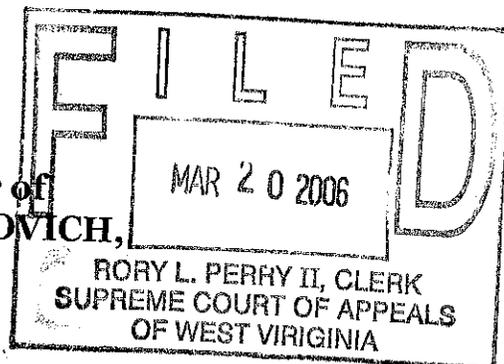


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 05-32968

MARK MIKESINOVICH,
Individually and as Executor of
the Estate of **MARY E. MIKESINOVICH,**
Plaintiff Below, Appellant



v.

REYNOLDS MEMORIAL HOSPITAL, INC.,
Defendant Below, Appellee

Honorable Mark A. Karl, Judge
Circuit Court of Marshall County
Civil Action No. 01-C-92-K

BRIEF OF APPELLEE

Counsel for Appellant

James G. Bordas III, Esq.
W. Va. State Bar ID No. 8518
Geoffrey C. Brown, Esq.
W. Va. State Bar ID No. 9045
James B. Stoneking, Esq.
W. Va. State Bar ID No. 3627
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410

Counsel for Appellee

Ancil G. Ramey, Esq.
W. Va. State Bar ID No. 3013
James C. Wright, Esq.
W. Va. State Bar ID No. 6816
Hannah B. Curry, Esq.
W. Va. State Bar ID No. 7700
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, W. Va. 25326-1588
Telephone: (304) 353-8000

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I. INTRODUCTION

This is the brief of the Appellee, Reynolds Memorial Hospital, Inc., in an appeal by the Appellant, Mark Mikesinovich, Executor of the Estate of Mary Mikesinovich. The Appellant seeks reversal of an order entered on May 23, 2005, in the Circuit Court of Marshall County, West Virginia, denying a motion for judgment notwithstanding a verdict in favor of the Appellee or, in the alternative, for a new trial.

On January 24, 2001, the Appellant's decedent, Mary Mikesinovich, was admitted to Reynolds Memorial Hospital to undergo a previously scheduled out-patient breast biopsy surgical procedure. After Ms. Mikesinovich recovered from the biopsy and was being prepared to be discharged, she lost her balance and fell, fracturing her hip. On April 25, 2001, the Appellant's decedent, Mary Mikesinovich, instituted suit against the Appellee alleging that she was injured when one of its nurses "dropped" her while she was being transported to a wheelchair.

The Appellee filed an answer denying liability. Eventually, Ms. Mikesinovich died of unrelated causes and her son was substituted as party plaintiff. This was not a complicated case and the Appellant's brief, focusing on the "medical malpractice crisis," conveniently ignores the fact that this was a simple negligence case. The Appellant's theory was that the Appellee's nurse was negligent, which caused the Appellant's decedent to fall. The Appellee's theory was that the decedent's sudden and unexpected movement caused her to fall. This was not a trial, as the Appellant would have the Court believe, conducted in the dark shadow of the "medical malpractice crisis." Rather, it was an ordinary case simply resolved in the Appellee's favor.

Prior to the trial of this matter scheduled for July 19, 2004, the Appellant submitted a "Motion for the Use of a Jury Questionnaire." [Exhibit C, attached to Petition for Writ of Prohibition]. The stated purpose of the questionnaire was as follows:

Given the recent publicity and media attention directed at the perceived medical liability crisis in West Virginia and neighboring states, it is a near certainty that prospective jurors in this case have some preconceived notion about medical malpractice lawsuits and the effect those suits have on the accessibility and quality of health care in West Virginia. Additionally, it is clear from the public reaction to the recent outcry for "tort reform," the prospective jurors likely have strong opinions about negligence lawsuits, the plaintiffs who bring those suits, and the hospitals that defend them.

These feelings are understandable, but they also threaten to deprive all of the parties in this case of their respective rights to a fair and impartial jury. Allowing a written questionnaire affords the prospective jurors the opportunity to candidly express their opinions about these very emotional issues without the fear of having to do so in front of their neighbors during *voir dire*.

Id. at 1-2. The Appellee objected to the use of the jury questionnaire generally and to a number of individual questions specifically. After a hearing was conducted and an order entered that overruled nearly all of the Appellee's objections, including its objections to public opinion survey type *voir dire* questions, the Appellee filed a Petition for Writ of Prohibition, arguing that the jury questionnaire would potentially create rather than ferret out bias. This Court denied the Petition by a vote of 3-2, with Chief Justice Starcher and Justice Maynard voting to grant.

The parties tried this matter before the Circuit Court of Marshall County beginning on July 19, 2004. On July 22, 2004, after hearing all of the evidence, the jury found from the preponderance of the evidence that the Appellee was not negligent and did not cause

or contribute to Ms. Mikesinovich's fall occurring on January 24, 2001. [Judgment Order dated July 22, 2004, at 1]. The Appellant now complains that error occurred when certain jurors were not struck for cause as a result of their responses to the juror questionnaire. Alternatively, the Appellant complains that error occurred simply because the jury did not accept his theory of the case and was allowed to hear relevant testimony as to the reasons for the existence of two separate nurse's notes.

Trial judges have broad discretion with respect to conducting *voir dire*, and one of the legitimate purposes of *voir dire* is to allow parties to intelligently exercise their peremptory challenges. As the Appellee respectfully submitted in its Petition for Writ of Prohibition, however, the use of juror questionnaires, beyond eliciting general qualifying information, that include questions that reference, even indirectly, insurance issues; questions that are open-ended and require narrative responses; questions that elicit information regarding political party affiliation or philosophy; questions that intrude into areas of medical or mental health treatment; or questions that are argumentative in tone, presents the potential for abuse. The Appellant's appeal is indicative of just such abuse and is precluded by the "invited error" doctrine. The Appellant should not be allowed to use a jury questionnaire to elicit information regarding individual juror philosophies and to influence individual jurors regarding current events involving medical malpractice liability reforms and then complain on appeal that certain jurors should have been struck for cause on grounds that would only justify the Appellant's exercise of peremptory challenges.

Nor has the Appellant presented evidence of clear statements of disqualifying bias for or against either party sufficient to disqualify Jurors Tuskey, Ullom, Anderson, West, or McDiffit from serving on the jury. The trial court clearly considered the totality of the

circumstances and conducted a full inquiry before determining that there was no basis to disqualify these prospective jurors from serving on the jury. And the trial judge's self-evaluation and assessment is entitled to great deference under West Virginia law because he was in the best position to determine the sincerity of these jurors when they pledged to adhere to the court's instructions.

When the evidence is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions, questions of negligence, due care, proximate cause and concurrent negligence are issues of fact to be determined by a jury. In this case, the Appellant's theory was that a nurse "dropped" his mother. Appellant's Brief at 3. The Appellee's theory was that the Appellant's mother unexpectedly lost her balance when she suddenly turned to toss a tissue into a nearby wastebasket, rather than waiting until she had been secured in a wheelchair, and that its nurse was not negligent. The jury rejected the Appellant's theory, adopted the Appellee's theory, and the verdict had nothing to do with the composition of the jury.

II. STATEMENT OF FACTS

On January 24, 2001, Ms. Mikesinovich was admitted to Reynolds Memorial Hospital for an out-patient breast biopsy at Reynolds Memorial Hospital. She arrived with her son, the Appellant, and was processed for her out-patient surgical procedure. Ms. Mikesinovich was then taken to the out-patient surgical department and prepared for surgery. The Appellant waited for his mother in the out-patient waiting area.

The breast biopsy was performed uneventfully and Ms. Mikesinovich was taken to the recovery area. After an appropriate period, she was returned to the out-patient surgery area for her post-operative evaluation and discharge. In evaluating Ms. Mikesinovich for

discharge, Nurse Tagg, with the assistance of another nurse, assisted Ms. Mikesinovich to the bathroom. It was observed that she was able to ambulate. It was determined that she was alert and oriented to her surroundings and her vital signs had returned to within 20% of her pre-operative values. She was provided with a light snack which was tolerated. Accordingly, it was determined that she was appropriate for discharge.

Nurse Tagg assisted Ms. Mikesinovich with her dressing while she sat in a regular chair. She was then to be transferred to a wheelchair for discharge to home. The Appellant was asked to retrieve his automobile and told that they would meet him in front of the hospital with his mother. While Nurse Tagg assisted Ms. Mikesinovich from the chair to a wheelchair, Ms. Mikesinovich lost her balance and began to fall after she turned to the side and tossed a tissue to a nearby wastebasket. Although Nurse Tagg attempted to break her fall, Ms. Mikesinovich fell to the floor.

With assistance, Nurse Tagg placed Ms. Mikesinovich in the bed and evaluated her. After a quick evaluation, Ms. Mikesinovich was transported to the Emergency Room where she was seen by Dr. Templeton. X-rays were obtained and she was diagnosed with a non-displaced subcapital fracture of the right hip. Ms. Mikesinovich also had some discomfort in the right hand where she sustained a small abrasion. The Appellant was present in the Emergency Room and requested that his mother be transferred to Wheeling Hospital for care under the service of Dr. Andreini. Transfer arrangements were made and Ms. Mikesinovich was transferred to Wheeling Hospital.

At Wheeling Hospital, Ms. Mikesinovich was evaluated and Dr. Andreini performed surgery where she underwent internal fixation of her hip fracture, utilizing three screws. Ms. Mikesinovich remained at Wheeling Hospital until January 30, 2001 where she was

discharged to the Wheeling Hospital skilled care unit where she remained for two weeks for physical therapy.

On April 25, 2001, Ms. Mikesinovich instituted suit against the Appellee alleging that she was injured when one of its nurses was negligent in transporting Ms. Mikesinovich to a wheelchair. After this Court denied the Appellant's Petition for Writ of Prohibition challenging the Appellant's granted "Motion for Use of a Jury Questionnaire," the parties tried this matter before the Circuit Court of Marshall County beginning on July 19, 2004.

At issue in the trial was (1) whether Nurse Betsy Tagg, an employee of Reynolds Memorial Hospital, deviated from an applicable standard of care for her care and treatment of Ms. Mikesinovich relative to her accident of January 24, 2001; (2) if Nurse Tagg deviated from the applicable standards of care, whether such deviation caused or contributed to the damages of Ms. Mikesinovich's Estate; and (3) whether the monetary value of damages suffered by the estate is a proximate result of the Appellee's liability. On July 22, 2004, after hearing all of the evidence, the jury found from the preponderance of the evidence that the Appellee was not negligent and did not cause or contribute to Mary Mikesinovich's fall occurring on January 24, 2001. [Judgment Order dated July 22, 2004, at 1].

After trial, the Appellant filed a timely motion for judgment notwithstanding the verdict or, in the alternative, for a new trial on grounds that (1) the trial court erred in denying the Appellant's motion to strike five jurors for cause; (2) the evidence was "undisputed" that the Appellee's procedures were "violated" and, thus, insufficient to support a verdict in favor of the Appellee; and (3) the trial court erred in overruling the Appellant's objection to evidence that the Appellant took and later returned an entry in

Nurse Tagg's nurse's notes. Within its discretion, the trial court properly denied the Appellant's post-trial motion, concluding:

1. "[T]he Court authorized the pre-trial distribution of a lengthy Juror Questionnaire that was largely the work product of Plaintiff's counsel. Further, complete and unfettered individual *voir dire* was also carried out, without any objection, upon each venire member selected for the panel. . . . Plaintiff has provided the Court with no valid reason to disturb its ruling during *voir dire* that the prospective juror at issue should not be stricken for cause. The prospective jurors made no clear statements indicating prejudice or bias. Each simply articulated his or her honest thoughts concerning the state of our tort system. As observed by the court in *Flynn*, and as demonstrated during *voir dire* in this case, as awareness of high damage awards is shared by virtually all potential jurors. *Flynn*, 602 N.E.2d at 887. Rather, as the *Vrzal* court wrote, views based on "life experiences" are precisely what we look for when we empanel a jury. *Vrzal*, 728 N.E.2d at 725." [Order at 1-16];
2. "Sufficient Evidence was Presented to Support a Verdict in Defendant's Favor. . . . [T]he jury was given complete and thorough evidence regarding Nurse Tagg's post-surgical assessment of Mrs. Mikesinovich and heard ample testimony that the technique utilized to assist Mrs. Mikesinovich to transfer her from the chair to the wheelchair was well within the standard of care given the findings of Nurse Tagg's assessment." [*Id.* at 16-17]; and
3. "The Court Did Not Err in Allowing Testimony as to the Reasons for the Existence of Two Separate Nurse's Notes. . . . This evidence was . . . necessary for an understanding of why these statements were created. . . . Finally, the Plaintiff cannot point to any prejudice to their case." [*Id.* at 17-19].

The appeal should be refused where the Appellant was entitled to and received a fair trial by a jury of his "peers" who were not required to share the Appellant's opinions, beliefs, and experiences or to agree with the Appellant's theory, but rather to objectively listen, despite their opinions, beliefs, and experiences, to all of the evidence, to comply with the law as instructed by the trial judge, and to return a fair and just verdict.

III. DISCUSSION OF LAW

A. THE TRIAL COURT DID NOT ERR BY REFUSING TO STRIKE CERTAIN PROSPECTIVE JURORS FOR CAUSE.

1. The Appellant Invited Any Error With Respect to Certain Prospective Jurors By Insisting on a Jury Questionnaire that Was the Subject of a Petition for Writ of Prohibition by the Appellee.

Prior to the trial of this matter scheduled for July 19, 2004, the Appellant submitted a "Motion for the Use of a Jury Questionnaire." The stated purpose of the questionnaire, much of which read like a public opinion survey, was as follows:

Given the recent publicity and media attention directed at the perceived medical liability crisis in West Virginia and neighboring states, it is a near certainty that prospective jurors in this case have some preconceived notion about medical malpractice lawsuits and the effect those suits have on the accessibility and quality of health care in West Virginia. Additionally, it is clear from the public reaction to the recent outcry for "tort reform," the prospective jurors likely have strong opinions about negligence lawsuits, the plaintiffs who bring those suits, and the hospitals that defend them.

These feelings are understandable, but they also threaten to deprive all of the parties in this case of their respective rights to a fair and impartial jury. Allowing a written questionnaire affords the prospective jurors the opportunity to candidly express their opinions about these very emotional issues without the fear of having to do so in front of their neighbors during voir dire.

Id. at 1-2. The Appellee objected to the use of the jury questionnaire generally and a number of individual questions specifically.

Following a pretrial conference on February 27, 2004, the trial court entered an order on March 15, 2004, granting the jury questionnaire motion and directing the parties to submit an agreed upon questionnaire. Subsequently, however, a hearing was conducted

on the issue on March 12, 2004, and an order was entered on April 20, 2004, overruling nearly all of the Appellee's objections, including its objections to the following public opinion survey type voir dire questions:

22. Have you seen anything in your doctor's office about medical malpractice or medical negligence? If you have, what have you seen?
41. Are you aware that the doctors in Wheeling recently went on strike claiming that they could no longer afford medical malpractice insurance? If so, what is your opinion about those doctors' decision to go on strike?
42. Do you think that the doctors who went on strike had the right to refuse to treat their patients out of concern for their own financial well-being?
43. Do you believe that healthcare providers in this area are truly unable to afford medical liability insurance?
44. Are you aware that the West Virginia Legislature passed medical malpractice "tort reform" legislation in 1986, in 2001, and again in 2003?
45. Do you believe that West Virginia healthcare providers are finished with their efforts to immunize themselves from civil liability, or do you feel that they will continue to seek more and more restrictive legislation just like they have done many times before?
46. Steel mill workers, coal miners, teachers, mechanics, secretaries, store clerks, automobile operators and many other hard working men and women are held accountable for their mistakes through the civil justice system. Do you think that healthcare providers should be protected from the same type of responsibility just because they are healthcare providers?
47. Would you refuse to sue your own hospital even if you are a loved one were injured by your hospital's negligence? If so, why would you refuse to seek fair compensation.
48. Do you believe that negligence lawsuits have interrupted the quality of medical care to the public or have increased the cost of medical care or medical insurance? Please explain.

78. Which of the following best describes your opinion of the quality of healthcare in the Ohio Valley area: (check the one that best describes your feeling):

- a. very positive
- b. positive
- c. somewhat positive
- d. negative
- e. very negative

Please tell us why you feel this way.

80. Are you:

- a. very conservative
- b. conservative
- c. moderate
- d. liberal
- e. very liberal

[Emphasis supplied]. Although the Appellee objected to all of these questions, it was particularly concerned about the underscored questions, which have nothing to do with bias, but with eliciting information regarding individual juror philosophies or with influencing individual jurors with respect to current events involving medical malpractice liability reforms. Thus, it filed a petition for writ of prohibition with this Court seeking to prohibit the trial court's use of this questionnaire. On June 10, 2003, this Court voted to refuse the Appellee's petition for writ of prohibition and the case proceeded with the use of the jury questionnaire.¹

One of the Appellee's key objections to the questionnaire, strongly advocated by the Appellant, was its propensity, not to elicit possible bias or prejudice, a permissible use of a jury questionnaire, but its propensity to foster bias or prejudice:

¹Except for Questions Nos. 45 and 46, all of the afore-mentioned questions were included on the jury questionnaire presented to the prospective jurors in this case.

Other courts have held that the types of questions contained in the questionnaire proposed to be used in this are inappropriate. In *United States v. Serafini*, 57 F. Supp. 2d 108 (M.D. Pa. 1999), the court refused to use a number of proposed *voir dire* questions on behalf of a state legislator who was charged with committing perjury in connection with an investigation into alleged illegal contributions to candidates for political office. The court's analysis of the use of juror questionnaires was respectfully instructive:

Whether to allow written questionnaires to be submitted to prospective jurors in advance of the jury selection date, and the content of any such questionnaire, falls within the wide discretion accorded to the trial court in conducting *voir dire*. Juror questionnaires may serve as a better vehicle to unearth bias than oral questioning in court and may also expedite the jury selection process. In addition to searching for evidence of actual bias, the trial lawyer may seek to use the questionnaire to obtain information to aid jury consultants to compile profiles on prospective jurors for purposes of identifying those prospective jurors more likely to favor the side of the party retaining the consultant. The questionnaire may thus contain a number of inquiries into intensely personal matters that have nothing to do with discovering actual bias. In addition, the questionnaire may also be intended to condition the jury to a party's particular viewpoint.

The Sixth Amendment guarantees a "right to . . . trial by an impartial jury . . .", but does not accord the right to either the prosecution or the defense "to have *voir dire* conducted in such a way as to mold the jury in a way that the jury will be receptive to counsel's case." *Padilla-Valenzuela*, 896 F. Supp. at 972. As stated in *Schlinsky v. United States*, 379 F.2d 735, 738 (1st Cir.), *cert. denied*, 389 U.S. 920, 88 S. Ct. 236, 19 L. Ed. 2d 265 (1967):

[T]he purpose of the *voir dire* is to ascertain disqualifications, not to afford individual analysis in depth to permit a party to choose a jury that fits into some mold that [counsel] believes appropriate for [counsel's] case.

It is the trial court's responsibility to ensure that the *voir dire* is not an overly intrusive inquiry into the private affairs of prospective jurors for the purposes of obtaining personality profiles or molding "the jury in a way that the jury will be receptive to counsel's case." *Padilla-Valenzuela*, 896 F. Supp.

at 972. In performing this responsibility, the trial court must balance the right of the parties to engage in a meaningful inquiry against the prospective juror's right of privacy. As explained by Judge Gawthrop in *United States v. McDade*, 929 F. Supp. 815, 817-818 (E.D. Pa. 1996):

[The prospective jurors'] privacy rights – 'to be let alone' – are not, of course, absolute. Their jury service does expose them to some searching inquiry as to such matters as their ability to be fair, their absence of preconceived, fixed opinions. But there must be some balance, some drawing the line, and when hard-charging counsel are in hot pursuit of every little empirical nugget they get their eyes on, it is the trial judge who must, sua sponte, reign them in and give the jurors some protection.

In other words, an intrusion into the prospective jurors' personal and private thoughts is warranted when a question has great probative value with respect to the issues in the case or the ability of the prospective juror to be fair, unburdened by strongly-held opinions. But as the connection between the voir dire question and matters of actual bias or fair-mindedness becomes attenuated, the intrusion into the prospective juror's personal and private thoughts cannot be sanctioned. And when the inquiry has no obvious relevance to actual bias or fair-mindedness, the inquiry should be disallowed.

Id. at 111-12. [Emphasis supplied]. Moreover, the court noted, "In addition to having the authority to 'limit voir dire when the parties seek information too remote from the issues in the case . . .,' *Brandborg*, 891 F.S upp. at 361, the trial court has the authority to screen the interrogatories for purposes of determining whether they are unfairly phrased, seek improperly to condition the jury to a party's perspective, or are redundant." *Id.* at 114-15. [Emphasis supplied].²

²See also *Irish v. Gimble*, 1997 Me. 50, 691 A.2d 664, 675 (1997) ("Plaintiffs specifically proposed questions about a series of full page advertisements appearing in a Portland newspaper in April and May of 1995. The advertisements complained about 'outrageous' jury awards and 'excessive legal judgments' resulting in 'staggering liability costs' that are 'emptying our pockets and hurting our lives.' Plaintiffs argue that the full page newspaper advertisements are false and misleading, and that they are part of a concerted effort by the insurance industry to 'poison the well' by creating juror prejudice against tort victims and high jury verdicts. They contend that the court unfairly prevented them from uncovering juror prejudice created by these advertisements. . . . The

court's voir dire questions addressed plaintiffs' concerns while appropriately avoiding direct references to insurance.); *Williams v. Mayor*, 98 Md. App. 209, 632 A.2d 505 (1993)(affirming a trial court's refusal to ask the following voir dire questions: "1. Did any of the members of this panel hear the acceptance speech of President Bush at the Republican Convention in which he contended that trial lawyers and all the suits they file have contributed to the economic problems faced by our Country? If so, would what you heard keep you from fairly and justly deciding the issues in this case, especially as to compensation to be awarded? 2. Would any of the members of this panel be unable to fairly and justly decide the issues in this case especially as to compensation to be awarded because of all that you have heard and/or read about the effect of large jury awards on your liability insurance premiums? 3. Would any of the members of this panel be unable to fairly and justly decide the issues in this case especially as to compensation to be awarded because of all that you have heard and/or read about the effect of fraudulent or frivolous law suits for injuries, etc.? 4. Would any of the members of this panel be unable to fairly and justly decide the issues in this case especially as to compensation to be awarded because of all that you have heard and/or read about the high costs of medical care and gauging [sic] or even fraud by doctors in their billing for treatment done or even not done? 5. Would any of the members of this panel be unable to fairly and justly decide the issues in this case especially as to compensation to be awarded because you are a taxpayer in Baltimore City or because you or a close relative or friend works or worked for the City?"); *Russo v. Birrenkott*, 770 P.2d 1335, 1338 (Colo. Ct. App. 1989)(" Next, plaintiff contends that the trial court erred in failing to permit voir dire regarding the 'liability crisis' or 'lawsuit crisis.' We disagree. . . . Here, the trial court ruled that plaintiff could not ask the potential jurors whether they had read newspaper articles about jury verdicts being too high. The trial court stated that because such articles usually were related to tort insurance reform, such questions would tend to lead to comments in impermissible areas. The court, however, did permit voir dire questioning on jurors' attitudes concerning damage awards generally and concerning State-owned property. Considering all these circumstances, we conclude that the trial court did not abuse its discretion in its limitations on voir dire."); *Speet v. Bacaj*, 237 Va. 290, 293-95, 377 S.E.2d 397, 398-99 (1989)("Before examining the prospective jurors, the Speets requested that they be allowed 'to inquire of the jury what their knowledge is of the medical malpractice crisis and whether or not this will influence their decision in this particular case.' The trial court denied the request, stating, 'Our Supreme Court has made it very clear that any mention of insurance is strictly verboten and grounds for an immediate mistrial.' The Speets contend that the trial court erred in denying their request to examine prospective jurors about their knowledge of the so-called medical malpractice insurance crisis. They claim that their case 'was tried in an environment inundated with press coverage by the media concerning a crisis which has detrimentally [a]ffected the insurance industry as a consequence of enumerable claims instituted for personal injury.' Therefore, they opine, 'it was virtually impossible to ensure that a fair and impartial jury was selected in the absence of [such an] inquiry.' . . . Clearly, the Speets' requested examination would have injected the subject of insurance into the trial. Such an inquiry arguably could have impaired the jurors' impartiality by acting as 'a sword rather than a shield.' We conclude, therefore, that the trial court did not abuse its discretion in refusing to allow the Speets to examine the jury panel about the medical malpractice insurance crisis."); *Maness v. Bullins*, 19 N.C. App. 386, 198 S.E.2d 752, 752-53 (1973)("During the selection of the jury to hear the evidence in this case, Mr. Burton, counsel for plaintiffs, asked the prospective jurors the following question: 'Is there any member of the jury who feels that his liability insurance rates will go up if he returns a verdict against the defendants in this case?' The trial judge instructed the jurors that they were not to consider the question or any feature of it in this case. At the earliest time available for such motion defendants

* * *

The ability to use *voir dire* questions as a sword rather than a shield, as a tool to create rather than ferret out bias has been observed. In *Hope Windows, Inc. v. Snyder*, 208 Va. 489, 491-92, 158 S.E.2d 722, 724 (1968), for example, the Virginia Supreme Court noted, "The examination should not be so limited as to impede the solicitation of information in deciding whether a juror is impartial. On the other hand, the questions asked can convey to the panel certain information that would prevent them from being impartial and may act as a sword rather than a shield. Thus the *voir dire* examination must be conducted with great care if its goal of obtaining impartial jurors is to be realized." [Emphasis supplied]. Respectfully, in the instant case, questions such as: "Do you believe that West Virginia healthcare providers are finished with their efforts to immunize themselves from civil liability, or do you feel that they will continue to seek more and more restrictive legislation just like they have done many times before?" or "Steel mill workers, coal miners, teachers, mechanics, secretaries, store clerks, automobile operators and many other hard working men and women are held accountable for their mistakes through the civil justice system. Do you think that healthcare providers should be protected from the same type of responsibility just because they are healthcare providers?" are argumentative and more likely to create bias

moved for a mistrial. Their motion was denied and they assign this as error. Such a question could only be calculated to instill in the minds of the jurors that defendants have adequate liability insurance to respond in damages."); *Brockett v. Tice*, 445 S.W.2d 20, 22-23 (Tex. Ct. App. 1969) ("After admonition by the court not to pursue that line of questioning, counsel then asked the whole panel 'whether any of them thought that a verdict in the case would affect their insurance rates.' The necessary effect of this was to infer that appellant has insurance because a verdict could not possibly affect their rates unless he had insurance. This was error."); *Murrell v. Spillman*, 442 S.W.2d 590, 591 (Ky. Ct. App. 1969) ("Pursuant to a ruling made in pretrial conference the court refused to allow appellant's counsel to put the following questions to the prospective jurors on *voir dire*: 'Have any of you ladies and gentlemen read any publications, in the way of articles in magazines, newspapers, or advertising matter, which purported to announce the fact that large jury verdicts affect each juror adversely financially? 'Do you believe what you have read in these articles? 'Do you believe that if the evidence warrants a substantial verdict to indemnify plaintiff that you may be reluctant to make such a verdict on the basis of feeling that your financial interest is involved?' The transcript of the *voir dire* shows that the panel was thoroughly examined by counsel for all parties for the purpose of determining whether any of the prospective jurors had any reason that might prevent his rendering a fair trial. In her brief appellant cites and quotes from numerous articles and advertisements in various magazines, newspapers and other publications over the past 20 years or so from which it appears that considerable efforts have been made by or in behalf of the insurance industry to educate or 'propagandize' potential jurors against large verdicts in accident cases. This material does not persuade us to overrule or modify *Farmer v. Pearl*, Ky., 415 S.W.2d 358, 361 (1967), in which we held that the exclusion of this type of questioning lies within the discretion of the trial court.").

rather than detect it. These questions are also much like the old joke, "Have you stopped beating your wife?" If a prospective juror answers "yes" to "Do you believe that West Virginia healthcare providers are finished with their efforts to immunize themselves from civil liability, or do you feel that they will continue to seek more and more restrictive legislation just like they have done many times before?" what would it mean? What if a prospective juror answers "no" to the same question? These type of "no-win" questions simply make jurors feel uncomfortable and make unnecessarily unpleasant the performance of one's civic duty.

[Petition for Writ of Prohibition at 16-18, 24-25]. Now, after creating a hyper-sensitive environment, through use of this questionnaire, the Appellant has the audacity to complain, like the defendant who after convicted of murdering his parents at sentencing by saying, "But Your Honor, I'm now an orphan," of his own creation. This is plainly precluded by the "invited error" doctrine.

As a general rule, this Court has observed, "[a] judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal.' Syl. pt. 21, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966)." Syl. pt. 4, *State v. Johnson*, 197 W. Va. 575, 476 S.E.2d 522 (1996); see also *Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 539 S.E.2d 478 (2000); *Smith v. Bechtold*, 190 W. Va. 315, 438 S.E.2d 347 (1993)("invited error" when appellant moved for the very delay that was the subject of the appeal); *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 599, 396 S.E.2d 766, 780 (1990)("the appellant cannot benefit from the consequences of error it invited"). In *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996), for example, this Court stated:

"Invited error" is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error. The idea of invited error is not to [legitimize the error]

but to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.

[Emphasis supplied].

Other courts have recognized that the doctrine of invited error applies to the jury selection process. In *State v. Ahmed*, 2005 WL 140682 (Ohio Ct. App.), for example, the defendant argued that he was deprived of a fair trial because of comments made during voir dire relating to his Middle-Eastern heritage and Muslim faith. “Although he acknowledges that such statements were initiated by his counsel and followed by the State,” the court observed, “he contends that such comments constitute plain error” *Id.* at *19. The court, however, rejected this assignment of error, noting that, “under the invited error doctrine, Ahmed has waived any argument pertaining to this issue because defense counsel initiated and pursued this line of questioning during voir dire.”³ Likewise, in the instant

³See also *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 775 N.E.2d 517, 2002-Ohio-4849; *State v. Smith*, 148 Ohio App.3d 274, 772 N.E.2d 1225, 2002-Ohio-3114, ¶ 30 (‘a party is not entitled to take advantage of an error that he himself invited or induced’).” *Id.* See also *Powell v. Commonwealth*, 267 Va. 107, 144, 590 S.E.2d 537, 559-60 (2004)(“The record demonstrates that Powell’s counsel was fully aware that advising the prospective jurors that Powell had been previously convicted of capital murder carried with it the potential for creating bias against his client, but apparently deemed this risk acceptable in order to seek the strategic advantage of being able to test the jurors’ potential response to the evidence concerning that conviction during the trial. Counsel further recognized the risk that the trial court would not permit him to pursue that line of questioning, and, as we have just determined, was within its discretion to do so. Under the ‘invited error’ doctrine Powell may not benefit from his counsel’s voluntary, strategic choice to place Powell at a potential disadvantage in the hope, unproductive though it was, of gaining some advantage.”); *State v. Dieterman*, 271 Kan. 975, 981, 29 P.3d 411, 416 (2001)(“The second comment cited by Dieterman was one made by venireperson Thomas Dietz. After defense counsel stated that he was going to ask the venire what it specifically had heard from the media, the State objected. The State argued that such comments may prejudice and taint possible members of the jury. The court admonished the defense counsel and warned him that he would have to ‘live with the consequences.’ Defense counsel proceeded to ask each juror if what he or she had heard had caused them to think that Dieterman might be guilty. After directly soliciting a comment from Dietz about an article that the defense counsel claimed contained ‘sensationalist language,’ Dietz expressed that

case, the Appellant should not be heard to complain about the consequences of a process that he initiated and advocated.

2. The Trial Court Carefully Elicited Responses From the Challenged Jurors Which Indicated that They Could Return a Fair Verdict Based Upon the Evidence and the Instructions.

The Appellant complains about the denial of his motions during *voir dire* to strike for cause five prospective jurors, but such complaint is based solely upon certain vague and ambiguous answers by these prospective jurors to questions on the juror questionnaire. When individual *voir dire* was properly conducted with these prospective jurors, however, each provided clear statements in support of the fact that each were free of bias or prejudice and could return a verdict based upon the law and the evidence. Thus, under this Court's well-settled precedent, the trial court did not err in refusing to strike these jurors for cause.

In Syllabus Point 2 of *Michael v. Sabado*, 192 W. Va. 585, 453 S.E.2d 419 (1994), this Court held, "The official purposes of *voir dire* is to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges. The means and methods that the trial judge uses to accomplish these purposes are within his discretion."⁴ The primary purpose of *voir dire*, however, is not a Spanish Inquisition into the private beliefs of prospective jurors.

the article's content would sway him toward thinking that Deiterman was guilty. Any resulting error was clearly invited."); *State v. Elmore*, 139 Wash.2d 250, 280, 985 P.2d 289, 308 (1999)("First, the defense proposed the statement of facts and its presentation to the venire at the beginning of *voir dire*. As Elmore proposed such presentation, assisted in its drafting, and agreed to its content, he cannot now be heard to complain the trial court did as he requested.").

⁴See also *State v. Curtin*, 175 W. Va. 318, 321, 332 S.E.2d 619, 622 (1985)("[t]he purpose of conducting a *voir dire* examination of a jury is to find jurors who are qualified, not related to either party, and with no interest in the cause or sensible of any bias or prejudice").

State v. Ball, 685 P.2d 1055, 1060 (Utah 1984) (approving a question about religious beliefs because such beliefs were related to the case but prohibiting attorneys at voir dire from "conduct[ing] an inquisition into the private beliefs and experiences of a venireman").

In *State v. Miller*, 197 W. Va. 588, 601, 476 S.E.2d 535, 548 (1996), this Court quoted from the United States Supreme Court's decision in *Gomez v. United States*, 490 U.S. 858, 873 (1989), as follows: "voir dire being the 'primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice['] Citing *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S. Ct. 1629, 1634, 68 L. Ed. 2d 22, 28 (1981) . . ." [Emphasis supplied]. Obviously, none of the challenged prospective jurors in this case are alleged to have any ethnic, racial, or political prejudice.

In addition to ethnic, racial, or political bias, this Court has also addressed the issue of party bias. In *Rine v. Irisari*, 187 W. Va. 550, 555, 420 S.E.2d 541, 546 (1992), for example, two of the jurors had ties to the defendant which this Court ruled should have resulted in their disqualification:

The appellants next contend that the trial court erred in refusing to strike two jurors for cause. One juror, Alice Okel, was employed as a licensed practical nurse at Reynolds Memorial Hospital, which was one of the defendants in the case. The other juror, William Brown, owned a grocery store across the street from Dr. Irisari's office. Dr. Irisari maintains that the qualifications of both jurors were within the sound discretion of the trial court, and that there was no abuse of that discretion warranting a new trial.

The record shows that Ms. Okel was employed as a licensed practical nurse at Reynolds Memorial Hospital, knew of Dr. Irisari and his wife, and had observed two surgeries performed by Dr. Irisari while she was training to become a nurse. Furthermore, while the court and counsel were conducting individual voir dire in chambers, it was learned that Ms. Okel and another prospective juror, Teri Dobbs, who was a patient of Dr. Irisari, had a conversation about Dr. Irisari's performance as a physician. Both admitted to the conversation upon being questioned by the trial court. Ms. Dobbs stated that she told Ms. Okel that Dr. Irisari was a good doctor and that she

was "pleased with him." Ms. Dobbs was excused for cause. Ms. Okel, while being questioned by the court regarding the conversation, stated that, from what she knew of Dr. Irisari, "he seems alright to me." The trial court did not, however, excuse Ms. Okel for cause.

The other juror, William Brown, at first indicated that he did not know Dr. Irisari. However, it later came out that Mr. Brown operated a grocery store across the street from Dr. Irisari's office, that Dr. Irisari's wife was one of his customers, and that Dr. Irisari and his wife were both good neighbors and customers. When asked whether he would be uncomfortable to see Dr. Irisari's wife at the grocery store if he awarded a verdict against her husband, Mr. Brown responded that "[i]t might be hard to look her in the eye when I saw her."

[Footnotes omitted]. Again, however, none of the challenged prospective jurors in this case are alleged to have any party bias.

In addition to ethnic, racial, political, or party bias or prejudice, a prospective juror must not have any firmly-held beliefs that would cause the juror not to return a verdict based solely upon the law and the evidence. In *Davis v. Wang*, 184 W. Va. 222, 224, 400 S.E.2d 230, 232 (1990), for example, this Court reversed a judgment where two of the jurors, when asked permissible questions about the return of certain types of damages recoverable by plaintiff, indicated that they had serious reservations about the award of such damages:

At trial, the appellant moved to strike four jurors for cause. The court granted the appellant's motion for two jurors, but did not excuse the final two, Albers and Heyl. Juror Albers stated that she did not believe in damages for mental anguish, yet reluctantly stated that she would follow the law if so instructed. Juror Heyl testified that Steptoe & Johnson, the law firm which represented the defendants, had in the past done some work for his corporation, that his son-in-law was a doctor, and that his daughter and wife were nurses. He also testified that he had reservations about returning a damage award for pain and suffering. However, when asked if he would obey the law, he too stated that he would. Thus, the appellant used peremptory challenges to remove them from the jury.

More specifically, this Court observed:

In the case now before us, the potential jurors, Albers and Heyl, were both equivocal and hesitant in their answers to the question of whether they could follow the court's instructions to the jury. They advised the court that they were biased against malpractice suits and that, regardless of the court's instructions regarding mental anguish, they did not believe it would change their opinion that the plaintiff should not be permitted damages for mental pain and suffering. Thus, the potential jurors' eventual agreement that they would follow the law was compromised by their earlier prejudices.

After admitting prejudice to an issue central to the outcome of the case, it is impossible for that juror to negate that prejudice by merely stating that they would follow the law as instructed by the court. A jury comprised of jurors 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 as envisioned by this Court in *State v. Matney*, 176 W. Va. 667, 346 S.E.2d 818, 822 (1986).

Id. at 226, 400 S.E.2d at 235. [Emphasis supplied]. "The true test as to whether a juror is qualified to serve on the panel," as this Court held in Syllabus Point 1 of *State v. Wilson*, 157 W. Va. 1036, 207 S.E.2d 174 (1974), "is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." When a prospective juror indicated equivocation regarding returning a verdict on the law and the evidence, such juror fails that test. In the instant case, however, none of the jurors, unlike those in *Davis*, failed that test.

The common thread for nearly all of the separate jurors listed in the appeal is the individuals' responses to Question Number 49. This question asked (without any further explanation or details about each of these "categories" of damages) whether the respondent "could" award jury damages for "physical pain; mental anguish; medical expenses; pain and suffering; and, loss of enjoyment of life." Some of these potential jurors had not circled all of the damages categories listed in response to this question. As such, the Appellant argues that each was improperly biased or prejudiced and should have been stricken. When these

prospective jurors, however, were interrogated in individual *voir dire*, it was revealed that this particular question, standing alone, was the source of a great deal of confusion for many potential jurors. Indeed, once these types of damages were explained, particularly in light of the role of the Executor of an Estate, each of these jurors agreed that if instructed and the evidence showed, they could award damages as they found appropriate. None needed to be cajoled or pressured into making these statements. This explanation cannot be viewed as “rehabilitation” because, regardless of their answer to Question Number 49, each and every juror acknowledged in Question Number 51 that they could and would follow all instructions of the Court relating to damages.

Disqualifying bias is more than merely “an inclination toward one side of an issue rather than the other.” *O’Dell v. Miller*, 211 W. Va. 285, 288, 565 S.E.2d 407, 410 (2002)(quoting *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963)). Rather, to rise to a level of bias mandating disqualification, “it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality.” *Id.* “Prejudice,” the Court held, is more easily defined, and simply means “prejudgement.” *Id.*

In Syllabus Point 1 of *State v. Griffen*, 211 W. Va. 508, 566 S.E.2d 645 (2002), a criminal case, the Court articulated the applicable test for bias:

The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror’s protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

Nothing in the statements of the prospective jurors at issue here suggests even slightly that any individual had prejudged any issues in this case. Nothing suggests that any juror was

possessed by such a strong opinion about damages awards that he or she could not fairly sit in judgment of this case. Nothing any juror said leads naturally to an inference that he or she could not act with impartiality. And nothing in the record indicates any statement that he or she could resolve the case in accordance with the law and the evidence should in any way be discounted as untrue. Noteworthy is that the Appellant contends, not that any of the prospective jurors had any bias or prejudice related to the case or the parties, but rather he takes issue with their general views towards large damages awards or medical malpractice cases generally, based upon their life experiences.

In *Vrzal v. Contract Transportation Systems Co.*, 728 N.E.2d 722, 722 (Ill. Ct. App. 2000), however, the court wisely rejected a challenge to a trial court's refusal to excuse for cause a juror who had expressed views during *voir dire* that were "antagonistic to personal injury plaintiffs" and said that she "would have difficulty being fair to the plaintiffs." The prospective juror in *Vrzal* said that she "believe[d] in tort reform based on life experiences" and resented the fact that "[e]verybody's always sue, sue, sue." *Id.* at 723. Despite her views toward the tort system, the prospective juror assured the trial court that she would comply with her sworn duty to follow the law and decide the case based on the evidence. *Id.* The trial court refused to strike the juror for cause, and she served on the panel that decided the case. The appellate court affirmed, and held that the juror's world view concerning the tort system did not disqualify her from serving as a juror. To the contrary, the court suggested those views might, in fact, make her a better juror. The court wrote: "Jurors do not come to the justice system as empty shells. They have life experiences that shape their beliefs on a myriad of issues and it is precisely that "life experience" that we seek when we empanel a jury. *Id.* at 725.

The *Vrzal* court's observation is particularly noteworthy here, where the Appellant essentially contends that any prospective juror with opinions about the state of our tort system or medical malpractice issues must be stricken automatically from serving as a juror. Our law does not come close to suggesting that any juror with a particular political or social view must be excluded from jury service in favor of those with no political or social opinions at all (or those who simply do not express them). It is those varying political and social views that contribute to a jury truly compromised of one's peers. Cases that concern the type of comments made by the challenged jurors in the case at bar repeatedly have been found to be insufficient to mandate disqualification.

For example, in *Hawes v. Chua*, 769 A.2d 797 (D.C. Ct. App. 2001), the court upheld a trial court's refusal to dismiss for cause two jurors who had stated during *voir dire* that "people are often sued unfairly" and that sometimes lawsuits "are unjust." *Id.* at 809. One of the prospective jurors in *Hawes* had previously done "tort reform work" for a law firm. *Id.* The court determined those facts provided no bias to conclude the juror could not be fair. *Id.*

Likewise, in *Flynn v. Edmonds*, 602 N.E.2d 880 (Ill. App. 1992), the court held that plaintiffs had failed to meet their burden of proving a prospective juror should have been stricken for cause where he said during *voir dire* that he would be "hesitant in awarding damages for pain and suffering." *Id.* at 886. The prospective juror in *Flynn* had said, "I guess my hesitation here is the frequency and the amount of liabilities that this country is going through right now." *Id.* at 887. The *Flynn* court wrote:

The fact that Jones, in a single comment, expressed some concern about damage awards does not outweigh his clear expressions of impartiality and his specific willingness to award damages according to the evidence heard.

Jones' awareness of high damage awards is shared by virtually all potential jurors.

*Id.*⁵

Indeed, this Court recently upheld a trial court's refusal to excuse for cause a prospective juror in a criminal case where he admitted during *voir dire* that he might have trouble rendering judgment in the case because he was uncomfortable "making a decision with another man's life." *State v. Hutchinson*, 215 W. Va. 313, 599 S.E.2d 736 (2004). This Court wrote that this was not a "statement of clear bias or prejudice," but instead was simply "a normal reaction to jury service." *Id.* at 319, 599 S.E.2d at 742. The Court wrote, "[T]he question is not whether a juror is uncomfortable; rather, it is whether they can put those personal feelings aside, listen to the evidence and instructions on points of law, and make a fair decision." *Id.*

In this case, the challenged jurors made clear that his or her general views about the tort system would not affect their ability to render a fair verdict based upon the evidence and the instructions of the trial court. This Court made clear in *State v. Griffin*, 211 W. Va. 508, 511, 566 S.E.2d 645, 648 (2002), that it is the challenging party who bears the burden of persuading the trial court that a juror is partial and subject to being excused for cause. *See also State v. Miller*, 197 W. Va. 588, 606, 476 S.E.2d 535, 553 (1989)). "The discretion to decide whether a prospective juror can render a verdict solely on the evidence is an issue for the trial court to resolve." *O'Dell, supra* at 289, 565 S.E.2d at 411. Moreover, as this Court held in syllabus point 12 of *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998):

⁵The *Flynn* court's observation that an awareness of high damage awards is shared by virtually all potential jurors certainly is borne out by the instant case, where many prospective jurors expressed an opinion about such awards.

A trial judge is entitled to rely upon his/her self-evaluation of allegedly biased jurors when determining actual juror bias. The trial judge is in the best position to determine the sincerity of a juror's pledge to abide by the court's instructions. Therefore, his/her assessment is entitled to great deference.

Id. Based upon these principles, this Court recently upheld a trial court's refusal to excuse for cause a former patient of a defendant doctor in a medical malpractice case where the trial court, in accordance with *O'Dell*, questioned the prospective juror further to determine whether he was capable of rendering a fair verdict and was convinced of the prospective juror's sincerity when he stated that he would not find in favor of the doctor simply because he had treated him fourteen years ago. *Thomas v. Makani*, 218 W.Va. 235, 624 S.E.2d 582 (2005).

Likewise, in this case, the trial court took special care to determine that the prospective jurors at issue were free from bias and prejudice. The Appellant did not meet his burden of persuading the trial court to strike these prospective jurors for cause. The trial court's assessment is entitled to great deference. And the Appellant presents no valid justification for disturbing the trial court's decision not to strike these prospective jurors on appeal.

The prospective jurors made no clear statements indicating prejudice or bias. Each simply articulated their honest thoughts concerning the state of our tort system. As observed by the court in *Flynn*, and as demonstrated during *voir dire* in this case, an awareness of high damage awards is shared by virtually all potential jurors. *Flynn*, 602 N.E.2d at 887. But an awareness and opinion about political or social issues such as this does not disqualify a potential juror. Rather, as the *Vrzal* court wrote, views based on "life experiences" are precisely what we look for when we empanel a jury. *Vrzal*, 728 N.E.2d at

725. A review of the individual *voir dire* examinations of each of the challenged jurors bears this out.

Prospective Juror Tuskey. The Appellant asserts that prospective juror Tuskey was so biased against those bringing malpractice lawsuits, that the trial court erred in not striking her for cause. In his argument, the Appellant relies upon Juror Tuskey's responses that she was "devastated" because she could not continue her own prior relationship with Dr. Porter, a Wheeling-area physician. This was raised in the context of her belief that Dr. Porter retired from the practice of medicine because of a malpractice case that was brought against him. Tr. at 49. However, a fair review of the transcript does not reveal that Ms. Tuskey was improperly biased against medical malpractice cases. While she offered the opinion that she believes Dr. Porter was a "great doctor," she also stated that she "sort of follow[ed] the trial, all that I could read in the newspapers and that." Because of her own personal knowledge of Dr. Porter, it surprised her to learn that Dr. Porter was alleged to have committed certain acts. Nevertheless, she also testified unequivocally that:

Mr. Bordas: If the things you read that were being alleged against Dr. Porter were true, do you think that the people who filed the lawsuit against him were justified in doing that?

Prospective Juror Tuskey: Yes.

Mr. Bordas: Would the fact that your sister is a nurse who's worked in the hospital setting in the past affect your ability to – and the fact that you think that doctors have been forced into early retirement, that type of thing, would that affect your ability to fairly listen to the issues in this case and render a fair verdict either for or against the hospital?

Prospective Juror Tuskey: Absolutely not.

Tr. at 50-51. These answers do not reveal that Ms. Tuskey felt that she could not be fair or that she had any reluctance at serving on the jury. Rather, it was clear that Ms. Tuskey

could and did “render a verdict based on the evidence without bias or prejudice, according to the instructions of the court.” Syl. pt. 1, *Wilson, supra*. Certainly, while Ms. Tuskey may have understandably felt a sense of loss with Dr. Porter’s retirement, her clear reflection on that fact and the obvious respect for our legal system and civil litigants in general is evident. This is precisely what the trial court was referring when it denied the Appellant’s motion to strike and remarked that “I was impressed with her answers. I thought she was kind of above and beyond the average juror.” Tr. at 56. Ms. Tuskey’s responses indicated that she could fairly and impartially listen to the evidence and return a verdict in accordance with the instructions, and the trial judge did not err in refusing to strike her for cause.

Prospective Juror Ullom. The Appellant’s main argument that Mr. Ullom should have been stricken from the jury stems from his testimony regarding ambiguous testimony as to whether he would be able to award “loss of enjoyment of life” damages due to the fact that Mr. Ullom himself was in some type of truck accident and sustained an uncompensated loss of his own. Although Mr. Ullom expressed ambiguous opinions in this regard, such did not rise to the level of removal for cause. This is due to the fact that questions originally propounded by the Appellant and contained in the juror questionnaire injected confusion and ambiguity. More specifically, a series of questions asked prospective jurors whether they could award certain undefined types of damages – with a subsequent question inquiring as to whether the juror would follow the instructions of the trial court with regard

to damages.⁶ As a matter of fact, it appears that the trial court sensed this confusion when it questioned Mr. Ullom:

“THE COURT: Let me ask you, Mr. Ullom, on that question Mr. Bordas asked you about, at the end of the case, the Court may instruct the Jury to consider certain damages. If supported by the evidence, could you award damages for, you answered, physical pain, yes; mental anguish, yes; medical expenses, yes; pain and suffering, yes; loss of enjoyment of life, this means losing your ability to take part in those activities of life which provide contentment, happiness, pleasure and satisfaction, you answered, no.

But then on the next page, Question 51 says, if the Plaintiff proves negligence, do you understand that you are to follow the Court’s instructions on how to consider the issue of damages? You answered, yes. I’m kind of on the cusp here.

⁶Specifically, questions number 49 and 51 were patently confusing when given in the vacuum of pretrial proceedings:

49. At the end of the case, the Court may instruct jury (sic) to consider certain damages. If supported by the evidence, could you award damages for:

- | | |
|---|------------|
| 1. Physical pain | Yes or No? |
| 2. Mental anguish | Yes or No? |
| 3. Medical expenses | Yes or No? |
| 4. Pain and suffering | Yes or No? |
| 5. Loss of enjoyment of Life: This means losing your ability to take part in those activities of life, which provide contentment, happiness, pleasure and satisfaction. | |

Yes or No?

51. If the plaintiff proves negligence, do you understand that you are to follow the Court’s instructions on how to consider the issues of damages?

Within a vacuum, the prospective juror was asked whether he or she could award certain vague, overlapping, and mostly undefined types of monetary damages. Then, the prospective juror was asked whether he or she could follow the instructions of the Court regarding the consideration of damages. A number of prospective jurors circled “no” with regard to “loss of enjoyment of life” but all answered in the affirmative when responding to question number 51.

I don't understand. If you say you can follow the instructions and the Court instructs you that loss of enjoyment, if proven, is an element of damages, could you follow the Court's instructions?

PROSPECTIVE JUROR ULLOM: I would probably have to, yes.

THE COURT: Mr. Wright, any questions?

MR. WRIGHT: Just to follow-up on what Judge Karl was asking you. Can you be faithful to that and follow the Court's instructions, not an equivocal, possible, but you will follow the Court's instructions?

PROSPECTIVE JUROR ULLOM: If instructed to by the Court, yes.

MR. WRIGHT: I don't think I have any other questions."

Tr. at 151-152. Mr. Ullom's responses indicated that he could fairly and impartially listen to the evidence and return a verdict in accordance with the instructions, and the trial judge did not err in refusing to strike him for cause.

Prospective Juror Anderson. The Appellant's challenge as to Mr. Anderson was and is completely unfounded. A review of the trial transcript reveals completely even and balanced responses on behalf of Mr. Anderson such that the Appellant's challenge motion was properly denied. While the Appellant cites trial transcript testimony wherein Mr. Anderson stated that he had read about "the crisis that was in the papers" contributing to drive up health care costs, Mr. Anderson actually said that "my thoughts are that its one aspect of health care costs going up. That would be the main thing." Tr. at 160. (emphasis supplied). This does not show a juror who is biased or prejudiced for or against either party such that he should have been disqualified for jury service. Rather, it shows an intelligent and articulate individual who understands that there are many facts and circumstances that are related to the undeniable increase in health care costs and insurance rates.

Additionally, while attempting to veil this argument, the Appellant seemed to also be challenging Mr. Anderson on the basis that some of his childhood friends are now physicians and that he is the son of a local physician. Perhaps it could be argued that these relationships could, on their face, demonstrate a potential for prejudice. Contrary to the Appellant's arguments, however, the mandate of *O'Dell* was satisfied through the extensive additional questioning that took place in the individual *voir dire*. Indeed, Syllabus Point 2 of *O'Dell* provides the trial court with a number of options: "[j]urors who on voir dire of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against a party, requiring their excuse." (emphasis supplied).⁷

This procedure was followed. Once again, this area was thoroughly explored during the individual *voir dire* process and no disqualifying bias or prejudice was found. For example, Mr. Anderson was not even aware if any of his friends had ever been sued and while some of his physician friends may have voiced opinions indicating that they are not happy with increasing medical malpractice insurance premiums, he quickly confirmed that he could return a verdict against the Appellee for a substantial sum of money in the case if the evidence warranted it: "If you were to return a verdict against Reynolds for a substantial sum of money in this case, if the evidence warranted it, do you think that would make you feel perhaps uncomfortable . . . ? . . . No." As a matter of fact, Mr. Anderson candidly acknowledged that his father may have held certain negative views with regards to medical

⁷See, e.g., Syl. Pt. 2, *West Virginia Dep't of Highways v. Fisher*, 170 W. Va. 7, 289 S.E.2d 213 (1982) ("Where a physician-patient relationship exists between a party to litigation and a prospective juror, although such prospective juror is not disqualified *per se*, special care should be taken by the trial judge to ascertain . . . that such prospective juror is free from bias or prejudice.").

malpractice cases. When asked to elaborate on that, he testified that the basis of that is his thought that “any physician probably feels that way. I can’t answer for him or any of them.” Tr. at 157. The tone of his responses is such that Mr. Anderson was not aligning himself with any particular cause or side of the issue. Rather, he was merely expressing his observations as the son of a physician, a friend of physicians, and a distribution manager at a local newspaper. Discussing the lawsuit that he understood was filed against his father, Mr. Anderson testified that he understood that his father and other physicians were “held responsible or liable. I don’t remember any specifics.” Tr. at 158. When asked whether his father felt that he had done anything wrong, Mr. Anderson stated “I think he felt somewhat responsible, yes, sure.” *Id.* This testimony is not the mark of an individual biased against Mr. Mikesinovich; rather, he simply needed to hear the evidence and not decide the case in a pretrial vacuum. To the point, when asked:

MR. BORDAS: That’s fair enough. What about your thought regarding the physicians or medical care providers being sued?

PROSPECTIVE JUROR ANDERSON: If it’s a just thing. I’d have to hear all the information before I have a concrete answer for you.

Id. at 157-158. Mr. Anderson also testified:

“THE COURT: If you were a Plaintiff in this case, putting yourself in place of Mr. Mikesinovich, would you be satisfied to be tried by a Jury with your frame of mind?

PROSPECTIVE JUROR ANDERSON: Yes.

THE COURT: If you were a Defendant, Reynolds Memorial Hospital, would you be satisfied to be tried by a jury with your frame of mind?

PROSPECTIVE JUROR ANDERSON: Yes.

THE COURT: Do you know of any reason why you couldn’t or shouldn’t sit as a juror in this case?

PROSPECTIVE JUROR ANDERSON: No.

THE COURT: Do you believe you could sit and listen to the evidence in this case and make a decision based on what you hear in this courtroom?

PROSPECTIVE JUROR ANDERSON: Yes.”

Tr. at 166-167. Mr. Anderson’s responses indicated that he could fairly and impartially listen to the evidence and return a verdict in accordance with the instructions, and the trial judge did not err in refusing to strike him for cause.

Prospective Juror West. The thrust of the Appellant’s argument for the disqualification of Juror West is that his wife had worked at the Appellee’s hospital for approximately twenty-three years. Juror West didn’t know, however, whether his wife knew Nurse Tagg. Tr. at 179. Juror West’s wife was employed at the obstetrical department, whereas Nurse Tagg was employed in the outpatient surgery department. Tr. at 173. Moreover, regardless of Mr. West’s wife’s employment, it was clear that he had no personal interest in the outcome of the litigation. There was no evidence that he owned any stock or had any other pecuniary interest in the Appellee’s hospital. He further testified that:

“MR. BORDAS: Would the fact that Reynolds Memorial Hospital is the Defendant in this case cause you some concern if you were to sit on the Jury and return a large amount of money against Reynolds, since your wife works there?

PROSPECTIVE JUROR WEST: Not really.

MR. BORDAS: Why not?

PROSPECTIVE JUROR WEST: Well, first thing, they’ve got confidentiality. So I don’t know anything that goes on over there. Even I don’t.

MR. BORDAS: With respect to if you were a juror on this case, you understand that Reynolds is the Defendant and would know you were on the jury in the case, correct?

PROSPECTIVE JUROR WEST: That's correct."

Tr. at 174-175. Mr. West's responses indicated that he could fairly and impartially listen to the evidence and return a verdict in accordance with the instructions, and the trial judge did not err in refusing to strike him for cause.

Prospective Juror McDuffitt. The thrust of Appellant's argument as to the disqualification of Juror McDuffitt was simply that the law firm representing the Appellant had, at one time a number of years ago, prosecuted a personal injury case against Mrs. McDuffitt's daughter. Tr. at 249. While the Appellant emphasizes that Ms. McDuffitt admitted to having been "angry" about the suit, Ms. McDuffitt actually stated that she was "at first, I was kind of angry, but I guess it was just the normal reaction." Tr. at 250. Ms. McDuffitt testified that she believed that the incident occurred approximately ten years ago and she could not even recall the individual that the law firm had represented. Tr. at 249. Most importantly, Ms. McDuffitt succinctly stated "no" when asked whether she held any ill feelings towards the law firm or any of the attorneys there regarding the litigation involving Ms. McDuffitt's daughter. Tr. at 250.

Ms. McDuffitt's answers and responses to questions concerning her views on the medical malpractice climate and its perceived impact on insurance rates is also telling and display an astute juror who is able to see all sides of an issue. Specifically, Ms. McDuffitt was asked questions about increases as to her health insurance premiums and she testified:

MR. BORDAS: Have you had any discussions with your daughter regarding how lawsuits have effected health insurance premiums, things like that?

PROSPECTIVE JUROR MCDIFFITT: Yes, I believe we have talked about that.

MR. BORDAS: Tell me about that?

PROSPECTIVE JUROR MCDIFFITT: I don't remember in detail, but we have discussed that's probably why our insurance rates are higher because of lawsuits. We hashed that around.

MR. BORDAS: Was that in response to your questions to her as to why your health insurance was so high or something like that or was that just in general conversations?

PROSPECTIVE JUROR MCDIFFITT: It was probably in general, talking about health insurance, I would say.

MR. BORDAS: If you were to return a verdict for a substantial amount of money in this case, if you felt the evidence supported it, would that cause you some concern that it would cause health insurance rates or health care costs to further go up?

PROSPECTIVE JUROR MCDIFFITT: Yes, I think it would concern me a little bit.

MR. BORDAS: Is that something you think would at least in some way factor into your decision if you were back in the jury room, if you were on the jury in this case, that that would at least be in the back of your mind when you were deciding what number you were going to return?

PROSPECTIVE JUROR MCDIFFITT: No, I don't think I would think on that, no.

MR. BORDAS: Why not?

PROSPECTIVE JUROR MCDIFFITT: Because I would just consider the facts in the case, rather than my personal opinion on health rate insurance going up."

Tr. at 253-254. As is readily apparent, Ms. McDiffitt was able to very quickly and honestly distinguish between having an honest and open opinion with regard to a particular issue in understanding that such an opinion would not impact her view of the evidence and facts in the case. None of this rises to the level of demonstrating that Ms. McDiffitt was biased

having such a fixed opinion that she could not judge the facts impartially. Rather, Ms. McDiffitt's responses indicated that she could fairly and impartially listen to the evidence and return a verdict in accordance with the instructions, and the trial judge did not err in refusing to strike her for cause.

The Appellant was not entitled to a jury comprised of people predisposed to ignore the evidence and the jury's instructions and return a verdict in his favor; to a jury comprised of people who are hermits and are not exposed to the public debate over the effect of medical malpractice suits on the cost of healthcare; to a jury comprised of people who have no experience with the healthcare system or with no close family members in the healthcare system; or to a jury comprised of people who have no experience in the civil justice system or with no beliefs as to the costs and benefits of the civil justice system. The Appellant was entitled to a jury comprised of people who, despite their opinions, beliefs, and experiences, were willing to objectively listen to the evidence, to comply with the law as instructed by the trial judge, and to return a fair and just verdict. A jury of one's "peers" does not mean a jury of those who share a party's opinions, beliefs, and experiences. Rather, it means a cross-section of the community with differing opinions, beliefs, and experiences, whom, despite such opinions, beliefs, and experiences, can objectively consider the evidence and return a verdict in accordance with the court's instructions. Finally, as previously noted, this was not a traditional "battle of the experts" medical malpractice case; rather, it was an ordinary negligence case involving whether a nurse was negligent in supervising the Appellant's decedent.

B. THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE PREPONDERANCE OF THE EVIDENCE SUPPORTS THE JURY'S FINDING OF NO NEGLIGENCE ON THE PART OF THE APPELLEE.

In assessing the Appellant's motion for judgment notwithstanding the verdict, the "evidence must be viewed in the light most favorable to the non-moving party." Syl. Pt. 1, *Gonzalez v. Conley*, 199 W. Va. 288, 484 S.E.2d 171 (1997). "Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them." *Id.* at Syl. Pt. 3. Thus, on appeal, "it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below." *Id.* at Syl. Pt. 1. This Court further held in syllabus point 5 of *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983):

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Id.; *Gillingham v. Stephenson*, 209 W.Va. 741, 551 S.E.2d 663 (2001).

In this case, the evidence presented a question for the jury regarding whether the Appellee was negligent in connection with a fall that occurred while Ms. Mikesinovich was being assisted by Nurse Tag from a chair to a wheelchair. Mrs. Mikesinovich lost her

balance and began to fall when she turned to the side and tossed a tissue to a nearby wastebasket. Although Nurse Tagg attempted to break her fall, Ms. Mikesinovich fell to the floor and fractured her hip.

The Appellant complains that “[t]he predominate 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” and that it is “undisputed” that the Appellee’s procedures were “violated.” Appellant Brief at 19. This is simply incorrect.

The Appellant contends, as at trial, that Nurse Tagg failed to follow applicable policies and procedures of the Appellee and that such a failure was the proximate cause of Ms. Mikesinovich’s unfortunate fall on January 24, 2001. While the Appellant is correct that Nurse Tagg testified that policies and procedures are to be “followed,” she never admitted or even implied that a blind verbatim following of a given policy or procedure was somehow “required.” Appellant’s incomplete citations of the transcript including only pages 649-651 fails to reference testimony at pages 652 and 653 of the record.

Nurse Tagg further testified that while policy and procedure is to be “followed” the precise language is, in her expert opinion, a “guideline.” She then explained, in detail, how she would hold a patient around the waist during a walking maneuver. She testified that she would need to grasp around the waist because of her height differential and that in doing so, she was “trying to make the patient safe.” Unfortunately, Ms. Mikesinovich lost her balance and fell when she was being transferred from a chair to a wheelchair. The Appellant’s criticism of Nurse Tagg would seemingly have her checking her education,

training and experience at the door. The jury obviously understood this fact and found in the Appellee's favor.

The Appellant also contends that the policies and procedures of the Appellee require a nurse to "always obtain as much help as needed to provide for safety of the patient." Appellant's Brief at 21 (citing Pl. Ex. 21 at 1). The sentence immediately prior to the sentence relied upon by the Appellant, which the Appellant ignored at trial and continues to ignore herein, states that "more than one person *may* be necessary to assist the patient." (emphasis supplied). The Appellant's overarching criticism of Nurse Tagg's conduct at trial was that she failed to properly assess Ms. Mikesinovich with regard to her ability to walk. The Appellant argued that Nurse Tagg did not assess Ms. Mikesinovich appropriately and that two nurses were necessary to transfer Ms. Mikesinovich from the chair to her wheelchair. The Appellee presented evidence from Nurse Tagg, along with expert witness, Patricia Gallagher, R.N., that contradicted the Appellant's position.

As Nurse Tagg explained throughout her testimony, she described her assessment process and explained how she came to the conclusion that, in her nursing opinion, after utilizing two nurses to successfully ambulate Ms. Mikesinovich to and from the bathroom, among other findings, then one nurse would be necessary to complete the transfer maneuver from chair to wheelchair. She agreed with the Appellant's proposition that it would have "been more cautious to have two people supporting Mary while she was being transported to the chair to the wheelchair." However, she explained that this precaution would not have been undertaken because Ms. Mikesinovich would not have been appropriate for discharge if it required two people to move her to the wheelchair. Specifically, she testified that "it would have been more precautions, but again, she would

not have been going to the wheelchair. If it took two of us to get her from the chair to that wheelchair, she would have been going back to bed.” Tr. at 669.

Additionally, the Appellee’s expert, Patricia Gallagher, R.N. as well as the Appellee’s employees, testified that the “procedures” at issue were guidelines and were followed in the context of the standard of care. Thus, the evidence did not overwhelmingly demonstrate a violation of the applicable standard of care — rather, it demonstrated, as the trial court concluded, that “reasonable minds could determine that Nurse Tagg complied with the standard of care and chose a proper technique for transfer after she received Ms. Mikesinovich as her patient and assessed her:

- ability to take and receive nourishment;
- ability to communicate;
- that her vital signs stable and within normal limits;
- ability to resume her admission form of ambulation as demonstrated by walking her to and from the bathroom;
- ability to void; and,
- ability to stand.”

[Order at 17].

As a question of fact, it was within the province of the jury to conclude that Nurse Tagg complied with the standard of care and in her assessment of Mrs. Mikesinovich’s ability to walk as part of her discharge plan. The jury simply did not accept the Appellant’s theory of the case that Ms. Mikesinovich was “dropped” by a nurse. As there was ample evidence to support the verdict in favor of Reynolds Memorial Hospital, this Court should affirm the judgment.

C. THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY AS TO THE REASONS FOR THE EXISTENCE OF TWO SEPARATE NURSE'S NOTES WHERE THE EVIDENCE WAS RELEVANT.

The Appellant finally complains about limited testimony allowed on the issue of the Appellant's retention of Nurse Tagg's original hand-written nurse's note. The Appellant's contention that such evidence was introduced for an improper purpose and irrelevant is without merit.

The Appellant was simply asked on cross-examination about the fact that he took the original nurses note and returned a copy of the same after litigation began. While the Appellee had no desire to finger-point or otherwise accuse the Appellant of "petty theft," the testimony was relevant to explain the reason for the existence of two nearly identical nurse's notes. It was relevant on the issue of Nurse Tagg's memory and credibility since the two notes are nearly identical. Furthermore, upon the Appellant's objection and stated concern, the trial court ruled that the Appellee would not be permitted to accuse the Appellant of stealing or otherwise converting the note.

The Appellant contends that the Appellee introduced the issue in an attempt to improperly prejudice the Appellant's case. It was the Appellant, however, who included both nurses notes in the exhibit list at the time of trial. At the time of the examination of the Appellant, the Appellant had three nurse employees of the Appellee – Nurses Gillingham, Tagg and Meeker under subpoena for possible adverse examination. The Appellant never advised the Appellee that some or none of these witnesses would not be called adversely. The Appellant also intended to admit as evidence two "statements" made by Nurses Tagg and Gillingham after the accident at issue, but waited until just before

closing arguments to advise the trial court and defense counsel that these statements would not be introduced.

It was unknown as to what strategy the Appellant would utilize in questioning witnesses or otherwise publishing these exhibits to the jury. These statements were tendered to the Appellant in the course of discovery and were made, in large measure, because the original nurse's note was missing. Thus, this evidence was necessary for an understanding of why these statements were created. This type of evidentiary ruling was clearly within the trial court's discretion. Syl. Pt. 1, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995) ("The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings."); *Gable v. Kroger Co.*, 186 W. Va. 62, 66, 410 S.E.2d 701, 705 (1991) (Rules 402 and 403 of the West Virginia Rules of Evidence [1985] direct the trial judge to admit relevant evidence, but to exclude any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice to the defendant. Such decisions are left to the sound discretion of the trial judge[.]").

Finally, the Appellant has failed to point to any prejudice to his case. The Appellee made the brief point with the Appellant that he retained the record and it was returned some time later. No attempt was made by the Appellee to elicit testimony with regard to an improper reason or motive behind the Appellant's retention of the note. The trial court ruled that the Appellee was not permitted to infer any improper reason or motive. Nor was the note ever mentioned in closing argument. Since the evidence was relevant and clearly not prejudicial to the Appellant, the appeal should be denied.

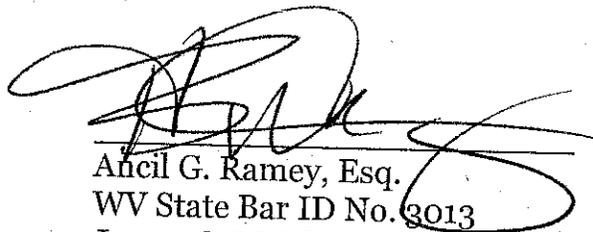
IV. CONCLUSION

The trial court's judgment should be affirmed. First, the Appellant created an environment, in an ordinary negligence case, with his use of an objectionable jury questionnaire, and now seeks the benefit of any error invited by its use. Second, all of the challenged jurors gave nothing but equivocal responses to mostly confusing questions, but clearly, convincingly, and unequivocally indicated their firm resolve to return a verdict based upon the evidence and the instructions. Third, the evidence was sufficiently in dispute to create genuine issues of material fact, to be resolved by the jury, regarding the Appellee's alleged negligence. Finally, the fleeting reference to the Appellant's conduct with respect to the nurse's notes did not constitute reversible error.

For the foregoing reasons, the Appellee, Reynolds Memorial Hospital, respectfully requests that this Court affirm the trial court's judgment.

REYNOLDS MEMORIAL HOSPITAL

By Counsel

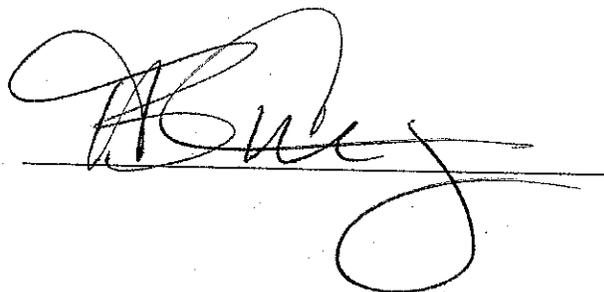


Ancil G. Ramey, Esq.
WV State Bar ID No. 3013
James C. Wright, Esq.
WV State Bar ID No. 6816
Hannah B. Curry, Esq.
WV State Bar ID No. 7700
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone (304) 353-8112

CERTIFICATE OF SERVICE

I do hereby certify that service of the foregoing **BRIEF OF APPELLEE** has been made upon the parties by mailing a true and exact copy thereof to counsel, in a properly stamped and addressed envelope this 20th day of March, 2006.

James G. Bordas III, Esq.
Geoffrey C. Brown, Esq.
James B. Stoneking, Esq.
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003

A handwritten signature in black ink, appearing to read "J. Stoneking", is written over a horizontal line. The signature is stylized and cursive.

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