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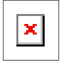

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Tobacco Jurors Related To Class Members Unseated Where Influence Suspected

Scott v. The American Tobacco Company,
01-CC-2498 (9/25/01), ___ So.2d ___

A divided Louisiana Supreme Court overruled the trial court's call as to seven out of twelve jurors and alternates finding that they should have been excluded for cause. The question was whether prospective jurors who had family members who were part of the class could be seated as jurors in this class action seeking medical monitoring for smokers and former smokers. The Louisiana Supreme Court in a per curiam opinion declined to adopt a bright line rule which would have automatically excluded jurors who had close relatives who were part of the class. Instead, the per curiam reasoned that the circumstances of each juror's situation had to be individually examined to determine whether it was reasonable to believe that the relative's claim would influence that juror in coming to a verdict.

The Court discussed each of the challenged jurors. In those instances where the juror's responses when taken as a whole indicated the juror might want close relatives to take advantage of medical monitoring, the Court found the juror should have been excluded. In those instances where there was no specific indication that the juror had a particular belief about the desirability of medical monitoring, the Court found the juror was correctly seated by the trial court, even though challenged by the defendants.

Five of the justices wrote their own opinions. Chief Justice Calogero concurred noting that in his opinion while jurors in a civil case should not sit where a close family member was asserting "a substantial monetary claim", the five jurors who had not been excused "do not have family members who are parties in this litigation, nor do they have close relatives with serious monetary ... interests at stake."

Justice Kimball concurred in the portion of the opinion refusing to set a bright line rule of exclusion for jurors who had family members who were part of the class. She dissented from the portion of the opinion which found that the trial judge had abused his discretion as to seven of the twelve challenged jurors. "Additionally, I do not believe it is the function of this Court to micro-manage the selection of a jury in this manner."

Justice Johnson picked up on the latter theme stating that she would have denied the writ application in the first place because it was up to trial judges to make determinations as to whether jurors can be fair.

Justice Victory concurred in that portion of the opinion excusing the seven jurors, but dissented from the portion of the opinion allowing the retention of the five other jurors. Justice Victory felt the per curiam fell into error by confusing the tests applicable to excusing jurors under two different subsections of article 1765 of the Code of Civil Procedure. He noted that while article 1765(2) requires dismissal of jurors who have a demonstrated subjective bias, article 1765(3) which addresses relationships of jurors to parties to the suit requires dismissal when the relationship is "such that a reasonable person would expect the juror to be influenced by that relationship...." In the latter instance, there is no necessity of proving an actual bias, and article 1765(3)'s test is an objective one. While not every relationship justifies excusing a potential juror under article 1765(3), "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." Justice Victory also thought it was irrelevant whether a juror doubted that family members would participate in a free medical monitoring program or had family members who were already being seen regularly by a physician or had health problems unrelated to smoking. Regardless of these factors, he felt it would be improper to ask these jurors to make decisions which might forever preclude family members from having the option of participating in free medical monitoring for cancer.

Similarly Justice Knoll concurred in the dismissal of the seven jurors but strongly dissented as to the remainder of the opinion. Using language bespeaking downright alarm she stated:

> In my view, it is an absurdity to allow an immediate family member to sit on the jury in a trial of another close family member when the challenge has been made to excuse this juror for cause based on this relationship. Common sense dictates this conclusion. Indeed, this basic rationale and conclusion is so fundamental to our jury system, it hardly needs explanation. The party litigants are entitled to be tried by a jury composed of their peers and not a jury composed of their close family members, lest we have a mockery of the trial by jury system.

The *Scott* case will now be sent back to the trial court for selection of new jurors and alternates to take the place of those excused in this opinion.

- *Madeleine Fischer*

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Duplicate Class Actions To Proceed In St. Bernard Parish?

Elfer v. Murphy Oil, U.S.A., Inc.,
2001-C-1058 (La.App. 4 Cir. 9/12/01)

The Fourth Circuit, acting upon a writ application, appears to be prepared to allow two class actions arising out of the same occurrence to proceed to trial. The case arises out of an explosion at the Murphy Oil refinery in Meraux, Louisiana. Several class actions were filed and later merged into a single case (*Andry*). The trial court certified a class and set a deadline for filing individual claim forms.

After the claim form deadline had passed 43 individual class members who had not filed forms filed a motion for an extension of the deadline which the trial court denied. In an attempted end run around this ruling these 43 individuals together with 58 additional people filed a new class action (*Elfer*) asserting the same cause of action as in the existing *Andry* class action.

The defendants filed a variety of exceptions. The trial court sustained exceptions of *lis pendens* and *res judicata*, dismissing class action number two. From this ruling, the plaintiffs in Elfer filed writs with the Fourth Circuit.

In a somewhat confusing decision, the Fourth Circuit held that the 43 individuals who had attempted to file claim forms late were precluded from filing the second class action on grounds of *lis pendens* and *res judicata*. However, the Fourth Circuit held that the second class action could proceed as to the 58 additional people who never even attempted to file claim forms in the original case.

The genesis of the Fourth Circuit's erroneous ruling is hinted at in the following sentence from the opinion: "It appears that the forty-three relators who attempted to become members of the *Andry* class are precluded from bringing their own action because of the doctrines of *lis pendens* and *res judicata*." In fact, the 43 individuals were already members of the class – they simply failed to file proofs of claim in a timely manner. All persons who failed to file claim forms (both the 43 and the 58) would have been more accurately characterized as class members who were not entitled to damages due to their failure

to comply with the binding orders of the trial court in the original *Andry* case.

A rehearing application will be filed. We will continue to keep our readers posted on this interesting class action case.

\- *Madeleine Fischer*

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Fifth Circuit Finds Pecan Harvesting Machine Defective

Ellis v. Weasler Engineering Inc.,
258 F.3d 326 (5th Cir. 2001)

The Fifth Circuit affirmed a jury verdict finding against the manufacturer of a pecan harvester machine where the plaintiff lost his arm when his clothes became entangled in the works of the machine. The plaintiff, Ellis, was using the machine to pick up fallen pecans when the machine began to malfunction. Leaving the machine running, Ellis walked around it to see why it was not properly working. Some part of the loose clothing he was wearing became caught in the spinning drive shaft and pulled his body into the machine traumatically amputating his arm at the shoulder.

The opinion decided under the Louisiana Product Liability Act was written by former Louisiana Supreme Court Justice Dennis. The court framed the issue as whether the use of the machine by Ellis was a reasonably anticipated use. The defendant argued that the addition of a large bolt on the drive shaft by the machine's owner was an alteration of the machine which made its use by Ellis an unanticipated one. The court rejected this argument stating that Ellis was using the machine for its intended purpose of picking up pecans, that his inspection of the machine while the machine was running was standard procedure, and that the alteration of the product by the addition of the large bolt was neither unreasonable nor unforeseeable by the manufacturer. The court also affirmed the jury's holding that Ellis's consumption of alcohol prior to operating the pecan harvester was negligent but not a cause of the accident.

\- *Madeleine Fischer*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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