9/25/01

SUPREME COURT OF LOUISIANA

No. 01-CC-2498

GLORIA SCOTT, et al

versus

THE AMERICAN TOBACCO COMPANY, et al

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

VICTORY, J., CONCURRING in part, DISSENTING in part

La. Code Civ. P. art 1765 provides in pertinent part:

> A juror may be challenged for cause based on any of the following:
>
> (2) When the juror has formed an opinion in the case or is not otherwise impartial, the cause of his bias being immaterial;
>
> (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. [Emphasis added.]

Fundamental to our system of justice is the rule of law providing that jury trials must be tried before an impartial jury. At issue in this case is whether parents, children, and siblings of persons who qualify to participate as plaintiffs in a class action lawsuit should be allowed to sit as jurors to determine whether judgment is rendered in favor of their relatives. While the Per Curiam of the Court has reversed the decision of the trial court in part and has ordered Jurors Nos. 1, 7 and 10 and

Alternate Jurors Nos. 13, 17, 21 and 22 to be excused and replaced, it declares as acceptable jurors Nos. 2, 5, 11, 12 and Alternate Juror No. 14. Incredibly, a plurality of the Court finds no problem with allowing parents, children, and siblings of eligible class action plaintiffs to decide the fate of the class action claims. I believe that allowing such individuals to sit as jurors strikes at the very heart of the jury system. None of the cases cited in the Court's Per Curiam stands for the proposition that immediate family members of parties to a lawsuit should be seated as members of the jury panel. I have been unable to locate a single reported Louisiana decision in which such closely related family members have been allowed to decide the fate of their relatives' cases.

In my view, the Court falls into error because it confuses the tests applicable to excusing jurors under two distinct subsections of Code Civ. P. art. 1765. The jurors excused by the plurality all demonstrated in response to voir dire questioning that they were not impartial. They indicated an interest in the medical monitoring program sought by the plaintiff class and some even admitted that they would want their close relatives to participate in it. These jurors were clearly due to be excused under La. Code Civil P. art 1765(2), which deals with jurors who can be shown on the evidence presented to harbor actual subjective bias and who cannot be impartial. All prospective jurors who cannot be impartial are excused under article 1765(2), whether or not there is any **relationship** between the prospective juror and a party to the litigation.

La. Code Civ. P. art 1765(3), on the other hand, embodies a separate and different rule for excusing jurors. Under this provision, when the **relationship** between a prospective juror and a party to the suit is such that a **reasonable person**

would expect the juror to be influenced by that relationship, the juror should be excused. That is the case regardless of whether actual subjective bias or impartiality can be demonstrated and even where it is denied from the subjective point of view of the individual prospective juror. Unless article 1765(3) is understood in this way, there would be no purpose to the provision, since a demonstration of actual bias would always prompt dismissal of the prospective juror pursuant to article 1765(2). Article 1765(3) utilizes an **objective test to determine whether a reasonable person would believe that the demonstrated relationship** is such that the **relationship** would influence the juror's verdict. The use of this objective reasonableness test is common in our law. ***See e.g., State v. Dumas***, (La. 5/4/2001), 786 So. 2d 80; ***State v. Gunn***, 319 So. 2d 407 (La. 1975); ***State v. Gunn***, 319 So. 2d 407 (La. 1975).

Not all relationships justify excusing a potential juror pursuant to Code Civ. P. art. 1765(3). The trial judge must examine the facts regarding the closeness and the nature of the relationship to determine whether a reasonable person would conclude that the prospective juror might be influenced by it. However, an immediate family member should never be allowed to sit on his or her relations' case. Such a close familial relationship is sufficient for any reasonable person to conclude that the juror's views might be influenced by that relationship. If we were to adopt the rationale suggested in the Court's Per Curiam, husbands and wives would be eligible to sit in judgment of their spouses' claims. All such potential jurors would have to do to survive a challenge for cause is to testify that they could be "fair" and refrain from saying anything that would prove actual bias.

The Per Curiam of the Court espouses the correct test under article

1765(3) when it considers Juror 10 and finds "ordinary experience suggests that as a mother, Juror No. 10's love for her children could influence her verdict." It also uses the correct test in dealing with the challenge to Juror No. 13 when it finds that even though the juror insists that she can be "fair", her love for her brother could influence her verdict. Regrettably, the Court does not apply the same test consistently to all of the challenged jurors. Had it done so, it would have excused the remaining jurors as well.

Juror Nos. 2, 5, 11, 12 and Alternate Juror No. 14 all have immediate family members who are eligible members of the defined class. They could not reasonably be expected to put aside their personal feelings and render a decision that is fair and impartial without regard to the health or welfare of their immediate family members. Just as in the case of Jurors No. 10 and alternate Juror No. 13, ordinary experience dictates that a mother, father, sister, brother, son or daughter's love would influence their verdicts. As to Jurors Nos. 5, 11, 12 and Alternate Juror No. 14, the Court errs primarily because it deviates into a subjective consideration of whether these particular jurors could overcome their familial relationships and be "fair." The majority concludes that there is no evidence that these Jurors would **actually** be influenced in making their decisions. This is the wrong standard. This inquiry might be relevant to a determination of whether the jurors should be disqualified for actual bias under 1765(2) but it is not determinative of whether a juror should be excused under article 1765(3). Moreover, even under the reasoning employed in the Per Curiam, the emphasis is on the wrong consideration. The Court deems it important that jurors doubt their family members would opt to participate in free medical monitoring if it were available, that the family members are already seen regularly by

a physician, or that the health problems of the family members are not related to smoking. The Court ignores the fact that if these jurors render a verdict adverse to the plaintiffs, their family members will forever be precluded from making the decision to participate in free medical monitoring for cancer. Thus, whether they believe that their close relatives actually will or should participate in such a program, they will nevertheless be placed in a position as jurors of deciding whether or not that option will be available. It is this dilemma, inherent in the immediate family tie, that calls into question the integrity of any verdict these jurors might render. It is just such a situation that article 1765(3) was designed to avoid by focusing on the nature of the relationship itself, rather than demanding evidence of actual bias.

Moreover, in my view, prospective Juror No. 11 and Alternate Juror No. 14 should have been excused under both article 1765(2) and (3). Juror No. 11 has a sister who is a current smoker with a long history of smoking. The prospective juror indicated that she thought her sister **should** get medical monitoring. Alternate Juror No. 14 indicated on initial voir dire questioning that he would like to see his father, who recently had a stroke, receive free medical monitoring. While he said he changed his mind on that issue in response to a subsequent question, in my view his initial answer indicated a clear preference that his father have the benefit of the remedy sought by the class. These jurors demonstrated lack of impartiality in their responses during voir dire examination by indicating that they would like their family members who currently smoke or who have smoked in the past to get the benefit of medical monitoring and/or programs designed to help smokers quit smoking. These jurors were due to be excused pursuant to both La. Code Civ. P. arts. 1765(2) and 1765(3).

For the reasons indicated, I respectfully concur in the result reached by a

plurality as to those jurors who have been excused. However, I dissent as to the other jurors at issue in this application who have not been excused.

.