.C. 2313.17(B)(1)-(8). These challenges "consist of objectively verifiable facts and conclusions, which, if found valid by the court, require the court to excuse the prospective juror." *Hall* at ¶1. R.C. 2313.17(B)(1)-(8) are challenges based on objective, verifiable facts. Either the juror is an employee or a blood relation of a party, or the juror is not.

But R.C. 2313.17(B)(9) is an entirely different challenge. R.C. 2313.17(B)(9) states that there is a "good cause[] for challenge" if a potential juror "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 court." R.C. 2313.17(B)(9) is a challenge based on *subjective* criteria. Whether a juror is fair or impartial requires a weighing of the juror's honesty, self-interest, prejudice and favoritism. It also

may require the juror receive additional information about the law or the judicial process to evaluate fairness.

The statute accounts for just such a subjective weighing of these factors in its plain language. R.C. 2313.17(C) states that "[e]ach challenge listed in division (B) of this section shall be considered a principal challenge, *and its validity tried by the court."* (Emphasis added). R.C. 2313.17(B)(1)-(8) require the trial court to ask *objective* questions to determine if a fact is true, e.g. "Juror 1, are you related by blood to the Defendant?" or "Juror 2, have you ever been employed by the Plaintiff?" The responses to these questions are "yes" or "no" and the trial court can excuse the juror. R.C. 2313.17(B)(9) requires the trial court to ask *subjective* questions about fairness and impartiality, e.g. "Juror 1, why do you think you cannot be fair?" Subjective questions require narrative answers that may reveal the juror merely does not understand the judicial process, not that the juror truly does not believe he or she cannot be fair, e.g. "I do not know what the law says about this issue" or "I have never been a party to a lawsuit before."

Appellant asks this Court to ignore R.C. 2313.17(C) which grants the trial court the discretion to determine if a challenge is valid, thereby washing away all distinction between the objective analysis of R.C. 2313.17(B)(1)-(8) and the subjective analysis of R.C. 2313.17(B)(9). Appellant argues that excluding R.C. 2313.17(B)(9) from the principal challenges is an "expansion of judicial discretion." *See* Appellant's Merit Brief at p. 20. But the language granting judicial discretion has been included in the statute all along. If Appellant's interpretation of R.C. 2313.17(B)(9) is permitted, the question "are you fair and impartial" must be answered with the same "yes" or "no" as the question "is this party your relative?" The trial court has been granted no additional discretion for challenges under R.C. 2313.17(B)(9) from those under (1)-(8) – only the *test for validity* is different.

It is due to the subjective nature of the test for R.C. 2313.17(B)(9) that *Berk* held such determinations should be left to the discretion of the trial court. This Court noted in *Berk* that "the trial court had the opportunity to observe the demeanor of the prospective juror and evaluate firsthand the sincerity of her responses to questions." *Berk* at 169. When the juror in *Berk* on nine separate occasions "assured the court and counsel for the parties that she could be fair and impartial and would follow the law as it was given to her by the judge," the trial court in *Berk* had the opportunity to observe the juror, her reactions, her affect, her body language, and determine if those assurances could be trusted. For these reasons, this Court has no reason to revisit or revise the holding in *Berk.*

> **Appellant's Proposition of Law No. 2: When a prospective juror discloses that 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).**

Appellant characterizes this Court's holding in *Hall* as an attempt to salvage *Berk* while simultaneously committing the cardinal sin of statutory interpretation. *See* Appellant's Merit Brief at p. 18. Appellant's argument overlooks that the rationale for principal challenges used in in *Hall* is identical to that in *Berk. Hall* makes no revisions to the statute or this Court's previous holdings.

Appellant's entire argument comes from a single paragraph of dicta in *Hall*:

> The legislature's incorporation of Division (J) into R.C. 2313.42 appears to be misplaced because that challenge was not part of the common law, nor was it included in an earlier version of this statute, G.C. 11437 . . .

Hall at ¶37, *see also* Appellant's Merit Brief at p. 20. Appellant argues that this Court should revisit *Berk* and *Hall* since "if R.C. 2313.17(B)(9) is 'misplaced,' it is up to the General Assembly to fix it." *Id.* at p. 20. Appellant's argument boils down twelve paragraphs of discussion on the history of principal challenges to a single, pithy, point.

This Court's historical discussion in *Hall* is significant for its holding and cannot be overlooked. The current statute, R.C. 2313.17, has its roots in the common law where jurors could be challenged "propter affectum because some circumstance, such as kinship with a party, rendered the potential juror incompetent to serve in the particular case." *Hall* at ¶28. Challenges propter affectum were of two types: principal challenges and challenges to the favor. *Id.*, citing 2 Blackstone, *Commentaries on the Laws of England*, *363.

Principal challenges were those "where the cause assigned carries with it prima facie evident marks of suspicion of either malice or favor which, if true, cannot be overruled." *Id.* If a party presented the "existence of facts supporting a principal challenge, this finding results in automatic disqualification and no rehabilitation of the potential juror can occur." *Id.*, citing *Black's Law Dictionary* (8th Ed. 2004) at 245. *Hall* noted that Blackstone's Commentaries set forth examples of principal challenges including jurors of blood relation, jurors with an interest in the case or jurors who are "the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him." *Id.*, citing 2 Blackstone *363.

By comparison, challenges to the favor "permit a party to assert a challenge for cause when no principal challenge exists, but when the party objects only on some probable circumstances of suspicion, as acquaintance and the like." *Id.* at ¶29. When a party asserts a challenge to the favor, "two indifferent persons named by the court for the purpose of determining whether a potential juror can be impartial – would then decide whether to seat the juror." *Id.* Challenges to the favor therefore act as a "catch all" provision for potential bias that is not obvious on the surface such as employment or kinship. For principal challenges under Blackstone the malice or favor is *presumed,* and the party objecting must only present a *fact.* For challenges to the favor, whether the malice or favor exists must be flushed out by the trier of fact.

This Court in *Hall* acknowledged that "[t]he nature of principal challenges and challenges to the favor is well entrenched in Ohio jurisprudence." *Id.* at ¶33. Indeed, the General Assembly incorporated both types of challenges in R.C. 2313.17 and its predecessors. Yet *Hall* acknowledged that R.C. 2313.42(J) (now (B)(9)) required a different test, one that had been recognized in *Berk*: "[r]egardless of placement by the General Assembly, we are convinced, as we explained in *Berk*, that Division (J) allows the exercise of discretion by the court, as reflected in the syllabus of *Berk*, which specifically confines its holding to a challenge made pursuant to R.C. 2313.42(J)." *Id.* at ¶38.

Appellant argues that *Hall* treated R.C. 2313.42(J) (now (B)(9)) as a legislative "goof" in finding it required a discretionary test. For Appellant, if the General Assembly included (B)(9), it intended it to be treated as a principal challenge. R.C. 2313.17 (and R.C. 2313.42) did not specify the enumerated challenges were all principal challenges. The language of the statute reads that "[t]he following are good causes for *challenge.*" *See* R.C. 2313.17(B).

The 2012 amendment to R.C. 2313.17 speaks volumes of how the General Assembly intended these challenges to be treated. R.C. 2313.42 was revised by the General Assembly in 2012 to include the (A) through (C) designations in its current version. R.C. 2313.17, Amendment Notes. The letters in R.C. 2313.42 became (B)(1) through (9) in the current version. *Id.* The Amendment Note describes this change as "redesignated former (A) through (H) *and (J)* as (B)(1) through (B)(9). *Id.* (Emphasis added).

Although the legislature deleted section (I), how it chose to word this revision suggests it set section (J) as separate from the remaining challenges. Otherwise, the note may have read "section (I) has been deleted and the remaining letters enumerated as B(1) through B(9)." Appellant argues this Court in *Hall* committed the cardinal sin of statutory interpretation. But the

plain language of the statute, including the selection of the word "challenges" rather than "principal challenges" suggests that *Hall* was following the statute as written.

The dicta in *Hall* that Section (J) was "misplaced," is an objection to the formatting of the statute – *Hall* suggests the better wording is to designate which are principal challenges and which are challenges to the favor. *See Hall* at ¶37, citing *Dew v. McDivitt*, 31 Ohio St. 139 (1876) and *United States v. Wood*, 299 U.S. 123, 57 S. Ct. 1778, 81 L.Ed. 78 (1936) ("The difference between the statutes, of course, is that the latter challenges applied the abuse-of-discretion standard . . . while the former required absolute disqualification regardless of actual bias or partiality.") The dicta in *Hall* is *not* proposing that Section (J) (now (B)(9)) should be evaluated with the objective, factual analysis of the remaining challenges. *Id.* at ¶38 ("Regardless of the placement by the General Assembly, we are convinced, as we explained in *Berk*, that Division (J) allows the exercise of discretion by the court . . . the remaining divisions of R.C. 2313.42(A) through (I) do not permit the exercise of discretion.")

As such, Appellant's Second Proposition of Law fails to show that a single comment in dicta by this Court in *Hall* warrants a reversal of over a century of Ohio law recognizing that juror partiality and bias are subjective questions which require review in the immediate moment by the trial court. This Court in *Hall* recognized that "great latitude of discretion must be allowed to the court in the trial of a challenge *for favor.*" *Hall* at ¶30, citing *Dew* at 142. This discretion includes whether a juror may be rehabilitated. *Id.* at ¶33. Appellant's Second Proposition of Law requests this Court remove the long-recognized discretion of the trial court in jury questioning and should not be granted.

III. CONCLUSION

For the reasons set forth above, Amicus Curiae, OACTA supports Appellees and respectfully requests this Court uphold the ruling of the Second District Court of Appeals. Appellant's Merit Brief argues about the integrity of the trial process and the significance of the impartial juror. Ironically, Appellant asks this Court to adopt an interpretation of R.C. 2313.17(B) that removes discretion from the trial courts and puts the selection of a fair and impartial jury at risk.

The necessity of the trial court evaluating the subjective criteria in R.C. 2313.17(B)(9) cannot be understated. The Second District Court of Appeals identified this problem deftly when it stated Appellant's argument was "not compatible with the reality that perspective [sic] jurors come to the process without legal training or experience which, given the relatively informal give-and-take voir dire process, can result in a juror making a statement that, in isolation, would allow a conclusion that the perspective [sic] juror will not follow the law as instructed by the trial court." *Estate of Price v. Kidney Care Specialist, LLC*, 2024-Ohio-3122, ¶12. (2nd Dist.) The Second District noted that "unlike the immutable R.C. 2313.17(B)(1)-(8) disqualifiers, a juror's initial response to a question regarding the burden of proof or another legal topic is not fixed but instead is subject to change following further questioning and explanation." *Id.*

On behalf of Appellees, Amicus OACTA respectfully requests this Court preserve that discretion and affirm the ruling of the Second District Court of Appeals.

Respectfully submitted,

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