Winning Challenges for Cause:
Hall v. Banc A New View Towards Conducting *Voir Dire*

"Armed with the holding that 'good cause for challenges' as identified in R.C.§§2313.42(A)-(I) are now non-rebuttable presumptive disqualifications... Plaintiffs' attorneys have opened before them a vast new array of paths and opportunities to have biased jurors removed."

I. INTRODUCTION

Prior to *Hall v. Banc One Mgt Corp.,* [1] the judge was the undisputed master and final arbiter of the decision whether a prospective juror's response to a question gave rise to a viable cause challenge under R.C.§2313.42. With the *Hall* decision, that legal landscape may well have changed, and the new view reveals a land of great opportunity. We are all too familiar with this scene: a prospective juror clearly expresses doubts about his/her ability to be fair given a relationship, connection or some other interest with a defendant, only to be subsequently questioned (and some might even say goaded or prodded) into acknowledging to the court that in fact s/he *will* be able to set aside those feelings and "be fair and impartial." The trial court, in an act of judicial discretion, finds the latter comment credible and, to the chagrin of plaintiff's counsel, seats the juror. To a significant degree, *Hall* has now removed that subjective, discretionary determination by the trial judge and replaced it with a limited, focused and objective inquiry restricted to verifying the facts supporting many cause challenges. Once verified, disqualification is now automatic, there is no discretion allowed.

In the next four sections, this article will analyze both R.C.§2313.42 and the *Hall* case to provide an overview of the role that judicial discretion has played in relation to cause challenges during voir dire. The holding of *Hall* and its severe limitations on judicial discretion in the voir dire process will be discussed in detail. Then, in Section VI, armed with an understanding of the *Hall* decision, it will be suggested how we might creatively utilize voir dire to expand our abilities to remove unfavorable jurors pursuant to the "good cause" challenges listed in R. C. 2313.42 (A)-(I), without fear of the juror being "rehabilitated" and restored to the panel through an act of judicial discretion.

II. *HALL V. BANC ONE MGT CORP.*

The case of *Hall v. Banc One Mgt Corp.,* [2] is the Ohio Supreme Court's most recent pronouncement on a trial court's power to deny a statutory challenge for cause against a prospective juror pursuant to R.C. §2313.42. This is not an area that the Court visits often, the last time being 16 years ago in *Berk v. Matthews.*[3] The lack of case law in the area of voir dire challenges for cause has allowed trial courts, under the exercise of long-acknowledged and near-unlimited judicial discretion, to undo our best efforts to successfully challenge and remove biased jurors by "rehabilitating" them through brief judicial questioning designed to elicit in the juror's acknowledgment that s/he can be "fair and impartial." The trial court then, in a further act of discretion, makes a subjective assessment that the juror's last comment is to be believed and overrules the challenge. In *Hall*, the Supreme Court gave trial lawyers a rare gift in removing from the court's exercise of discretion all those "good cause" challenges set forth in R.C. §§2314.43 (A)-(I). While we might agree that *Hall* does not go far enough, as it still interprets R.C.

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§2314.43 (J) as a general judicial discretion provision that allows for the court's subjective assessment as to whether a juror cannot be fair and impartial or will not follow the law as given,[4] it is the better view that the new restrictions on judicial discretion as to the other nine statutory categories for cause provide new pathways and opportunities for securing the jury members we desire.

III. THE FACTS OF *HALL*

Anne Hall sued her former employer Banc One Corporation for age and sex discrimination and retaliation. After granting the Defendant's motions for summary judgment on the age discrimination and retaliation claims, Ms. Hall proceeded to trial on the claim of sex discrimination. At trial, Hall's attorney questioned a prospective juror concerning his relationship with the Defendant, Banc One. The prospective juror offered that the Defendant currently employed both his two sons. Plaintiff moved to exclude of this juror for cause based on R.C. §2313.42(E), which allows a "good cause" challenge against any prospective juror whose child is employed by a party in the case.

Rather than grant the challenge, the judge permitted further questioning. The prospective juror then revealed that additionally, his daughter had worked at Banc One, although her position had been terminated due to economic reasons for which the juror held no ill will. The juror maintained he felt no loyalty to Banc One as a result of his sons' current employment, and claimed he could still be fair to both sides. The trial judge then denied Hall's challenge for cause, stating, in a subjective act of judicial discretion, that he believed the prospective juror could be fair.

The jury returned a defense verdict in favor of Banc One. The Plaintiff appealed to the 10th District Court of Appeals, citing the refusal of the trial court to remove this juror for cause in accordance with the statute. The appellate court denied Hall's appeal stating that it was *not* an abuse of discretion to deny the challenge for cause. The Ohio Supreme Court, in an 8-1 decision, reversed and remanded the case to the trial court, holding that the Plaintiff's statutory challenge for cause should have been granted.

IV. OHIO REVISED CODE §2313.42

The Ohio Supreme Court's decision is based on the language of R.C.§2313.42, and, because the decision is anchored in principles of statutory construction, a review of the entire statute is in order. The statutory language of special interest for this article is emphasized:

> **Causes for challenge of persons called as jurors; examination under oath**
>
> Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. A person is qualified to serve as a juror if he is an elector of the county and has been certified by the board of elections pursuant to section 2313.06 of the Revised Code. A person also is qualified to serve as a juror if he is eighteen years of age or older, is a resident of the county, would be an elector if he were registered to vote, regardless of whether he actually is registered to vote, and has been certified by the registrar of motor vehicles pursuant to section 2313.06 of the Revised Code or otherwise as having a valid and current driver's or commercial driver's license.
>
> The following **are good causes for challenge** to any person called as a juror:
>
> (A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;
>
> **(B) That he has an interest in the cause;**
>
> (C) That he has an action pending between him and either party;
>
> (D) That he formerly was a juror in the same cause;
>
> (**E) That he 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**;
>
> (F) That he is subpoenaed in good faith as a witness in the cause;
>
> (G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;
>
> (H) That he or his 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 him;
>
> (I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months;
>
> **(J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.Each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court.**

V. THE *HALL* COURT'S REASONING: CURTAILING JUDICIAL DISCRETION

The issue presented in *Hall*, as the Court understood it, was whether a trial court, while empaneling a jury, may exercise discretion to deny a statutory challenge that the legislature has stated constitutes "good cause" to excuse a prospective juror. Justice O' Donnell, writing for the majority, held that the court does *not* have discretion when ruling on a challenge for cause pursuant to R.C. §§2313.42 (A-I). Those challenges, as the language of the statute states, are presumed to be "good causes for challenge," and, therefore, the trial court's inquiry (and hence, its discretion), is limited only to establishing the factual validity or "truth" of the challenge. Significantly, this determination is held to be an "objective" one and the

trial court may *not* attempt to rehabilitate the prospective juror, such as was done in the *Hall* case, by seeking a declaration from the juror that he could still be fair and impartial. If there are verified facts that support a statutory challenge then the court *must* grant the challenge as an "absolute disqualification" warranting removal of the prospective juror.

In the case before the Court, once the trial court had verified that the prospective juror's children were employees of the Defendant Banc One, the disqualification of that juror was established per R.C.§2313.42 (E), and the court had no discretion to either allow "rehabilitation" of the juror or deny the cause challenge.

To arrive at its holding that all the challenges listed in subsection (A)- (I) are situations where bias is presumed *as a matter of law*, the Court applied basic statutory construction, noting that "we are bound by the language enacted by the General Assembly, and it is our duty to give effect to the words used in a statute."[5] Because the Court was "neither [free] to disregard or delete portions of the statute through interpretation, nor to insert language not present," there was no interpretation necessary of the statute's explicit mandate that "[t]he following **are good causes** for challenges....."[6] Calling specific attention to the word "good" as evidence of legislative intent that the listed challenges are valid challenges and presumed to be evidence of bias, the Court held that these challenges for cause are to be *objectively* considered by the trial court.[7] "[T]hey do not involve *any* subjective analysis regarding fairness or impartiality, . . ." (Emphasis added).[8]

The Court also observed that this interpretation was consistent with the common law, noting that "[t]he legislature has incorporated historic principal challenges into R.C. 2313.42(A) through (I)." Common law's mandatory "principal challenges" (the same language used in R.C.§2313.42), which resulted in absolute juror disqualification, were compared to and distinguished from challenges "for favor," which allowed for the exercise of judicial discretion to assess actual bias. The *Hall* Court ruled that *only* subsection (J) of R.C.§2313.42 allowed for such judicial discretion.[9]

In holding that subsection (J) is the sole provision allowing for any judicial discretion, the *Hall* Court was clearly reluctant to remove all judicial discretion from the voir dire process. In slightly strained reasoning, the *Hall* Court found that "[t]he legislature's incorporation of Division (J) into R.C. 2313.42 appears to be misplaced,"[10] forcing the conclusion that "[r]egardless of the placement by the General Assembly...", subsection (J) is not a "good cause" challenge in spite of the statutory language to the contrary. For that subsection alone, a subjective standard exists to permit the trial court's exercise of judicial discretion in assessing a juror's ability to be fair and impartial.

In holding that subsection (J) permits the exercise of judicial discretion to determine if cause is present, the court affirmed its holding in *Berk v. Matthews*.[11] Until the *Hall* decision, the statute listing "good causes for challenge," had been mostly interpreted to allow a trial court blanket discretion in assessing whether a juror may be seated when any one of the principal cause challenges was made. That expansive application of judicial discretion found its support in *Berk,* where the holding within the body of the opinion[12] clearly stated: "We therefore hold that the determination of whether a prospective juror should be disqualified for cause is a discretionary function of the trial court. Such determination will not be reversed on appeal absent an abuse of discretion."[13] Thus, prior to *Hall*, the allowance of judicial discretion to assess whether to excuse a juror for cause was *not* expressly limited to R.C. 2313.42(J) alone.[14]

The *Berk* case involved a collision between the plaintiff who was jogging in the street and the defendant motorist. The juror, when questioned about her views on persons who jog in the street, candidly answered that persons who run in the street all "bother her" and that she would have trouble *not* being prejudiced against the plaintiff based on those feelings. A challenge for cause was raised based on the prospective juror's admitted bias. The trial court allowed for rehabilitative questioning, and the juror subsequently stated that she could be fair and impartial. The trial court, in an act of judicial discretion, then denied a challenge for cause pursuant to R.C.§2313.42 (J).[15] The Supreme Court upheld the actions of the *Berk* trial court.

Hall now clarifies that the holding of *Berk* is confined *solely* to challenges brought pursuant to R.C.§2313.42 (J).

VI. THE PRACTICAL USE OF *HALL*: A NEW VIEW OF THE VOIR DIRE

Armed with the holding that "good cause for challenges," as identified in R.C.§§2313.42(A)-(I), are now non-rebuttable *presumptive* disqualifications for prospective jurors who fall within their parameters, Plaintiffs' attorneys have opened before them a vast new array of paths and opportunities to have biased jurors removed. Our challenge will be to be creative in drafting our voir dire questions in order to elicit statements from prospective jurors that fall within one of the "good cause" challenges. This will require a fresh look at those categories, encouraged by *Hall*'s caveat that, once a prospective juror's response falls within R.C.§2313.42 (A)-(I), the judge has no discretion and must remove the juror. A couple of examples as to how the *Hall* decision can be useful are worth exploring.

Consider R.C.§2313.42 (B), which addresses the "good cause" challenge for a juror who has an "interest in the cause." It is significant that the term "interest" is not defined in the statute and, as such, it does not denote a legal term of art. It is, therefore, appropriate to look at the definition of "interest" in Black's Law Dictionary, which defines "interest" most generally, beginning with the recognition that an "interest" can be "[t]he object of *any* human desire, especially the advantage or profit of a financial nature," noting further that "[c]ollectively the word includes *any* aggregation of rights, privileges and powers, and immunities," and then proceeds to identify a vast category of legal "interests," including equitable interests, insurable interests, financial interests, restitution interests, reliance interests, working interests, and a host of others.[16]

Not surprisingly, in the context of cause challenges, courts have taken an similarly expansive definition of "interest," often times equating it with merely "a connection." In the longstanding case of *Dowd-Feder v. Truesdell,*[17] the trial court permitted questioning of prospective jurors concerning their interests with a casualty insurance company. When discussing the issue, the Supreme Court used the term expansively and generi-

cally in terms of the juror having "any connection with or interest in" the casualty company.[18] Significantly, under *Hall*, a prospective juror who now admits to having any "interest" in a cause, regardless of how attenuated or minuscule, and arguably regardless of the nature of that "interest," can now be removed for "good cause" as the challenge is to be applied objectively, without qualification. Before *Hall*, a judge or defense counsel, would press to rehabilitate such a juror and attempt to demonstrate how the lack of any substantial or substantive "interest" would not or could not possibly prevent the juror from being fair or impartial. Under *Hall*, such questioning should now invoke a sustainable objection by plaintiff's counsel.

Moreover, the *Dowd* Court's broad synonymous association of the word "interest" to "connection with" permits creative lawyering in developing voir dire questions to identify a prospective juror's "connections" with any number of areas of "interest" relating to the defendants. Here again, the point to be stressed is that *Hall* mandates that once an "interest" is established as existing, regardless of the nature of that interest, it becomes an objective basis for removal. The judge does not have any subjective discretion to inquire beyond the establishment of the "interest" itself.

While we can probably anticipate litigation down the road as to how broad a definition is to be applied to the term "interest," we presently have *carte blanche* and need to take advantage of this opportunity. To make the most of this chance, we need look beyond the broad definitional horizons to case law to identify the many ways that courts have identified "interests."[19]

For example, case law informs that an "interest" can be understood to include a "personal" interest. In *McGarry v, Horlacher*[20] the Montgomery County Court of Appeals for the Second District found it reversible error for a trial court to deny a challenge for cause when a prospective juror was a current patient of the defendant doctor, and had been treated by him for an abdominal mass, a medical condition similar to the plaintiff's. Although it was not clear upon which basis the challenge for cause was raised, the case holding indicates the trial court had abused its discretion in refusing to excuse the juror for cause, "notwithstanding her somewhat qualified statements that she believed she could be fair and impartial." [21] The holding clearly delineates what the court considered to be personal interests under *Hall* and *Dowd*, which should now be a basis for a presumptive disqualification. Indicating that they were "unpersuaded" that the juror "could have totally put aside her own physician-patient relationship with [the defendant]," the *McGarry* Court held that "it is axiomatic that McGarry was entitled to jurors who were free from *personal relationships* with [the defendant]," noting "we are somewhat baffled by the trial court's determination not to excuse Lindsay for cause in light of the information presented during voir dire about her relationship with [the defendant]"(emphasis added). [22]

So not only is the term "interest" in R. C. § 2313.42 (B) worthy of exploration and expansion, but so is the term "cause." This is certainly a much broader term than the term "case" and should be used to its full effect.

McGarry also makes clear that the significance of *Hall*'s limitations on judicial discretion will carry over to cases where a plaintiff, in order to prevail on appeal, had to previously overstep that most difficult high hurdle of demonstrating that the trial court had abused his/her discretion. The term "abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable." [23] Arguing that a trial court's conduct fit that uncomplimentary definition has always been a difficult task, not made any easier by having to convince the appellate court panel that the juror's protests of unfairness and partiality to the contrary were unworthy of belief. Under *Hall*, to prevail on appeal, one now merely needs to demonstrate that the juror's responses fall within one of the "good cause challenges."

Another area where the legal landscape can be traveled anew after *Hall* is municipal liability. In the past, the Ohio Supreme Court has held that a juror's status as a taxpayer would *not* disqualify him as a juror in a case where the defendant was the city in which the prospective juror paid taxes. *Maddex v. Columber* [24] was a case decided under the statute that was the precursor to R.C.§ 2313.42 (B), but like its successor, dealt with the cause challenge that addressed a juror's "interest in the cause." In *Maddex*, the trial court denied a challenge for cause, believing the juror's statements that, despite being a taxpayer and recognizing that his taxes could arguably increase with a verdict against the defendant city, he could be fair. The trial court exercised its subjective discretion when deciding that, despite the juror's minimal financial "interest" in the outcome of the case, the juror could still be seated. After *Hall,* a challenge to a juror's "interest in the cause" is an objective assessment and must only be verified by the court before removal becomes mandatory. The trial court is no longer permitted to weigh the validity of the interest. Under *Hall*, *Maddex* might well have been decided in favor of the plaintiff.[25]

The above examples must only be the beginning of this process of retooling and re-thinking our approach to voir dire.

VII. CONCLUSION: THE LESSONS OF *HALL*

The *Hall* decision challenges us, as plaintiff's lawyers, to creatively engage prospective jurors with questions designed to elicit information as to any connection or interests, personal, professional, financial or otherwise, that the juror might conceivably have to any defendant. Under *Hall*, the mere establishing of *any* "interest" invokes the objective "good cause for challenge." No longer should the court *or defense counsel* be permitted to rehabilitate a tainted juror with questions designed to demonstrate that the juror's interest is either so insubstantial, so lacking in weight, or so indirect so as to *not* raise a serious question as to the juror's bias in the first instance, or that the a subsequent admission that s/he can be fair and impartial may be believed by the trial court and support a denial of a "good cause" challenge.

By developing voir dire questions that call for responses specific enough to fall within the rubric of R.C.§§2313.42(A)-(I)'s categories, counsel can avoid the frustration of identifying problem jurors only to have them rehabilitated

through the court's judicial discretion. Whenever possible, the challenge for cause should be raised pursuant to R.C.§§2313.42(A)-(I), as it is only subsection (J) that permits the trial court to rehabilitate a juror challenged for cause. Should the court or defense counsel seek to rehabilitate a "good cause" challenged juror through subsequent questioning, counsel should object and preserve the issue for appeal.

By viewing the legal landscape of "interests" through a broad lens, there are new areas of questioning available to successfully challenge jurors and lead to the successful prosecution of cases.

Finally, we must always be mindful that, in order to preserve a denial of a cause challenge for appellate review, you *must* use all your peremptory challenges.[26]

1. 114 Ohio St. 3d 484, 2007 Ohio 4640.

2. *Id*.

3. 53 Ohio St. 3d 161 (1990).

4. It is highly unlikely that the complete elimination of judicial discretion from the voir dire process would be permitted either by the Legislature or higher courts. The Supreme Court has acknowledged the "traditionally broad discretion accorded to the trial judge in conducting voir dire." *Mu'min v. Virginia* (1991), 500 U.S. 415, 423 (quoting *Ham v. South Carolina*, 409 U.S. 524, 528 (1973)).

5. *Hall*, 114 Ohio St. 3d at 487, (citing to *State v. White*, 103 Ohio St.3d 580, 2004 Ohio 5989 at P 14; *see*, *also*, *State v. Cress*, 112 Ohio St.3d 72, 2006 Ohio 6501 at P 38.)

6. *Id*.

7. *Id*. at 489.

8. *Id*. at 489-490.

9. *Id*. at 487-488. R.C.2313.41(J), allows for removal for cause of any juror "That [] discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court."

10. *Id*. at 490. The Court reasoned that Division (J) of R.C.§2313.42 was not part of the common law, nor was it included in an earlier version of this statute, G.C.§11437.

11. (1990) 53 Ohio St. 3d 161

12. As the *Hall* majority pointed out, the Berk syllabus had specifically limited the analysis to subsection (J). Id., at 490. It is established law in Ohio that a Supreme Court syllabus states the law of the case. *Cassidy v. Glossip* (1967), 12 Ohio St.2d 17.

13. *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, 169.

14. This was precisely the argument that Justice Lanzinger, as the sole dissenter in *Hall* made. *See Hall*, *id* at 190.

15. Arguably, had the *Hall* court held that subsection (J) was to interpreted 'objectively ' rather than 'subjectively ' the initial admission by the prospective juror that she was biased against joggers might have been sustainable as a challenge for "good cause" not subject to rehabilitative questioning. However, as suggested, the complete removal of judicial discretion from the voir dire process was highly unlikely. *Mu'min v. Virginia*, 500 U.S. 415, 423 (1991).

16. *See*, Black 's Law Dictionary, (8th Edition 2004), West Publishing. (Emphasis added).

17. (1936) 130 Ohio St.530 the Court

18. *Dowd*, syllabus 2.

19. It is suggested that the scope of the legal landscape not be confined to cases of 'juror' challenges. Rather, any case that identifies any "interest" is arguably fair game for inclusion in a "good cause challenge."

20. (2002), 149 Ohio App. 3d 33

21. *Id*. at 39.

22. *Id*.

23. *Berk v. Matthews* (1990), 53 Ohio St. 3d 161 syllabus; also *Id*., at 169.

24.(1926), 114 Ohio St.178

26. *McGarry v. Horlacher* (2002), 149 Ohio App. 3d 33, 2002 Ohio 3161, *State v. Getsy*, 84 Ohio St.3d 180, 191, 1998 Ohio 533. Similarly, the Ohio Supreme Court has recognized that a party is prejudiced when a challenge for cause is overruled with no peremptory challenges remaining See also *State v. Williams* (1997), 79 Ohio St. 3d 1. (The erroneous denial of a challenge for cause may be prejudicial because it forces a party to use a peremptory challenge on a prospective juror who should have been excused for cause, giving that party fewer peremptories than the law provides.); *State v. Berry* (1971), 25 Ohio St. 2d 255, 261

It should be noted, however, that "peremptory challenges are a creature of statute and are not required by the Constitution," and thus, one has only a right to receive "that which state law provides." *Ross v. Oklahoma* (1988), 487 U.S. 81, 89. OT

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