

9/25/01

SUPREME COURT OF LOUISIANA

NO. 01-CC-2498

GLORIA SCOTT, ET AL.

V.

THE AMERICAN TOBACCO COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FOURTH CIRCUIT, PARISH OF ORLEANS

PER CURIAM\*

We granted certiorari in this class action case to review the rulings of the district court on challenges for cause made by defendants as to certain prospective jurors with immediate family members who were also prospective members of the class. For the reasons that follow, we affirm the district court's judgment in part and reverse it in part.

**FACTS AND PROCEDURAL HISTORY**

This litigation arises from a class action filed by plaintiffs against various tobacco defendants. Essentially, plaintiffs allege defendants manufactured, promoted and sold cigarettes to them while fraudulently concealing and denying that the cigarettes contained the drug nicotine. Among the remedies sought by plaintiffs was the establishment of a medical monitoring program. The plaintiff class consists of all Louisiana residents who are or were smokers on or before May 24, 1996 and who desire to participate in medical monitoring and/or cessation assistance programs.

During jury selection, defendants challenged for cause several prospective jurors with immediate family members who smoked. Some of these same jurors indicated

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\* Retired Judge Robert L. Lobrano participating in this decision as Associate Justice Pro Tempore.

they would like to see their relatives receive free medical monitoring and smoking cessation assistance.<sup>1</sup> The district court denied these challenges.

At the conclusion of jury selection, defendants sought supervisory review in the court of appeal of the trial court's rulings denying their challenges for cause as to these jurors. Defendants also sought review of the district court's rulings denying challenges for cause alleging bias against other jurors.

A five-judge panel of the court of appeal, in a split decision, granted the writ in part and denied it in part. The majority found one juror and one alternate juror revealed bias toward defendants in their answers to questions during voir dire. As a result, the court of appeal found the district court erred in failing to grant defendants' challenges for cause as to these jurors.

However, the majority of the court of appeal rejected defendants' argument that those prospective jurors with family members who also could be potential class members should be excluded. The court found that merely because the prospective juror's family member was a potential class member does not automatically mean the prospective juror cannot be fair and impartial. Finding no abuse of discretion in the district court's conclusion that these prospective jurors could be fair and impartial, the majority of the court of appeal denied the writ on this issue.

Two judges dissented on this point. They observed that while the prospective jurors indicated they could be fair and impartial, such a statement failed the "psychological burdens of credibility" when the prospective juror potentially had immediate family members in the class. Because of the high profile nature of this case and its ability to affect thousands of Louisiana residents for the next twenty-five years,

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<sup>1</sup> Defendants challenged several prospective jurors for cause on this ground contemporaneously. At the end of jury selection, pursuant to La. Code Civ. P. art. 1767, defendants made a blanket challenge for cause as to all jurors with immediate family members who were potential members of the class.

the dissenting judges felt it was imperative that the jury selected avoid even the appearance of impropriety which would inevitably result if a juror was deciding remedies affecting his or her immediate family.

Following the court of appeal's ruling, defendants sought relief in this court. Defendants assigned two errors in their application to this court. First, they complained the district court erred in failing to grant their challenges for cause as to the prospective jurors with immediate family members who were potential members of the class. Secondly, they argued the district court erred in failing to grant their challenges for cause alleging bias on the part of other jurors. We granted the writ to address the first assignment of error, and denied the writ in all other respects.

The issues presented for our consideration are: (1) whether there is a per se prohibition against seating jurors whose immediate family members are potential members of the class, and (2) if no per se prohibition exists, whether the district court abused its discretion under the facts of this case in denying defendants' challenges for cause as to these jurors.

At the outset, we note it is unusual for this court to exercise its supervisory jurisdiction to review a district court's rulings during voir dire, especially when the case is presented in a pre-trial posture. However, this case involves unique circumstances due to the broad scope of the potential class, which may include a large percentage of Louisiana residents. Given the far-reaching consequences of this action, as well as the complexity and the length of trial, concerns of judicial economy motivate us to address these issues at this time.

## **DISCUSSION**

*Per Se Exclusion of Jurors with Immediate Family  
Members Who are Potential Class Members*

Defendants argue in favor of a per se rule excluding any prospective jurors who have immediate family members who are potential class members. Defendants reason that if the jury finds in favor of plaintiffs, such a finding will result in the availability of medical monitoring and smoking cessation assistance for these jurors' relatives. Under such circumstances, defendants suggest it is impossible for the district court not to reasonably believe that the juror's relationship with the immediate family member would not influence the juror in coming to a verdict, mandating that the challenge for cause be granted under La. Code Civ. P. art. 1765(3).

Despite defendants' argument to the contrary, there is nothing in La. Code Civ. P. art. 1765(3) which would suggest the legislature intended a "bright line" rule which would automatically exclude a prospective juror for cause merely because that prospective juror may be influenced by a family relation. Rather, that article, which is phrased in permissive language, provides that a juror **may** be challenged for cause if the juror's blood relations are such that it must be reasonably believed that they would influence the juror in coming to a verdict:

A juror may be challenged for cause based upon any of the following:

\* \* \*

(3) When the relations whether by blood, marriage, employment, friendship, or enmity between the juror and any party or his attorney are such that it must be reasonably believed that they would influence the juror in coming to a verdict. . . .

While this court has never addressed the precise issue presented in this case, we have never held that a juror should be automatically disqualified because of a relationship. For example, in *State v. Gray*, 351 So. 2d 448, 455 (La. 1977), the

defendant argued the trial court should have excused three jurors because one juror was acquainted with the prosecuting and defense attorneys and was in business with the relative of a prosecuting attorney, one juror was a social friend of the prosecuting attorney and the third juror was the nephew of the sheriff of the parish where the prosecution was taking place. We found no error in the trial court's refusal to excuse these jurors, stating:

A trial judge is granted much discretion in determining the composition of the jury. The mere existence of personal acquaintances between a prospective juror and the trial participants does not, without more, demonstrate a lack of fitness to serve as a juror. In the present case all three of the prospective jurors stated on voir dire that the relationship involved would not prevent their impartial service on the jury. We cannot say that the failure to excuse these jurors was an abuse of the trial judge's discretion.

Similarly, courts have held the existence of a physician-patient relationship between a juror and the defendant was not sufficient to create a presumption that the juror could not render a fair verdict. *Cobb v. Kleinpeter*, 95-271 (La. App. 3<sup>rd</sup> Cir. 10/4/95), 663 So. 2d 236, writ denied, 95-2683 (La. 1/12/96), 666 So. 2d 323; *Seals v. Pittman*, 499 So. 2d 114 (La. App. 1<sup>st</sup> Cir. 1986). In *Savoie v. McCall's Boat Rentals, Inc.*, 491 So. 2d 94 (La. App. 3<sup>rd</sup> Cir.), writ denied, 494 So. 2d 334 (La. 1986), the defendant argued there should be an automatic prohibition against a husband and wife serving together on the same jury. The court of appeal rejected this argument, finding the trial court inquired as to whether they could exercise independent judgment, and was satisfied they could do so.

In sum, we are convinced there is no legislative or jurisprudential support for defendants' position that all jurors with family members who are potential class members must be excluded from the jury on a per se basis. Accordingly, we find the trial court did not err in refusing to excuse such persons from serving on the jury on

this basis alone.

*Whether the District Court Abused its Discretion under the  
Facts of this Case in Denying Defendants' Challenges for Cause*

Having determined there is no per se prohibition against jurors serving on the jury merely because they have immediate family members who are potential members of the class, we now determine whether the district court abused its discretion in denying defendants' challenges for cause as to these jurors. In doing so, we begin from the well-settled proposition that if a prospective juror is able to declare to the district court's reasonable satisfaction that he could render an impartial verdict according to the law and evidence, a challenge for cause to that juror is properly denied. *State v. Claiborne*, 397 So. 2d 486 (La. 1981); *State v. McIntyre*, 381 So. 2d 408 (La. 1980). The trial court is vested with broad discretion in ruling on challenges for cause and such rulings will not be disturbed on appeal absent an abuse of discretion. *State v. Benoit*, 440 So. 2d 129 (La. 1983). However, while the trial court is accorded broad discretion in ruling on challenges for cause, this court has cautioned that "[a] challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment accordingly may be reasonably implied." *State v. Hallal*, 557 So. 2d 1388, 1390 (La. 1990) (citing *State v. Jones*, 474 So. 2d 919, 926 (La. 1985)). With these principles in mind, we now turn to an examination of the transcript of the voir dire of the twelve jurors with immediate family members who are prospective class members to determine whether there is any basis for a reasonable belief under La. Code Civ. P. art. 1765(3) that these jurors' family

relations would influence them in reaching a verdict.<sup>2</sup>

Juror No. 1 is a thirty-four year old male, whose father is a former smoker and whose mother and brother are current smokers. During voir dire, when asked if he would want any of his relatives to participate in a smoking program, he responded that he had asked them if they wanted to quit, but they declined. Juror No. 1 also testified that he had briefly smoked in the past.<sup>3</sup> When asked whether he would consider participating in a smoking cessation program, he indicated he was not sure.

Juror No. 1's responses, when taken as a whole, indicate a basis for a reasonable belief that the juror's family relations may influence him in coming to a verdict. Juror No. 1's statement that he had specifically asked his mother and brother if they wanted to quit smoking, coupled with his failure to rule out his own participation in a smoking cessation program, suggest that Juror No. 1's verdict could be influenced by the availability of such programs.<sup>4</sup> Under these circumstances, we find the district court abused its discretion in denying defendants' challenge for cause as to Juror No. 1.

Juror No. 2 is a forty-four year old female, whose father is a former smoker. During voir dire, she indicated her father stopped smoking over forty years ago. When asked if she would like to see her father receive any medical monitoring, she stated, "I don't have an opinion on that." She indicated she did not know what his

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<sup>2</sup> Out of the twenty-two jurors and alternates, there were actually thirteen jurors with immediate family members who were potential class members. One of these, Juror No. 3, was removed by the court of appeal on different grounds. Accordingly, this juror will not be discussed.

<sup>3</sup> Juror No. 1 stated he was not a regular smoker, but only smoked for "about a month or so" when he was in the military.

<sup>4</sup> We acknowledge that the question of whether the juror himself would be influenced by the availability of class remedies is outside the scope of our writ grant, and our opinion should not be interpreted as directly addressing this issue. We merely observe that Juror No. 1's refusal to rule out the possibility his own participation in a smoking cessation program certainly implies that he may wish for his relatives to participate in such a program.

view is on medical monitoring.

Nothing in Juror No. 2's responses indicates a basis for a reasonable belief the juror's family relations are such that they would influence her in coming to a verdict. This juror's responses taken as a whole demonstrate she has no strong belief regarding medical monitoring, making it unlikely that the potential availability of such monitoring to her father would affect her ability to be impartial. Accordingly, we do not find the district court abused its discretion in denying defendants' challenge for cause as to Juror No. 2.

Juror No. 5 is a thirty-two year old female, whose father is a former smoker. During voir dire, she indicated her father stopped smoking over twenty years ago. Also, she stated her father had triple by-pass surgery about five years ago; however, she did not feel the surgery was related to his smoking. Rather, his heart condition could have resulted from his eating habits. Juror No. 5 affirmatively stated she could listen to the evidence and could be fair.

While Juror No. 5 was not examined extensively during voir dire regarding the potential availability of medical monitoring to her father, her testimony as a whole indicates that her judgment would not be adversely affected because of her father's condition and that she could be fair. Under these circumstances, we cannot say the district court abused its discretion in denying defendants' challenge for cause as to Juror No. 5.

Juror No. 7 is a thirty-five year old female. Her mother is a long-time smoker who recently quit and her two brothers are current smokers. During voir dire, she indicated she would want her mother to participate in a medical monitoring program. She stated she did not know whether her mother would participate, but would recommend that she participate.



The responses of Juror No. 7, taken as a whole, present the basis for a reasonable belief that she may be influenced by the potential availability of medical monitoring to her mother. Juror No. 7 obviously perceived a strong benefit to her mother from medical monitoring, as demonstrated by the fact she would recommend it to her mother, even though she was not sure her mother would accept it. While we recognize Juror No. 7 indicated she could be fair, we nonetheless conclude the district court abused its discretion in failing to sustain defendants' challenge for cause as to this juror.

Juror No. 10 is a fifty-seven year old female, whose husband is a former smoker and whose four sons are current smokers.<sup>5</sup> During voir dire, she indicated she did not think her sons would like to quit smoking. She stated she would like her sons to get medical tests to determine if smoking is harming their health, although she expressed some skepticism regarding whether the tests would "make sense" in light of their continued smoking.

Juror No. 10's responses as a whole demonstrate that she would like her sons to have the benefit of medical monitoring, even though she questioned its effectiveness. In applying the reasonable belief test of La. Code Civ. P. art. 1765(3), we find ordinary experience suggests that as a mother, Juror No. 10's love for her children could influence her verdict. Under these circumstances, we conclude the district court abused its discretion in denying defendants' challenge for cause as to Juror No. 10.

Juror No. 11 is a forty-two year old female, whose sister is a current smoker. During voir dire, she indicated her sister has been smoking for a long time, but her sister's smoking does not bother her one way or the other. She stated that her sister

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<sup>5</sup> The exact ages of Juror No. 10's four sons are unclear from her testimony, but she indicated they ranged from 34 to 41.

really does not care about developing smoking related diseases. She also stated she felt her sister should get medical monitoring, but probably would not. She was expressly questioned as to whether she would be more likely to rule in favor of plaintiffs because of the potential availability of medical monitoring to her sister. In her response, she stated she would have to weigh the evidence.

Juror No. 11's initial response suggests a possibility that she could be influenced by the availability of monitoring for her sister. However, when asked specifically by plaintiffs' counsel whether the availability of monitoring would influence her decision, she essentially responded in the negative, indicating her decision would be based on the evidence. Under these circumstances, we find that while Juror No. 11's preliminary response was suspect, plaintiffs' counsel successfully rehabilitated her by demonstrating her verdict would not be influenced by the potential availability of medical monitoring to her sister. Accordingly, we find no abuse of discretion in the district court's ruling denying defendants' challenge for cause as to this juror.

Juror No. 12 is a fifty-four year old male, whose father is a former smoker. During voir dire, he indicated that he is not concerned with his father possibly developing lung cancer, because his father goes to the doctor quite often. When asked whether he wanted to see his father get medical monitoring, he responded that his father goes to the doctor regardless. In addition, he stated that his "father wouldn't want nothing free anyway." He indicated that regardless of what his father may or may not want, he could be fair in deciding the case.

Juror No. 12's responses indicated he saw little benefit to medical monitoring for his father, because his father already received regular check-ups. Taken as a whole, Juror No. 12's responses support his statement that he could be fair in deciding the case. The district court did not abuse its discretion in denying defendants'

challenge for cause as to Juror No. 12.

Alternate Juror No. 13 is a fifty-two year old female, whose husband is a former smoker and whose brother is a current smoker.<sup>6</sup> During voir dire, she indicated she would like to see her brother quit smoking and would probably like to see him participate in a free smoking cessation program and receive free medical monitoring, although she had some doubt as to whether he would participate.

Alternate Juror No. 13's responses indicate that she perceived a benefit from the potential availability of medical monitoring for her brother. Although she indicated she could be fair, her responses taken as a whole disclose a basis for a reasonable belief that the availability of medical monitoring for her brother could influence her verdict. Accordingly, we find the district court abused its discretion in denying defendants' challenge for cause as to Alternate Juror No. 13.

Alternate Juror No. 14 is a thirty-six year old male, whose mother and father are former smokers. During voir dire, he admitted his parents smoked for a short period of time and quit over twenty years ago. In addition, he stated that his father recently had a stroke and is ill. When asked if he would be interested in seeing his father receive free medical monitoring, he initially stated that he would be interested. However, when asked the question again, he stated he changed his mind and would not like to see his father participate in a free medical monitoring program.

Although Alternate Juror No. 14 initially indicated that he would like to see his father receive medical monitoring, his subsequent response clearly and unequivocally demonstrated that he changed his mind on this issue and would not want his father to participate in medical monitoring. In ruling on defendants' challenge for cause, the district court observed that Alternate Juror No. 14's subsequent response negated any

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<sup>6</sup> Alternate Juror No. 13 actually has two brothers who smoke, but one of her brothers lives outside of the state and is therefore not a potential class member.

inference that he would be favorable to plaintiffs because of the availability of monitoring to his father. We cannot say the district court's ruling represents an abuse of discretion.

Alternate Juror No. 17 is a forty-one year old female, whose father is a current smoker. During voir dire, she stated her father did not opt out of the class in this case. She indicated she would like to see her father receive medical monitoring and participate in a smoking cessation program, although she questioned whether he would do so.

Despite her assertions that she could be fair, Alternate Juror No. 17's responses taken as a whole form the basis for a reasonable belief that the potential availability of medical monitoring for her father could influence her decision. She acknowledged her father is a potential class member who has not opted out of the class, and stated she would like to see him receive medical monitoring and smoking cessation assistance. Under these circumstances, we conclude the district court erred in denying defendants' challenge for cause as to Alternate Juror No. 17.

Alternate Juror No. 21 is a forty year old female, whose mother is a former smoker and whose husband is a current smoker who has not opted out of the class. During voir dire, she stated her husband has high blood pressure and his doctor wanted him to quit smoking. She indicated she is close to her mother and would like to have the best medical treatment and medical detection facilities available to her mother. She would like her mother to have an opportunity to receive free medical monitoring. In addition, when asked about her husband and his receiving free medical monitoring, she admitted she was "biased" and that she would want him to receive medical monitoring. She further indicated she was worried about his health and his smoking.

Alternate Juror No. 21's responses conclusively demonstrate a basis for a reasonable belief that the availability of monitoring to her relatives would influence her verdict. She clearly expressed a desire for her mother and husband to receive medical monitoring. She candidly admitted that she was biased with regard to the availability of monitoring to her husband. Although Alternate Juror No. 21 later testified she could be fair, we find this testimony is insufficient to rehabilitate her. The district court erred in denying defendants' challenge for cause as to Alternate Juror No. 21.

Alternate Juror No. 22 is a thirty-eight year old female, whose mother is a current smoker. During voir dire, she stated her mother has asthma and that doctors opined smoking was the cause of her mother's asthma. She also indicated she would like to see her mother quit smoking and would encourage her mother to participate in a smoking cessation program. She has strong beliefs regarding cigarettes and their addictiveness and their harmfulness.

Alternate Juror No. 22's responses demonstrate a basis for a reasonable belief that the availability of monitoring to her mother would influence her verdict. She indicated she wanted her mother to quit smoking and would encourage her to participate in a smoking cessation program. While she indicated she would not decide the case in favor of plaintiffs just to help her mother, we find her responses as a whole suggest otherwise. The district court erred in denying defendants' challenge for cause as to Alternate Juror No. 22.

## **CONCLUSION**

In sum, we find that La. Code Civ. P. art. 1765(3) does not set forth a per se rule which requires automatic disqualification of a prospective juror with a family member who is a potential class member. Rather, such determinations must be made

upon review of the voir dire testimony of each juror, and upon consideration of the juror's testimony as a whole.

Reviewing the record in this case, we find the district court abused its discretion in failing to excuse for cause Jurors Nos. 1, 7 and 10 and Alternate Jurors Nos. 13, 17, 21 and 22. As to all other jurors, we find no abuse of discretion in the district court's rulings.

On remand, we direct the district court to replace the excused jurors with the previously-selected alternate jurors who have not been disqualified. The district court should then perform new jury selection for purposes of replenishing the pool of alternate jurors.<sup>7</sup>

### **DECREE**

For the reasons assigned, the judgment of the district court is reversed insofar as it denied defendants' challenges for cause as to Jurors Nos. 1, 7 and 10 and Alternate Jurors Nos. 13, 17, 21 and 22. In all other respects, the judgment of the district court is affirmed. The case is remanded to the district court for further proceedings consistent with this opinion.

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<sup>7</sup> We recognize that the court of appeal's judgment previously removed Juror No. 3 and Alternate Juror No. 18. These jurors should be replaced by the district court using the procedures we have outlined.