

**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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**COMPLETE TITLE OF CASE**

ELAINE KHOURY and ALEX KHOURY,

Appellants,

v.

CONAGRA FOODS, INC.,

Respondent.

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**DOCKET NUMBER WD73084**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** March 6, 2012

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**APPEAL FROM**

The Circuit Court of Jackson County, Missouri  
The Honorable Jack R. Grate, Jr., Judge

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**JUDGES**

Division Two: Witt, P.J., and Ellis and Pfeiffer, JJ.

CONCURRING.

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**ATTORNEYS**

Kenneth B. McClain, Independence, MO

Susan Ford Robertson, Kansas City, MO

Attorneys for Appellants,

Stephen Torline, William Lynch, and Ryan Watson, Kansas City, MO

Jerry W. Blackwell, Corey L. Gordon, and Elizabeth J. Citurs, Minneapolis, MN

Attorneys for Respondent.

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## MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

ELAINE KHOURY and ALEX KHOURY, )  
)  
) **Appellants,** )  
v. ) **OPINION FILED:**  
) **March 6, 2012**  
CONAGRA FOODS, INC., )  
)  
) **Respondent.** )

**WD73084**

**Jackson County**

**Before Division Two Judges:** Gary D. Witt, Presiding Judge, and Joseph M. Ellis and Mark D. Pfeiffer, Judges

Elaine and Alex Khoury appeal from the trial court's judgment upon a jury verdict in favor of ConAgra Foods, Inc., on the Khourys' personal injury claim for damages. The Khourys claim, first, that the trial court erred in restricting or refusing certain rebuttal evidence they offered at trial; and, second, that the trial court erred in removing a juror and replacing him with an alternate juror after the jury was empanelled but before any evidence in the trial was presented.

**AFFIRMED.**

### **Division Two holds:**

1. Because the central issue in this case was the *cause* of Mrs. Khoury's disease, and both parties presented evidence of causation during their cases-in-chief, the trial court did not abuse its discretion in refusing to admit Mrs. Khoury's treating physician's cumulative causation testimony as rebuttal evidence because: (i) it was not injecting a response to a new issue raised by the defendant's case-in-chief; and (ii) it was cumulative evidence that was available to the Khourys at the time of their case-in-chief and could and should have been presented at that time.

2. The Khourys presented evidence during their case-in-chief regarding popcorn purchases. The trial court did not abuse its discretion in refusing to allow Mrs. Khoury to testify in rebuttal as to cancelled checks allegedly representing evidence of other popcorn purchases. Mrs. Khoury

testified during their case-in-chief, and any testimony by Mrs. Khoury regarding popcorn purchases was available and should have been offered then.

3. The trial court did not abuse its discretion in excluding certain rebuttal product defect and causation testimony and exhibits of one of the Khourys' experts, which was offered to refute certain testimony and exhibits of ConAgra's expert. The trial court has discretion to refuse admission of rebuttal evidence that merely contradicts the adverse party's evidence.

4. The trial court has the discretion to determine whether a juror is unable or disqualified to serve and to substitute an alternate juror for a regular juror during trial. Replacement of a juror with an alternate is an appropriate remedy when there is a *possibility* of juror bias. Even if a juror reaffirms his ability to be impartial upon questioning by the trial court, the trial court is in the best position to determine whether a juror will be able to effectively discharge his duties.

5. ConAgra's motion to strike a juror on the grounds of juror nondisclosure after the jury was empanelled was neither untimely nor prejudicial to the Khourys. An objection to a juror's alleged intentional nondisclosure of material information in voir dire is timely if such challenge is made before submission of the case.

**Opinion by: Mark D. Pfeiffer, Judge**

March 6, 2012

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