

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

No. 32968

MARK MIKESINOVICH, individually
and as Executor of the Estate of Mary
Mikesinovich,

Appellant
and Plaintiff Below

v.

REYNOLDS MEMORIAL HOSPITAL,

Appellee
and Defendant Below

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

PLAINTIFF'S INITIAL BRIEF

FROM AN ORDER DENYING A MOTION
FOR A NEW TRIAL

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INTRODUCTION

The question raised herein is simply this: does a party have a right to try his case to a fair and unbiased jury? In this medical/nursing negligence case, the trial court erred by refusing to strike five jurors for cause who, in their responses to a juror questionnaire and *voir dire* questioning, expressed clear, disqualifying biases. Perhaps nothing illustrates this point better than the contemporaneous observations about the jury panel expressed by the Honorable Mark A. Karl, the trial judge overseeing jury selection. As Judge Karl recognized part of the way through jury selection:

... We may not get a jury seated. If the challenges persist, and I understand that's your right, but I'm just saying, I know what the rest of these answers [to the jury questionnaire] are in this stack, and we're going to have it for the rest of the afternoon...

...

I'll take [the plaintiff's motions to strike] under advisement and see where we get with the rest of the jurors. I just want everybody to be on the heads up that we may not get a jury.

The climate that we have here, if you look at these answers that people say, they think that lawsuits have driven up health care costs. They think they've driven doctors out of area.

The publicity that the physicians got from their white coat day at legislature, the days that they went on strike, they got the jump when they came out on the attack here. I think they've done good PR work with the public.

I know the argument that insurance premiums went up because companies lost money in the stock market. That's hard to explain to the average juror who doesn't do this every day, like we do.

We'll plod on and see where we get.

See Trial Tr. at 170, 172. In an effort to seat a jury from this clearly biased panel, Judge Karl erred by denying the plaintiff's motion to strike five jurors who were disqualified as a matter of law under the principles announced in Syl. Pt. 5, O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d

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407 (2002) and Rine v. Irisari, 187 W. Va. 550, 555-56, 420 S.E.2d 541, 546-47 (1992). For

example:

- One of the jurors seated over the plaintiff's objection was Shelly Tuskey. During *voir dire*, Ms. Tuskey stated that it was her belief that among the many doctors "driven . . . out of practice and [into] retirement" by medical malpractice cases was her personal doctor of over 30 years. Ms. Tuskey admitted that she was "devastated" by the loss of her private physician and agreed that she was surprised by the allegations against him "[b]ecause of the character of him as a doctor." See Trial Tr. at 49-50. Not surprisingly, Ms. Tuskey became the foreperson of the jury that returned a verdict in the defendant's favor in just 43 minutes.
- Another one of the jurors seated over the plaintiff's objection was Dana Ullom. Mr. Ullom admitted that his own life experiences would probably prevent him from returning an award for certain types of damages even if instructed to consider those damages by the court. See Trial Tr. at 148.
- Another one of the jurors seated over the plaintiff's objection was Karen McDiffit. Ms. McDiffit told the court and the parties, that her daughter had previously been sued by plaintiff's counsel. Although she stated that she presently harbored no ill-feelings, she admitted to having been "angry" and "upset" because she thought the undersigned firm was representing a client falsely claiming to be hurt. See Trial Tr. at 248-50. *Even if Ms. McDiffit disavowed any continuing ill-will, it is impossible to see how the plaintiff could have had any credibility with Ms. McDiffit under these extraordinary circumstances.*
- Another one of the jurors seated over the plaintiff's objection was Carl Anderson. Mr. Anderson, a former employee of the defendant, admitted in *voir dire* that he believed that "the [medical malpractice] crisis that was in the papers" contributed to rising health care costs and stated that he would be concerned that if he returned a verdict against the defendant, he would be contributing to that problem. When asked if he could set aside this bias, he was simply unable to say that he could. See Trial Tr. at 159-64.
- The final juror seated over the plaintiff's objection was David West. At the time of the trial, Mr. West's wife had worked as a nurse for the defendant for the last 23 years. In fact, the very first thing Mr. West did upon receiving his jury questionnaire was show it to his wife to see if she knew any of the nurses whose conduct was at issue in the litigation. See Trial Tr. at 173-75. *Essentially, this amounts to an entirely improper ex parte communication about the case with an employee of the defendant.*

The trial court also erred by refusing to grant the plaintiff's motion for judgment as a matter of law. The liability issue at trial was straightforward: Did the nurse involved take

reasonable steps to ensure her patient's safety in moving her patient from a chair to a wheelchair? It was undisputed at trial that the nurse involved violated her own hospital's policies for lifting and moving patients by refusing to ask for assistance and, further, by grabbing the patient's coat sleeve instead of securing and supporting the patient's body. The nurse, in fact, admitted to violating these policies. The trial court's refusal to grant judgment as to liability in the plaintiff's favor under these facts constituted error.

The third assignment of error relates to a nurse's note that was withheld and later returned by the patient's son. The court erroneously permitted the son to be cross examined concerning this incident even though it bore absolutely no relevance to any of the issues in this case. This questioning left the false impression that the son was a "thief" who wanted to profit from his mother's misfortune. The court should have granted a new trial for this evidentiary error.

STATEMENT OF FACTS

On January 24, 2001, Nurse Elizabeth Tagg dropped Mary Mikesinovich while Mrs. Mikesinovich was a patient at Reynolds Memorial Hospital, Inc. ("Reynolds") causing her to suffer a broken hip and substantial pain and medical treatment. Mrs. Mikesinovich filed a lawsuit as a result of Reynolds' conduct. However, she did not live long enough to be able to have her day in court. Twenty-two months later, Mrs. Mikesinovich was dead and this case continued to be prosecuted by her son, Mark. Reynolds' own policies and procedures for lifting and moving of patients states, "More than one person may be necessary to assist patient. Always obtain as much help as needed to provide for [the] safety of the patient." See Plaintiff's Exhibit No. 21 (Reynolds' Policies and Procedures for Lifting and Moving Patients),

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at 1.¹ It was undisputed that Nurse Tagg attempted to transfer Mary Mikesinovich without asking for assistance from any one of the several other nurses available to help her that day.

That same policy states unambiguously that when assisting a patient to walk, a nurse must hold a "patient firmly around the waist [and] assist [her] to [a] standing position." The nurse must then "[h]ave [the] patient put [her] arm around [the nurse's] waist and support [her] firmly across the shoulders while walking." Id., at 3. It was also undisputed that Nurse Tagg violated this policy by merely holding onto Mary Mikesinovich's coat sleeve while trying to help her stand and walk to the wheelchair. As a result of these (and other) clear deviations from the standards of care, Nurse Tagg dropped Mary Mikesinovich and broke Mrs. Mikesinovich's right hip.

The facts may be briefly summarized: Mrs. Mikesinovich went to Reynolds for an excision of a mass in her right breast. She was 86 years old at the time. Prior to the procedure, Mary received Versed and Fenalyl and went under MAC anesthesia for the duration of the surgery. Following the procedure, Mary was then taken to the Reynolds' outpatient surgery department under the care of Nurse Tagg. Nurse Tagg and Darlene Gillingham, another nurse in Reynolds' outpatient surgery department, walked Mrs. Mikesinovich to the bathroom. Nurse Tagg was on one side of Mrs. Mikesinovich and Nurse Gillingham was on the other side, grasping Mary firmly around the waist as she was required to do by Reynolds' own policies and procedures.

After walking Mrs. Mikesinovich to the bathroom, Nurse Tagg dressed Mrs. Mikesinovich because of the patient's condition including her belief that Mrs. Mikesinovich might be "light headed" after her anesthesia.

¹ Reference is made to the plaintiff's trial exhibits which were marked, bound in a three ring binder and made a part of the record.

Once Mary was dressed, Nurse Tagg attempted to transfer Mary to a wheelchair for discharge to home. In spite of concerns just minutes prior, Nurse Tagg, in violation of Reynolds' policies, transferred Mrs. Mikesinovich to the wheelchair without help even though at least two other nurses were available in outpatient surgery to assist with the transfer. Nurse Tagg further violated Reynolds' policies and the standards of care by holding onto Mary's coat sleeve instead of grasping Mary firmly around the waist or shoulders as she was required to do.

As a result of Nurse Tagg's negligence, Mrs. Mikesinovich struck the ground and broke her hip. As a result of her injuries, Mary Mikesinovich was taken by ambulance to Wheeling Hospital where she underwent emergency surgery on her broken hip. She was transferred to the Hospital's Skilled Care Unit where she was treated for two weeks before being sent to Wheeling Hospital's Continuous Care Center for additional treatment. Before her fall, Mary was an energetic and vibrant member of her community, who drove her own car, attended church, and participated in bingo. Following her fall, she was a virtual shut-in, unable to care for herself in the most routine aspects of daily life.

Mary Mikesinovich and her son, Mark, brought this action against the defendant, Reynolds, alleging that it was liable for the negligence of its employee, Nurse Tagg. Mary died 22 months later and Mark Mikesinovich, Mary's son and executor, was substituted as plaintiff in her stead.

Because the defendant offered next to nothing to settle the case, the matter proceeded to trial on July 19, 2004. The jury venire was given questionnaires in advance of trial. The responses provided in these questionnaires reflected a substantial amount of bias. The plaintiff moved to strike multiple jurors based upon the written responses in the questionnaires and the responses given by them as part of the oral *voir dire*. In the case of five jurors, i.e., jurors Tuskey, Ullom, Anderson, West and McDiffit, the plaintiff's respective motions to strike were

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denied. These five jurors were opposed to certain categories of damages and/or expressed strong views concerning the medical malpractice "crisis." Judge Karl candidly acknowledged the "climate" in the Northern Panhandle against medical malpractice plaintiffs which was brought about by "good PR work" by the insurance companies. Accordingly, he struggled to seat a jury, noting at one point that "if the challenges persist,...we may not get a jury." Trial Tr. at 170, 172. As discussed below, in his effort to seat a full panel of jurors, Judge Karl unfortunately failed to strike jurors who should have been disqualified.

Following jury selection, the case proceeded to trial. The plaintiff moved, pursuant to Rule 50, for judgment as a matter of law in light of the undisputed nature of Nurse Tagg's deviations from Reynolds' own policies and procedures and the standard of care. The plaintiff's motion was denied. At the close of the evidence, the jury retired and returned a verdict in Reynolds' favor. The plaintiff then brought a motion for a new trial. Upon briefing and oral argument, the court entered an order dated May 23, 2005 denying the plaintiff's motion. This appeal followed.

STATEMENT OF ISSUES

Whether the trial court erred by refusing to strike Jurors Tuskey, Ullom, Anderson, West and McDuffit, for cause, when their responses to a written questionnaire and *voir dire* questioning indicated the presence of disqualifying bias?

Whether the trial court erred by refusing to grant the plaintiff's motion for judgment as a matter of law in the face of undisputed evidence that Nurse Tagg violated the standard of care, as articulated by the hospital's specific policies for lifting and moving patients?

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Whether the trial court erred by overruling the plaintiff's objection to evidence that Mary Mikesinovich's son, Mark, withheld and later returned a nurse's note where the incident had no relevance to the issues presented and was clearly and profoundly prejudicial to the plaintiff's case?

STANDARD OF REVIEW

The first assignment of error relates to the trial court's refusal to strike jurors for cause. The appropriate standard of review is abuse of discretion: "We review the trial court's decision on [striking a juror] under an abuse of discretion standard." State v. Wade, 200 W.Va. 637, 654, 490 S.E.2d 724, 741 (1997).

The denial of a motion for judgment as a matter of law is reviewed under the following standard: "We apply a de novo standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law." Gillingham v. Stephenson, 209 W.Va. 741, 745, 551 S.E.2d 663, 667 (2001).

With regard to the evidentiary issue raised in the plaintiff's third assignment of error, the following standard applies: "[M]ost rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard....[A]n appellate court reviews de novo the legal analysis underlying a trial court's decision." State v. Guthrie, 194 W.Va. 657, 680, 461 S.E.2d 163, 187 (1995).

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ARGUMENT

I.

THE TRIAL COURT ERRED BY REFUSING TO STRIKE JURORS TUSKEY, ULLOM, ANDERSON, WEST AND McDIFFIT FOR CAUSE WHEN THEIR RESPONSES TO A WRITTEN QUESTIONNAIRE AND VOIR DIRE QUESTIONING INDICATED THE PRESENCE OF A DISQUALIFYING BIAS

It is well established in West Virginia that “[w]hen individual *voir dire* reveals that a prospective juror feels prejudice against [a party] which the juror admits would make it difficult for him to be fair, and when the juror also expresses reluctance to serve on the jury, the [party’s] motion to strike the juror from the panel for cause should ordinarily be granted.” Syl. Pt. 1, State v. Bennett, 181 W. Va. 269, 382 S.E.2d 322 (1989). Additionally, once a juror has made a clear statement reflecting such bias, “the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.” Syl. Pt. 5, O’Dell v. Miller, 211 W. Va. 285, 565 S.E.2d 407 (2002). This fundamental principle has been cited and reaffirmed by this court time and again. See, e.g., Syl. Pt. 2, Thomas v. Makan, 624 S.E.2d 582 (W.Va. 2005). As this Honorable Court has held, “The relevant test for determining whether a juror is biased is whether the juror has such a fixed opinion that he or she could not judge impartially.... Even though a juror swears that he or she could set aside an opinion and decide the case on the evidence, a juror’s protestation of impartiality should not be credited if the other facts indicate to the contrary.” Syl. Pt. 4, State v. Miller, 197 W. Va. 588, 476 S.E.2d 535 (1996); State v. Salmons, 203 W. Va. 561, 580, 509 S.E.2d 842 (1998).

“Because preconceived notions about the case at issue threaten impartiality, each juror must be free of bias.” See Michael v. Sabado, 192 W. Va. 585, 592, 453 S.E.2d 419, 426

(1994). In other words, each party has a right to a verdict from unbiased jurors acting without prejudice. The minds of prospective jurors should be wholly free from bias or prejudice, which can be shown by either the juror's admission or by proof of specific facts. See Syl. Pt. 5, Miller.

Finally, a litigant has a right to exercise peremptory strikes from a jury panel consisting of qualified, impartial and unbiased jurors. See Doe v. Wal-Mart Stores, Inc., 210 W. Va. 664, 672, 558 S.E.2d 663 (2001). With respect to the issues presented here, Rine v. Irisari, 187 W. Va. 550, 420 S.E.2d 541 (1992) is on point and compelling.

Rine was a Marshall County medical malpractice case filed after Michael Rine suffered severe injuries at the hands of Dr. Irisari at Reynolds Memorial Hospital. Although the Rines had claims against Reynolds and several other defendants, the plaintiffs settled those claims and proceeded to trial against Dr. Irisari. See Rine, 187 W. Va. at 552 n. 4.

During jury selection in that case, issues arose as to the qualifications of two of the jurors. One juror, Ms. Okel, was an LPN at Reynolds. She knew Dr. Irisari and had observed him performing surgery. She also stated that her daughter had been a patient of Dr. Irisari's wife. Id. at 555 & n. 11. Despite this predisposition to bias, Ms. Okel stated that her employment at Reynolds "would not influence her either against Dr. Irisari or [the plaintiffs]." Id. at 555 n. 10. The trial court did not strike Ms. Okel for cause.

The second juror, Mr. Brown, owned a grocery store across the street from Dr. Irisari. He acknowledged that Dr. Irisari was a good neighbor and customer and that it might be difficult for him to return a verdict against Dr. Irisari knowing he would have to meet Dr. Irisari's wife and look her in the eye. Id. at 555.

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After the jury returned a verdict for Dr. Irisari, the Rines appealed. The Supreme Court of Appeals reversed and remanded the case for a new trial. Among the errors found by this Court was the trial court's failure to strike Ms. Okel and Mr. Brown for cause.

The Court began its analysis by recognizing the trial court's discretion in seating a jury, but held that this discretion had clearly defined limits:

[T]he discretion granted the trial court in striking jurors for cause must be balanced against our determination, after the fact, of whether the potential jurors were sufficiently biased so as to prevent a fair trial. This Court has concluded that 'the mere statement of a prospective juror that he or she is not biased with respect to a particular cause may not be sufficient for the trial court to include that no such bias exists.'

Rine, 187 W. Va. at 555-56, quoting Davis v. Wang, 184 W. Va. 222, 225, 400 S.E.2d 230, 233 (1990). Rine reaffirmed the holdings in State v. West, 157 W. Va. 209, 200 S.E.2d 859 (1973) and State v. Matney, 176 W. Va. 667, 346 S.E.2d 818 (1986) when it held that "[a]ny doubt the Court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror" and that the purpose of *voir dire* is to seat jurors "who are not only free from prejudice, but who are also free from the suspicion of prejudice." Rine, 187 W. Va. at 556 & n. 13.

In finding that the trial court abused its discretion in refusing to strike Ms. Okel and Mr. Brown, the Court held:

In the case now before us, although Ms. Okel and Mr. Brown both represented to the trial court that they each believed they could reach a verdict based solely on the evidence and the instructions, **certain statements made by each of them brought their impartiality into doubt.** The mere statements by both of these jurors to the effect that they would not be biased were not sufficient for the trial court to conclude that no bias existed, given their other statements about Dr. Irisari and his wife. In accordance with *Davis, supra*, **any doubt regarding the impartiality of Ms. Okel and Mr. Brown should have been resolved in favor of the appellants who were seeking to strike them from the jury for cause.** Thus, we agree with the

appellants that cause existed to strike Ms. Okel and Mr. Brown from the jury. Accordingly, we find that the trial court abused its discretion.

Rine, 187 W. Va. at 556 (emphasis supplied). As was the case in Rine, in each instance discussed below, Ms. Tuskey, Mr. Ullom, Mr. Anderson, Mr. West, and Ms. McDiffit exhibited a disqualifying bias and each of them should have been stricken from the jury. Furthermore, as was the case in Davis, the bias of these jurors prevented them from even reaching the issue of damages and, instead, resulted in a defense verdict.

Applying these same standards to the present case, it is clear that the trial court erred by refusing to strike five jurors for cause. Each of them expressed bias in clear terms preventing them from sitting as impartial jurors. Under settled law, any doubts concerning impartiality should have been resolved in the plaintiff's favor. More significantly, once a clear statement of bias was expressed it was impossible for the trial court to rehabilitate these jurors through further questioning.

A. Shelly Tuskey's devastation about what happened to her personal physician of over thirty years irrevocably biased her against the plaintiff.

In Shelly Tuskey's case, all of the indicia of an underlying bias were present. She was previously the secretary to the director of development at another area hospital and had a sister practicing as a nurse. Importantly, she had a personal experience in her life that solidified in her mind what she perceived to be the effects of the lawsuits brought against health care providers. As Ms. Tuskey told the court, she was aware that her personal physician of over thirty years was forced into retirement because of a medical malpractice suit. She also believed that such lawsuits have "driven a lot of doctors out of practice and [into] retirement." See Trial Tr. at 49-50. Ms. Tuskey told the court that she "was devastated [about what happened to her doctor], because he was a great doctor." Id. She told the Court that she was surprised by the

allegations against her doctor “[b]ecause of the character of him as a doctor, and because I was under his care for a number of years, 30 to be exact.” Id. at 50.

These personal experiences caused Ms. Tuskey to believe that malpractice cases have changed our health care system for the worse. Id. at 49. Additionally, on her juror questionnaire, Ms. Tuskey stated that medical malpractice cases have “driven up healthcare costs” and have adversely affected the availability of healthcare services. See Questionnaire Responses of Ms. Tuskey at Nos. 38, 43. Ms. Tuskey also supported the recent walkout of Wheeling area physicians stating that they had to do something “to protect themselves.” Id. at Nos. 41, 42.

The court took the plaintiff’s motion to strike Ms. Tuskey for cause under advisement and subsequently denied that motion. See Trial Tr. at 55-56, 204. The court’s rationale for denying the plaintiff’s motion to strike Ms. Tuskey was based on its perception that her admitted prejudice was somehow lessened by comparing it with the overwhelming biases of some of the other members of the panel. The court described Ms. Tuskey as “above and beyond the average juror.” See Trial Tr. at 56. Additionally, as was the case with most of the other jurors at issue, the court appears to have seated Ms. Tuskey out of a desire to seat a jury before running out of panel members. As the trial court stated:

[I]et me just make an observation here. I’ve gone through these jury questionnaires, twice. My reaction is, we’ve only got Mrs. Tuskey, which has been challenged by the Plaintiff. We have Mrs. Dolin, who’s not been challenged. We now have Dana Ullom, who’s been challenged, and Carl Anderson, who’s been challenged. We may not get a jury in this case.

...

We have two jurors out of 10. We may not get a jury seated. If the challenges persist, and I understand that’s your right, but I’m just saying, I know what the rest of these answers are in this stack, and we’re going to have it for the rest of the afternoon.

...

I'll take [the plaintiff's motions to strike] under advisement and see where we get with the rest of the jurors. I just want everybody to be on the heads up that we may not get a jury.

The climate that we have here, if you look at these answers that people say, they think that lawsuits have driven up health care costs. They think they've driven doctors out of area.

The publicity that the physicians got from their white coat day at legislature, the days that they went on strike, they got the jump when they came out on the attack here. I think they've done good PR work with the public.

I know the argument that insurance premiums went up because companies lost money in the stock market. That's hard to explain to the average juror who doesn't do this every day, like we do.

See Trial Tr. at 170, 172.²

Of course, the test for qualifying a juror is an individual question. A juror's biases cannot be evaluated in relation to other members of a jury panel, all of whom were exposed to "good PR work" by the medical-insurance industry. In short, then, Ms. Tuskey was biased. This does not change even if she happened to be not quite *as biased* as the other members of the panel.

As the above facts demonstrate, Ms. Tuskey's personal, surprising, and devastating loss of her physician translated into a bias against medical malpractice plaintiffs. This was a demonstrable bias that could not be rehabilitated. Instead of being stricken for cause, Ms. Tuskey became the foreperson for the jury that returned a verdict for the defense in just forty-three (43) minutes.

B. Mr. Ullom should have been stricken as soon as he stated that his life-experiences would prevent him from following the Court's instructions.

² The above-cited discussion came up in the context of the argument regarding potential juror Mr. Anderson, discussed in detail later in this memorandum.

As was the case with Ms. Tuskey, the preconditions for disqualifying bias existed in Mr. Ullom's life. First, Mr. Ullom's wife was a practicing CNA at Wheeling Hospital's Continuous Care Center. See Mr. Ullom's Jury Questionnaire Responses at No. 9. It must have been very easy for Mr. Ullom to place his wife in the role of Elizabeth Tagg as the case progressed. More importantly, Mr. Ullom was involved in a truck accident that caused him nerve damage and the loss of enjoyment of his own life. See Trial Tr. at 143-44. During *voir dire*, Mr. Ullom was asked what role this personal experience would play in his deliberations. Candidly, Mr. Ullom told the trial court and the parties that his life-experiences would probably prevent him from returning a verdict, even if that meant disregarding the court's instructions:

Mr. Bordas: If the court were to instruct you that if the plaintiffs prove their case and the evidence shows that Mrs. Mikesinovich suffered a loss of enjoyment of her life because she was unable to do certain things, would you be able to follow the court's instructions and return a verdict with respect to loss of enjoyment of life or would your own experiences and the fact that you didn't receive anything for your loss of enjoyment of life prevent you from doing that?

Prospective Juror Ullom: I think it would probably prevent me.

See Trial Tr. at 148.

In its order denying the plaintiff's new trial motion, the trial court indicated that Mr. Ullom was confused, and, when questioned further, clarified that he would follow the court's instructions. First of all, this is exactly the kind of rehabilitation that is improper under O'Dell. Mr. Ullom candidly and unequivocally stated that his life experiences would prevent him from awarding damages for loss of enjoyment of life. Even when questioned further by the court, Mr. Ullom did not relinquish his views but, instead, stated with considerable reluctance that if he was instructed to do so he "would probably have to" make an award for loss of enjoyment of life. See, Trial Tr. at 152. As this Court clearly held in syllabus point 2 of Davis v. Wang, 184

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W.Va. 222, 400 S.E.2d 230 (1990), “[a] jury comprised of members who do not believe in a certain type of damages, yet reluctantly agree that they will follow law to the contrary, does not constitute an impartial jury” consistent with constitutional, statutory and rule-based requirements.

Mr. Ullom also related his experiences in the fire department to the medical profession in another way. Specifically, Mr. Ullom said that doctors are just like those in the “sheriff’s department, fire department, anything where someone is trying to better themselves, it takes their time and their money to do this, and then like I say, the rates just keep going up” as a result of lawsuits. *Id.* at 150. Finally, and most importantly, Mr. Ullom freely admitted that he was concerned that returning a verdict against Reynolds in this case would cause health care costs to go up and that this would be in his mind if called on to serve as a juror. *Id.* at 150-51. Clearly, Mr. Ullom should not have been on the jury.

C. Carl Anderson should not have been on the jury because he admitted that the effect of malpractice verdicts on healthcare costs could enter his deliberations, even if the Court instructed him otherwise.

Again, Mr. Anderson had a predisposition against the plaintiff. He was the son of a physician who had been sued for malpractice. *See* Trial Tr. at 156-157. He was lifelong friends with several area physicians and had more than one conversation with those friends about the damage they believed had been inflicted on the health care system by malpractice cases. *Id.* at 161-63. Finally, Mr. Anderson was himself a former employee of Reynolds Memorial Hospital. *Id.* at 164.

This underlying predisposition and bias against the plaintiff became clear when Mr. Anderson was asked about his own views on malpractice cases. In response, Mr. Anderson stated that “the crisis that was in the papers” contributed to driving up health care costs. *Id.* at 159-60. Mr. Anderson said that he was concerned that if he returned a verdict against

Reynolds, he would be contributing to a further increase in health care costs. Id. at 161. Finally, when he was asked if he could set aside this bias if instructed to do so by the Court, Mr. Anderson was simply unable to say that he could. Id. O'Dell's mandate is clear: once Mr. Anderson made statements in *voir dire* evidencing his bias, he could not be rehabilitated by additional questioning. The record clearly demonstrates that Mr. Anderson was not free from bias or prejudice. Accordingly, the plaintiff's motion to strike him from the jury should have been granted.

D. David West's entire family was employed by the health care industry, including his wife - - a 23 year employee at Reynolds Hospital. This family history translated into a disclosed bias against the Plaintiff.

Mr. West's wife had worked for the defendant, Reynolds, for twenty-three years. See Trial Tr. at 173. Mrs. West spent most of her time in the obstetrics department, but did work on different floors from time to time and attended training seminars with the other nurses at Reynolds. In fact, upon receiving the jury questionnaire in this case, the first thing Mr. West did was ask his wife if she recognized any of the nurses' names. Id. at 178-79. This essentially constitutes an *ex parte* communication with a representative of the defendant. For all practical purposes, Mr. West's obligations as a juror began when he received that questionnaire. Soliciting even cursory information about the nurses at issue here from another nurse at Reynolds Hospital is, in and of itself, sufficient cause to strike Mr. West from the jury.

Moreover, even if he believed it would not affect him, the fact that his wife was employed by Reynolds would inevitably be on his mind while deliberating. After all, Reynolds had helped to put food on his table for 23 years. Additionally, Mr. West's son, daughter, son-in-law, and daughter-in-law all worked in hospitals. Id. at 177.

As is the case with Ms. Tuskey, Mr. Ullom and Mr. Anderson, Mr. West's personal situation had a direct effect on his views about malpractice cases. In his questionnaire, Mr.

West said that even if there was supporting evidence, he would not award damages for pain, suffering, or mental anguish. The only element of damage that he could award was for medical expenses. See Mr. West's Jury Questionnaire at No. 49. Mr. West had a demonstrable bias not susceptible to rehabilitation. The plaintiff's motion to strike him for cause should have been granted.

E. Karen McDiffit admitted to being angry about the fact that plaintiff's counsel had previously sued her daughter and she admitted that she would not award damages for loss of enjoyment of life even if instructed to do so by the Court.

Mrs. McDiffit's daughter had previously been sued by plaintiff's counsel, Bordas & Bordas, PLLC, and Mrs. McDiffit admitted to having been angry about that. See Trial Tr. at 248-50. Although she claimed no lingering hard feelings existed, Mrs. McDiffit said that she was upset because she thought the Bordas firm was representing a client falsely claiming to be hurt. Id. at 250. Even if her anger had subsided, as the trial court concluded, Mrs. McDiffit and her daughter felt that the Bordas firm had assisted their client in prosecuting a fraudulent claim. For this reason alone, she should have been stricken on the plaintiff's motion.

This point cannot be overemphasized. Even assuming that Ms. McDiffit retained no continuing hostility toward Bordas & Bordas, she clearly believed that the firm had sued her daughter on a bogus claim. You do not have to be actively angry at someone to consider them to be a liar. In all cases, the credibility of the parties and their attorneys are of paramount importance. That is particularly true given the issues in this case. It is simply impossible to win as a litigator if your credibility is in question. *Here, Ms. McDiffit was predisposed to question the credibility of plaintiff's counsel and, by extension, the plaintiff himself. Perhaps no greater bias can possibly exist in the litigation setting.*

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Adding to this bias, two of Mrs. McDiffit's sisters-in-law and her niece were all nurses, two of whom were employed by the same Wheeling area hospital, and in addition her daughter was employed by a health insurance company, Carelink. *Id.* at 251-53. Mrs. McDiffit stated that she had discussed with her daughter the perception that "our insurance rates are higher because of lawsuits." *Id.* at 253. Although the court thought it was able to rehabilitate her, Mrs. McDiffit had already admitted that she would be unable to return a verdict including a loss of enjoyment of life even if instructed to do so by the court. *Id.*, at 258-59. Under *O'Dell*, Mrs. McDiffit was disqualified "as a matter of law" and the court's refusal to strike her for cause was error.

F. The cumulative effect of seating jurors Tuskey, Ullom, Anderson, West, and McDiffit resulted in clear prejudice against the plaintiff.

When the plaintiff moved to strike jurors Tuskey, Ullom, Anderson, and West, the court initially took each of those motions under advisement. *See* Trial Tr. at 56, 155, 172, 185. Eventually, and after discussing the relative biases of the panel in light of the medical industry's PR campaign, the court denied the plaintiff's motions. *See Id.*, at 170-72, 204-05.³ Consequently, the plaintiff was forced to use his two peremptory strikes on Mr. Anderson and Mr. West allowing Mr. Ullom, Ms. Tuskey and Ms. McDiffit to remain on the jury. A full one-half of the jury deciding the case had previously expressed a bias against the plaintiff and it is perhaps of little surprise that the jury returned a verdict for Reynolds after deliberating a mere forty-three minutes.

As the above facts demonstrate, each of the five jurors at issue were prejudiced against the plaintiff. At the very least, it simply cannot be said that any of those jurors were "free from the suspicion of prejudice." *See Rine*, 187 W. Va. at 556 n. 13. Because "[a]ny doubt

³ The Court denied the plaintiff's motion regarding Ms. McDiffit at the time it was made. *Id.* at 263.

regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the juror," the trial court erred by seating Ms. Tuskey, Mr. Ullom, Mr. Anderson, Mr. West, and Ms. McDiffit. See Rine, 187 W. Va. at 556. The cumulative effect of the trial court's error cannot be overstated: not only was the plaintiff deprived of two peremptory strikes, but, even after using those two strikes to remove biased jurors, clearly one half of the jury was still too biased to decide this case. The right to an unbiased jury is fundamental. The court's error mandates a new trial before a bias-free jury.

II.

THE TRIAL COURT ERRED BY REFUSING TO GRANT THE PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW WHEN IT WAS ESTABLISHED BY THE UNDISPUTED EVIDENCE, INCLUDING AN ADMISSION BY NURSE TAGG THAT THE HOSPITAL'S SPECIFIC POLICIES FOR LIFTING AND MOVING PATIENTS WERE VIOLATED WHEN MARY MIKESINOVICH FELL

The predominant issue before the jury was whether Nurse Elizabeth Tagg followed accepted standards of care in transferring Mary Mikesinovich from her chair into her wheelchair on January 24, 2001. Reynolds agreed that Nurse Tagg was its agent and that Nurse Tagg was operating within the course and scope of her employment at all relevant times on January 24, 2001. In fact, Nurse Tagg served as Reynolds' corporate representative at trial and sat at counsel table over the plaintiff's objection. See Trial Tr. 284-86.

At trial, Reynolds sought to have its agent, Nurse Tagg, recognized as an expert "in the areas of nursing care, specifically as it relates to assessment and transfer of patients." See Trial Tr. at 619, 623. Specifically, Reynolds elicited testimony from Nurse Tagg regarding whether or not she believed her care and treatment of Mary Mikesinovich met the "standard of care in all respects." See Trial Tr. at 624. As the trial transcript indicates, Nurse Tagg

admitted that she failed to follow the standards of care for patient safety applicable to her attempt to move Mrs. Mikesinovich from her chair into her wheelchair on January 24, 2001.

As a matter of background, it is undisputed that Reynolds policies and procedures for "Assisting Patients to Walk" stated: "Have patient put his arm around your waist and support him firmly across the shoulders while walking." Plaintiff's Exhibit No. 21, at 3. At trial, Nurse Tagg, as Reynolds' agent and expert witness, testified that Reynolds' policies and procedures are supposed to ensure patient's safety. See Trial Tr. at 649. She further testified that as a nurse at Reynolds, "you have to follow policy and procedure." Id. at 650. She admitted that Reynolds' policy and procedure for assisting a patient to walk applied no matter whether the patient started the transfer in a bed, chair, toilet, or wherever else. Id.

When confronted with the policy and procedure quoted above, Nurse Tagg attempted to change her opinion and told the jury that the language of the procedure was a guideline and that because of her short stature she deviated from that policy on a regular basis. According to her modified procedure, she told the jury that "I'm to put my arm around the patient's waist and put their arm around my shoulder." Id. at 651. Nurse Tagg admitted that the policy and procedure regarding the proper technique for transferring a patient was "a patient safety thing." Id. at 654.

Thus, pursuant to Nurse Tagg's own admissions, Reynolds' policies require a nurse to assist a patient to walk by putting the patient's arm around the nurse's shoulders and by having the nurse hold the patient firmly around the waist. Nurse Tagg admitted this was a mandatory policy, but also admitted to modifying it on account of her height. Significantly, the evidence was also undisputed that in moving Mrs. Mikesinovich, Nurse Tagg did not even follow her unauthorized modification of the procedure. Rather, Nurse Tagg only held onto Mary's arm, allowing her to fall to the ground breaking her hip. See, e.g., Trial Tr. at 668.

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Additionally, Reynolds' policies required Nurse Tagg to "[a]lways obtain as much help as needed to provide for safety of the patient." Plaintiff's Exhibit No. 21, at 1. Nurse Tagg admitted that it would have been more precautionous to have the two other available nurses assist with Mrs. Mikesinovich's transfer, although she attempted to move Mrs. Mikesinovich by herself. See Trial Tr. 669-70.

Reynolds was bound by the admissions of its agent and by its own safety policies. Nurse Tagg admitted the mandatory nature of the Reynolds policies. She admitted that she did not follow those procedures and that Mrs. Mikesinovich fell as a result. Consequently, no legally sufficient evidentiary basis existed for a reasonable jury to find for Reynolds or the issue of liability. See W. Va. R. Civ. P. 50(a). Under West Virginia law, "a judgment as a matter of law should be granted at the close of the evidence when, after considering the evidence in the light most favorable to the nonmovant, only one reasonable verdict is possible." Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 481, 457 S.E.2d 152, 158 (1995). There being no evidence to support a verdict in Reynold's favor on the issue of liability, the plaintiff's motion should have been granted.

III.

THE COURT ERRED IN OVERRULING THE PLAINTIFF'S OBJECTION TO EVIDENCE THAT THE PLAINTIFF, MARK MIKESINOVICH, TOOK AND LATER RETURNED AN ENTRY FROM HIS MOTHER'S MEDICAL RECORDS

Fearing that Reynolds would take steps to hide its misconduct, the plaintiff, Mark Mikesinovich, took a note from his mother's medical records documenting the circumstances of her fall. The note was later returned. In the meantime, however, another note was written addressing the same subject matter. The plaintiff did not allege that there were any inconsistencies between the two notes or otherwise raise the subject as a part of his case in chief.

The defendant, Reynolds, while questioning the plaintiff, attempted to raise the issue of the missing record. According to the defendant, it needed to explain why there were two identical entries in Mrs. Mikesinovich's records. The plaintiff objected. Trial Tr. at 497. In a bench conference, the plaintiff advised that he did not intend to raise an issue concerning the two notes in any manner whatsoever.⁴ The plaintiff offered to have the defendant choose one of the notes to present to the jury as part of Mrs. Mikesinovich's records. The defendant insisted that it wanted both notes in the record and an opportunity to explain why there were duplicate notes. Id., at 501-02. The court overruled the plaintiff's objection, and the defendant proceeded to elicit this testimony from the plaintiff. In a later part of the trial, the defendant elicited this same testimony from Nurse Tagg. Id., 643-44.

Evidence is relevant only if there is a "nexus, that is, a relationship between the evidence offered for admission and a fact or issue of consequence to the case." F. Cleckley, Handbook on Evidence for West Virginia Lawyers 4-1(E)(3)(3rd ed. 1985). Explaining why there were duplicate notes describing the circumstances of Mrs. Mikesinovich's fall was simply irrelevant. To repeat: the plaintiff did not allege that the duplicate notes were in any way erroneous or improper. The only possible reason for introducing this evidence was to inform the jury that the plaintiff took the note, without permission, and kept it for a length of time before returning it. In this way, the defendant could prejudice the plaintiff's case by having the jury draw improper inferences. First, the jury could infer--erroneously, of course--that the plaintiff was a "thief" because he took the note in question. Second, the jury could infer a reason for taking the note, i.e., that the plaintiff was litigation hungry and was so anxious to profit from his mother's mishap that he would stoop to petty theft.

⁴ The plaintiff represented that no argument would be made that the second note was a "late" entry or that the defendant, Reynolds, otherwise did anything improper in its recordkeeping.

Even assuming, arguendo, that evidence of the removal of the note was somehow relevant, its relevance was clearly and substantially outweighed by its prejudicial effect. Rule 403 of the Rules of Evidence was designed to protect the parties from evidence that is unduly prejudicial. Evidence is unfairly prejudicial and, thus, subject to exclusion under Rule 403, if it "tends to suggest [a] decision on an improper basis." State v. LaRock, 196 W.Va. 294, 312, 470 S.E.2d 613, 631 (1996). Here, Reynold's insistence that both notes go to the jury with an explanation of the circumstances hid an ulterior motive. Clearly, Reynolds wanted to paint a picture of an unscrupulous, litigious plaintiff. The prejudicial effect of this evidence was all the more potent because Mrs. Mikesinovich died and it was, in fact, the plaintiff himself who was seated at the table as his mother's representative. The introduction of this evidence was error and the plaintiff is entitled to a new trial addressing all issues.

CONCLUSION

The right to a fair jury trial is fundamental, and an essential part of that right is having a jury free from bias or prejudice. The plaintiff was deprived of that fundamental right because no less than five of the potential jurors demonstrated bias or prejudice requiring their disqualification. The bottom line is this: *The plaintiff was forced to use his preemptory strikes on a jury that consisted of a woman personally devastated by the effects of a malpractice suit; a man whose personal experiences made it impossible to follow the court's instructions; a woman angry at plaintiff's counsel for suing her daughter; a former employee of the defendant who didn't want to contribute to rising healthcare costs by returning a plaintiff's verdict; and a man married to a 23-year veteran of Reynolds Memorial Hospital's nursing staff.* Under the circumstances, can it be said that Mark Mikesinovich was

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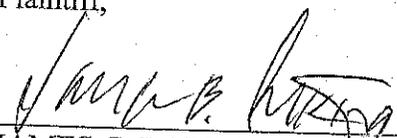
able to try his mother's case to a fair and unbiased jury? The trial court's refusal to strike these jurors was error entitling the plaintiff to a new trial.

The plaintiff also should have been granted a directed verdict on the issue of liability. The evidence of Nurse Tagg's evidence was not only overwhelming--it was, in fact, undisputed. For this reason, the plaintiff's motion for judgment as a matter of law should have been granted. At a minimum, the plaintiff should have been granted a new trial because the verdict was against the greater weight of the evidence.

Finally, the court erred when it permitted the defendant, Reynolds, to effectively brand the plaintiff a "thief" by introducing evidence that he removed a note from his mother's medical records. This evidence was irrelevant. It was, instead, intended to prejudice the plaintiff's case by portraying the plaintiff as someone who would steal for the sake of pursuing litigation.

For all of these reasons, the trial court's order denying the plaintiff's new trial motion should be REVERSED.

MARK MIKESINOVICH, Individually, and as
Executor of the Estate of Mary Mikesinovich,
Plaintiff,

By: 

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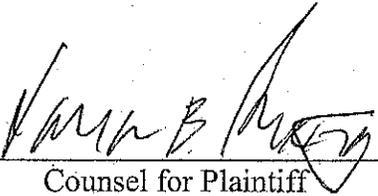
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CERTIFICATE OF SERVICE

Service of the foregoing PLAINTIFF'S INITIAL BRIEF was had upon counsel of record herein by mailing a true copy thereof via the United States mail on this 16th day of February, 2006, to:

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