

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 33218

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**SALLY BLACK**, as Executrix of the Estate of  
**CHARLES A. BLACK, Jr.**, (Charles Abbott, et al.,)  
Plaintiff Below, Appellant,

vs.

**CSX TRANSPORTATION, INC.**,  
Defendant Below, Appellee.

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Appeal from the West Virginia Mass Litigation Panel for FELA Asbestos Cases  
Circuit Court of Kanawha County Civil Action No.: 02-C-9500  
(Formerly Circuit Court of Marshall County Civil Action No.: 01-C-162M)  
Hon. Arthur M. Recht

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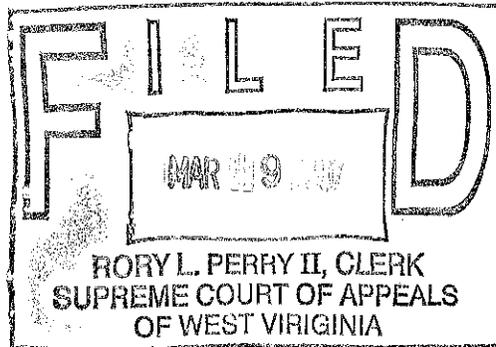
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**BRIEF OF APPELLEE**

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### **III. INTRODUCTION**

Appellant complains that she had to spend a peremptory challenge on a potential juror to whom she objected; this is her only complaint on appeal. However, Appellant had a full and fair opportunity to present her claims to a fairly-selected jury, but did not prevail. The juror complained of by Appellant stated without equivocation during *voir dire*, “[m]y guide must be the judge’s instructions in law.” R. 20, Transcript of Jury *Voir Dire*, November 7, 2005 at page 21, lines 12-13.<sup>1</sup> He also said that his decision in this case, were he to become a juror, must be based on “pure objective science.” R. 22, Supplemental Juror Questionnaire for F.E.L.A. Asbestos Cases, answer to question 46, page 8. A more ideal juror cannot be imagined, and the court’s refusal to strike him provides no basis for the award of a new trial to plaintiff.

### **IV. STANDARD OF REVIEW**

A trial court’s decision regarding the dismissal of a juror for cause will not be overturned absent an abuse of discretion. *State v. Sampson*, 488 S.E.2d 53, 57 (W.Va. 1997) (citing *State v. Phillips*, 461 S.E.2d 75, 94 (W.Va. 1995)).

### **V. STATEMENT OF THE FACTS OF THE CASE**

Appellant bases her entire appeal on her complaint that venire member Edward P. Polack, M.D., should have been dismissed for cause. Her complaint arises out of an inconclusive written response Dr. Polack gave to a question in a prospective-juror questionnaire, even though that inconclusive response was satisfactorily explained in individual *voir dire* in the Judge’s chambers.

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<sup>1</sup> Citations to the Record are reflected by the Reproduced Record Index Number (“R. \_\_\_”) and a specific citation to the document cited, including page and line references when appropriate.

In his written response to the “Supplemental Juror Questionnaire for F.E.L.A. Asbestos Cases”<sup>2</sup> completed by all potential jurors before jury selection began, Dr. Polack disclosed information suggesting he might be sympathetic to plaintiff or the defendant, depending on the question presented. For example, Dr. Polack disclosed in response to question 33 that he did know someone “who has been screened or tested for an asbestos related disease,” explaining that many of his patients had been tested. R. 22, Supplemental Juror Questionnaire for F.E.L.A. Asbestos Cases, page 6. He disclosed in response to question 34 that he had “a long-time friend” who has an asbestos-related illness. *Id.* After giving these responses that might make him seem disposed to favor an asbestos claimant like the Appellant, Dr. Polack answered a question asking whether there was “any reason at all that would make it difficult” for him to be a juror or to award money damages if they were warranted. To this he responded as follows:

A personal bias against personal injury lawyers and awarding of damages predicated upon anything other than pure, objective science – I would be willing to listen to the data presented but any decision on my part would be based on medical fact not emotion.

*Id.*, answer to question 46, page 8.

When questioned individually in chambers by counsel and the trial court judge about this latter response, Dr. Polack stated that although he did not like lawyers --in his comments he did not plainly differentiate between attorneys for plaintiffs or defendants-- his decision as a juror would have to be based on “pure, objective science.” R. 20, Transcript of Jury *Voir Dire*, November 7, 2005 at page 18, line 17 through page 19, line 24. Dr. Polack also asserted without reservation during *voir dire*, “My guide must be the judge’s instructions in law.” *Id.* at page 21, lines 12-13. Moreover, Dr. Polack stated that he would be willing to return a large verdict

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<sup>2</sup> The Court may observe that the corporate defendant was mistakenly named in the Questionnaire as “Norfolk Southern Railway,” but this inaccuracy does not affect the parts of the Questionnaire pertinent to the Petition.

against CSXT if the evidence justified it. R. 20, Transcript of Jury *Voir Dire* November 7, 2005, at page 20, line 18 through page 21, line 1.

The important portions of the questioning by counsel and the court are as follows:

MR. DALEY<sup>3</sup>: Lastly, the final question was No. 46: After completing this questionnaire, is there any reason at all that would make it difficult for you to be a juror or that would make it difficult for you to award money damages if they were justified? You said: Yes. And you indicated a personal bias against personal injury lawyers and awarding of damages predicated upon anything other than pure, objective science.

What do you mean by “personal bias against personal injury lawyers”?

DR. POLACK: Physicians tend not to like trial lawyers.

MR. DALEY: I understand that, but is there anything aside from the general physicians tend not to like plaintiffs<sup>4</sup> trial lawyers that underlies your personal bias?

DR. POLACK: My personal bias is about asbestos, because a lot of the issues about asbestos are not science, and I’m perfectly willing to listen to the data, but I will have to be convinced predicated on scientific information, not emotional information.

MR. DALEY: Okay. You think a lot of information on asbestos is not based on pure, objective science?

DR. POLACK: Partially.

MR. DALEY: You couldn’t award damages on anything other than pure, objective science based on your answer to No. 46?

DR. POLACK: That’s correct.

\* \* \*

MR. LAFFERRE<sup>5</sup>: Do you think that what you think about sound science as being the basis for decision-making -- I don’t want to put words in your mouth, but that’s my understanding of what you said just a moment ago --are you saying that that would be your guide in this case, as opposed to the judge’s instructions of law?

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<sup>3</sup> Robert F. Daley, counsel for Appellant.

<sup>4</sup> Dr. Polack never specified that he disliked “plaintiffs” trial lawyers.

<sup>5</sup> Luke A. Lafferre, counsel for Appellee CSXT.

DR. POLACK: My guide must be the judge's instructions in law.

MR. LAFFERRE: All right. Thank you very much.

MR. DALEY: Nothing.

THE COURT: The ultimate question, of course, Doctor, is simply this -- you know as much about the case right now as I know: Based upon what I told you, do you believe that you'll be able to sit as a juror in this case, listen to the evidence from the witness stand, the law that will be given to you at the close of the case, and you're going to be asked to marry the facts as you determine them to the law as I give them to you and return a fair, impartial, unbiased verdict?

DR. POLACK: Yes.

R. 20, Transcript of Jury *Voir Dire*, November 7, 2005 at page 18, line 17 through page 19, line 22 and page 21, line 5 through page 22, line 2.

The jury that was ultimately selected did not find for Appellee CSX Transportation, Inc. (CSXT) on all issues. *See* R. 4, Questions and Jury Verdict, dated November 11, 2005 at answers to questions 1 and 2, at page 1. Rather, after a one-week trial, the jury found CSXT negligent, but also found that asbestos exposure did not cause the Appellant's decedent's death from colon cancer. *Id.*<sup>6</sup>

Despite its specious scientific support, Appellant presented her novel theory to an impartial and unbiased jury, and that jury correctly found that there was no causal connection between asbestos exposure and the colon cancer from which Appellant's unfortunate decedent suffered and died.

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<sup>6</sup> The finding for CSXT on the causation issue is consistent with evidence adduced at trial regarding Mr. Black's questionable exposure to respirable asbestos dust in his work. The finding is also consistent with evidence presented at trial and with later scientific literature saying that there is no known causal relationship between asbestos exposure and colon cancer. The Institute of Medicine of the National Academies, a well-respected, non-profit institution that provides unbiased, evidence-based, and authoritative health information to the public, has reported since the trial was held that information derived from cohort studies of occupationally-exposed asbestos workers was "suggestive but not sufficient to infer a causal relationship between asbestos exposure and colorectal cancer." Committee on Asbestos: Selected Health Effects Board on Population Health and Public Health Practices, Institute of Medicine of the National Academies, *Asbestos Selected Cancers 226* (The National Academies Press, 2006).

## VI. LAW & ARGUMENT

The trial court in this case acted properly to investigate any possible bias or prejudice held by Dr. Polack, and determined that there was no reason to strike him for cause. A review of the court's ruling and the facts and law pertaining to it shows that there is no reason to overturn the trial court's decision.

### **A. The Court Properly Denied The Plaintiff's Motion To Strike Dr. Polack For Cause, As Dr. Polack Presented No Bias Or Prejudice.**

Dr. Polack unequivocally displayed the ability to render a verdict based solely on the evidence and the instructions of the court, and the Court's decision to deny Appellant's motion to strike Dr. Polack for cause was justified based upon Dr. Polack's statements and demeanor as observed by the trial Court.

The true test of whether a venire member is qualified to serve on a jury panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court and disregard any prior opinions he may have had. *State v. Finley*, 355 S.E.2d 47, 49 (W.Va. 1987) (quotations omitted). Under *Finley*, in considering whether to dismiss a potential juror for cause, the trial court must consider the totality of the circumstances and should make a full inquiry into any inconclusive or vague statements that may indicate the possibility of a disqualifying bias or prejudice. *O'Dell v. Miller*, 565 S.E.2d 407, 412 (W.Va. 2002). Once a prospective juror has made a clear statement of a disqualifying bias or prejudice, that prospective juror must be dismissed and cannot be rehabilitated. *Id.*<sup>7</sup>

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<sup>7</sup> In his dissent in *O'Dell v. Miller*, 565 S.E.2d 407, 414 (W.Va. 2002), Justice Maynard asserted that there is no right in a civil case to a jury panel that is free from bias before peremptory challenges are used:

There is no statutory basis for the assertion, first articulated in a footnote in *Davis [v. Wang]*, 400 S.E.2d 230 (W.Va. 1990)], repeated as law in *Doe [v. Wal-Mart Stores, Inc.]*, 558 S.E.2d 663 (W.Va. 2001)], and presumptuously used in the instant case to automatically reverse a verdict in a civil trial, [that a party] is entitled to exercise his or her peremptory strikes from a jury panel consisting of only qualified, impartial and unbiased jurors.

In *O'Dell*, the Court held that it was error for the trial court to fail to strike a prospective juror who was a former patient of the defendant and a former client of defense counsel. *Id.* at 409. The Court explained that both the physician-client relationship and the attorney-client relationship are “significant” and should mandate the dismissal of a prospective juror. *Id.* at 412.

In the instant case, Dr. Polack admitted that he was “biased” against awarding damages based on anything other than “pure objective science.” R. 22, Supplemental Juror Questionnaire for F.E.L.A. Asbestos Cases, answer to question 46, page 8. Appellant attempts, without success, to reinterpret this view as some kind of vice. Nevertheless, Dr. Polack affirmed his willingness to listen to the evidence and to follow the court’s instructions, and said that he would be willing to return a large verdict against CSXT if the evidence justified it. R. 20, Transcript of Jury *Voir Dire* November 7, 2005, at page 20, line 18 through page 21, line 1.

Thus, the instant matter is not one where a clear potential for, or even a suggestion of, unfair bias or prejudice was manifested; rather, it is one where the potential juror simply expressed the view that he would not be swayed by “emotion” and would base his decision on “pure objective science.” R. 22, Supplemental Juror Questionnaire for F.E.L.A. Asbestos Cases, answer to question 46, page 8. This statement is not objectionable. In fact, such a statement is in line with this Court’s Model Jury Instructions and with this Court’s standard for the admission of scientific evidence.

Jurors are instructed routinely to base their decisions on the facts and evidence presented in each individual case and not on sympathy. *See, e.g.*, the Court’s Model Jury Instructions for Civil Cases nos. 1.2, 1.3, and 1.5, located on the website of the West Virginia Supreme Court of Appeals. What the Appellant calls “unequivocal statements of bias” on the part of Dr. Polack

were merely expressions of sentiments entirely in accord with the model jury instructions offered by this Court for use by trial courts in West Virginia.

Dr. Polack's assertion that he would base his decision on "pure objective science" is in line not only with this Court's model instructions regarding the exclusion of emotion in jury deliberations, but also with the admissibility requirements for scientific evidence in West Virginia Courts. In Syl. Pt. 6 *Gentry v. Mangum*, 466 S.E.2d 171 (W.Va. 1995), this Court explained that the question of admissibility of expert testimony arises only if it is first established that the testimony deals with "scientific knowledge." "'Scientific' implies a grounding in methods and procedures of science while 'knowledge' connotes more than a subjective belief or unsupported speculation." *Id.* Accordingly, Dr. Polack's assertion that he would base his decision upon "pure objective science" is in line with the scientific evidentiary standards of this Court that are designed to filter out subjective and unsupported "junk science."

Appellant admits that her "scientific evidence" at trial was not objective:

As this Court well knows, very little about science in asbestos litigation can be fairly characterized as completely pure or completely objective. Because much remains debatable concerning the connection between asbestos exposure and colon cancer, Mrs. Black's expert would be presenting scientific ideas and theories to the jury that, although legally admissible and scientifically sound, would almost certainly not be considered "pure or objective" by Dr. Polack.

Appellant's Brief at 8.

Appellant admits that her scientific evidence was speculative, but takes issue with the fact that a juror might question the lack of scientific proof supporting her claims. Yet, that is exactly the issue that cases such as *Daubert* and *Gentry* have addressed – junk science. Appellant cannot argue credibly that she would have been unfairly disadvantaged by Dr. Polack's intention to take an unbiased "pure, objective" view of the scientific evidence in this case, since this view accords

with jury instructions recommended by this Court and the admissibility standards for scientific evidence of this Court.

Appellant claims also that Dr. Polack made a clear statement of bias against her lawyers and her case in general. However, this assertion is not supported by the record. Dr. Polack expressed misgivings about trial lawyers and personal injury lawyers. Appellee's attorneys, just like Appellant's attorneys, are personal injury trial lawyers<sup>8</sup>. Accordingly, Dr. Polack's statements were vague in that he appeared to express general misgivings about personal injury lawyers and trial lawyers based on his background as a doctor in West Virginia. However, even if Dr. Polack's comment was directed only at plaintiffs' attorneys, it was only a general statement; he did not express a specific bias against the Appellant or her attorneys. Accordingly, both parties stood on equal footing with Dr. Polack, and there was no indication that he would be partial to either party or their counsel.

Nevertheless, Appellant argues that, in Dr. Polack's eyes, "personal injury lawyers have no credibility to begin with . . . and there [was] no way that Plaintiff's counsel could have gained credibility . . ." See, Appellant's Brief at 7. However, that was not what Dr. Polack stated. He stated essentially that he had misgivings about all of the lawyers in the case and not against any particular party. In addition, lawyers are not witnesses. Juries are routinely instructed that what lawyers say in argument is not evidence. Thus, the "credibility" of lawyers can be established only by the credibility of the evidence they introduce at trial and by the arguments they make based on that evidence.

As former Justice Cleckley pointed out in *State v. Phillips*, "when a [party] seeks the disqualification of a juror, the [party] bears the burden of 'rebut[ting] the presumption of a

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<sup>8</sup> The court may take notice that the leading association of civil trial defense lawyers in West Virginia is named "Defense Trial Counsel of West Virginia

prospective juror's impartiality[.]” *State v. Phillips*, 469 S.E.2d at 94 (quoting *Irvin v. Dowd*, 266 U.S. 717, 723 (1961)). *Phillips* was a criminal case wherein a Defendant appealed his murder conviction claiming, among other issues, that two jurors were not stricken for cause despite statements they made during *voir dire*, and Defendant had to expend two peremptory challenges to strike the prospective jurors. *Id.* at 78. Defendant was charged with murdering his wife, and, to show motive for the murder, evidence was introduced to establish that the Defendant had committed adultery. *Id.* at 92. During *voir dire*, two jurors expressed a general dislike of adultery. *Id.* Although one of the jurors was determined by the Court to be truly biased, the second juror was not because of inadequate questions asked by Defendant's counsel during *voir dire*. *Id.* at 95-96.

The second juror admitted during *voir dire* that evidence of adultery would influence him. *Id.* at 95. In fact, he said such evidence could “tilt the scales” or “have some influence” in his decision. *Id.* Defendant's counsel proceeded to question this proposed juror, asking generally if the proposed juror would use evidence of infidelity against his client. *Id.* at 96, FN29. However, Defendant's counsel did not explain to the proposed juror how this evidence could properly be used in making his decision. *Id.* Adultery evidence could have been properly used as a motive for the crime or to attack the defendant's credibility, but it was not used as determinative of the Defendant's guilt. *Id.* Accordingly, the Court stated:

Because of the nature of the questions asked, we have some reservation as to whether the defendant met his burden. Giving deference to the trial court's determination, because it was able to observe the prospective juror's demeanor and assess their credibility, it would be most difficult for us to state conclusively on this record that the trial court abused its discretion.

*Id.* at 96.

As in *State v. Phillips*, Appellant's counsel in the instant case failed to ask the right questions to establish the bias she alleges. This fact was even pointed out by the trial court. When Appellant's counsel moved to strike Dr. Pollack for cause, the trial court addressed this issue stating, "What would it take to overcome a bias as against plaintiffs' lawyers? We don't know that. And I don't think that question was asked." R. 20, Transcript of Jury *Voir Dire* November 7, 2005, at page 119, lines 20-23. In fact, after both parties had a full opportunity to ask Dr. Polack questions, the Court again called Dr. Polack back to his chambers to ask this question:

The Court: Doctor, we asked most of the questions. I just have one question. And that is the response that you gave, and we appreciate your candor, is that you do have a bias against personal injury lawyers.

Dr. Polack: That's correct.

The Court: Question I have. (*sic*) What would it take to overcome that bias, if at all?

Dr. Polack: Credibility - -

The Court: Is it possible to do that, No. 1: if so, what would it take?

Dr. Polack: Credibility on the part of the source, in other words, the trial lawyer.

The Court: And the evidence?

Dr. Polack: That's correct.

The Court: So we get back really to, any verdict that you would reach would be based upon the evidence from the witness stand and the law given to you by the Court?

Dr. Polack: That's correct.

R. 20, Transcript of Jury *Voir Dire* November 7, 2005, at page 122, line 9 through 123, line 4.

Therefore, even after a second round of questioning by the Court on this issue, Dr. Polack continued only to express misgivings about trial lawyers generally but stated that he would weigh the case based on the evidence and the law as given to him by the Court, which is what an ideal juror is expected to do.

Dr. Polack did not express a bias against the Appellant's case or her counsel. Further, after a thorough review of the cases that have dealt with these types of peremptory challenges, Dr. Polack's answer in the written juror questionnaire at most called for additional questioning, which was provided and showed Dr. Polack to be an exemplary venire member.

**B. A Thorough Review of the Case Law Shows that Dr. Polack's Answers During *Voir Dire* Did Not Demonstrate a Fixed Bias or Prejudice Towards this Case.**

West Virginia case law on juror bias and prejudice can be divided into two categories. The first category involves jurors who are related to a party through kinship or have an interest in the outcome of the case, and the second category deals with situations where a statement made by the potential juror draws their impartiality into question. At common law, it was the first category, a relationship between the prospective juror and one of the parties, which amounted to *prima facie* grounds for disqualification of a venire member. The historical grounds for juror disqualification were outlined in *State v. Riley*, which include:

(1) Kinship to either party within the ninth degree; (2) was arbitrator on either side; (3) that he has an interest in the cause; (4) that there is an action pending between him and the party; (5) that he has taken money for his verdict; (6) that he was formerly a juror in the same case; (7) that he is the party's master, servant, counselor, steward, or attorney, or of the same society or corporation with him; and causes of the same class or founded upon the same reason should be included.

151 S.E.2d 308, 320 (W.Va. 1966).

The majority of the cases on juror disqualification have dealt with the issue of the degree of relationship between the proposed juror and one of the parties. See e.g., *State v. Wilcox*, 286 S.E.2d 257, 258 (W.Va. 1952) (criminal case holding employees of the crime victim's brother could serve on jury panels in criminal trials); *Doe v. Wal-Mart Stores Inc.*, 558 S.E.2d 663, 670 (W.Va. 2001) (holding that a party's employee's wife and stockowner should not serve on a jury panel wherein the corporate employer was a defendant); *O'Dell*, 565 S.E.2d at 412-13 (holding that a prospective juror who was a former patient of a defendant doctor and a current client of the law firm representing the defendant doctor should have been stricken for cause); *Thomas v. Makani*, 624 S.E.2d 582, 585 (W.Va. 2005) (holding that a physician-patient relationship between a party and a prospective juror does not create a per se disqualification of the prospective juror); *State ex rel. Quinones v. Rubenstein*, 624 S.E.2d 825, 833 (W.Va. 2005) (holding, in part, that a lawyer-client relationship between a prosecutor and prospective juror does not create a per se disqualification of a juror); *Mikesinovich v. Reynolds Memorial Hospital, Inc.*, 640 S.E.2d 560, 563 (W.Va. 2006) (holding that a husband of a full-time employee of a party should not serve on a jury panel).

In a smaller number of cases, a juror's statements during *voir dire* have been called into question. When these cases are examined in turn and compared to Dr. Polack's statements, it is clear that the trial court made a proper decision when it held that Dr. Polack was an able and impartial juror.

The first case on this issue at first blush appears to be based upon the degree of relationship between a potential juror and a member of law enforcement, but it is the juror's statements that raised questions about his impartiality. In *State v. Archer*, a prospective juror in a criminal case, P.J. Stevens, had a son who had served as a Deputy Sheriff. 289 S.E.2d 178, 179

(W.Va. 1982). In response to a question about possible bias in favor of law enforcement officials, the juror stated that he “would normally lean toward the officers.” *Id.* He was questioned further in this regard:

MR. RICHARDSON: Mr. Stephens, I believe you indicated, when I asked you questions, that you would lean toward favoring the testimony of a police officer.

PJ STEVENS: Yes.

MR. RICHARDSON: And do you feel, since officers are testifying in this case, that that would cause you to evaluate their testimony differently than you would Mr. Archer and persons who are not police officers?

PJ STEPHENS: Possibly so. Some officers I might know that testify just as casual acquaintances through my son, but it might affect me.

MR. RICHARDSON: So you feel that there is a possibility that the fact that your son is a Deputy Sheriff might influence you to give more weight to a policeman's testimony solely because he is a policeman?

PJ STEPHENS: I think so.

*Id.*

Based on these statements, the Court held that the trial court should have granted defense counsel's motion to strike this proposed juror for cause.

In that case, the challenged juror made it clear that he would favor the testimony of police officers and place added weight upon such evidence. In the instant case, Dr. Polack never made a clear statement of an inability to be fair. He did not state that he would favor one party over the other or that he would pre-judge the issues in the case to the detriment of any particular party.

Another case where a juror made an expression of bias is *State v. Wade*, 490 S.E.2d 724 (W.Va. 1997). In that case, a prospective juror stated during *voir dire* that he would find a juror guilty even if the prosecution failed to prove its case beyond a reasonable doubt. *Id.* at 740. This statement alone showed an immediate and unquestionable bias. The juror expressed the view

that he was not willing to follow the appropriate legal standard when judging the defendant's guilt. *Id.* Nevertheless, the Court held that the questions asked of this juror during *voir dire* were unclear. *Id.* at 742-43. The juror was confused about the appropriate legal standard, and the trial court was given the discretion to explain the appropriate legal standard to the proposed juror. *Id.* Again, this case is distinguishable from the case at hand in that the juror in *Wade* clearly made a statement of bias against the defendant whereas Dr. Polack expressed no bias toward any particular party.

In *Davis v. Wang*, two potential jurors stated unequivocally that they were biased against malpractice suits and that they would not award mental pain and suffering damages regardless of the Court's instructions. 400 S.E.2d at 234. Based upon these statements, it was clear that these jurors should have been stricken for cause. Not only did they express a personal bias against the Plaintiff's case, but they also acknowledged that they would not follow the trial court's instructions. Again, this case is distinguishable from the case at bar where Dr. Polack never made a statement of bias toward any particular side or issue.

*State v. Phillips* was discussed at length previously. In that case, two jurors stated during *voir dire* that evidence of adultery might influence their decisions. *State v. Phillips*, 461 S.E.2d at 92. There was evidence in the case that the Defendant had committed adultery, which was to be used properly to challenge the defendant's credibility and to prove motivation for killing his wife. *Id.* at 95. The court ruled that the first juror should have been stricken for cause, because after repeated questioning she continued to state that adultery would influence her decision about the defendant's guilt. *Id.* The second challenged juror was not immediately objectionable. He admitted that adultery would influence his decision, but he was never told that he could properly use this evidence to assess the presence of a motive for the commission of the murder or to judge

the credibility of the Defendant. *Id.* at 95-96. The Court held that Defendant failed to meet his burden to prove that this second juror should have been disqualified. *Id.* at 96. As in *Phillips*, the Appellant in this case failed to meet her burden to establish that Dr. Polack was biased against her case or her attorneys.

Another example of an inconclusive statement made during *voir dire* can be found in *State v. Mills*, 631 S.E.2d 586 (W.Va. 2005). In that case, two prospective jurors in a criminal case were informed that the sentence for first-degree murder was life in prison. *Id.* at 590-91. They were then asked if they could consider granting the possibility of parole after 15 years if they found the defendant guilty. *Id.* at 591. In responding to this question in the form of a written questionnaire, both potential jurors stated “no.” *Id.* At first blush, these answers appeared to be clear, affirmative statements that neither juror would consider proper sentencing guidelines. *Id.* at 592. Nevertheless, the Court held that these statements were equivocal and deferred to the trial court’s decision. *Id.* In doing so, it was determined that the statements made by the jurors were based upon confusion in the jury questionnaire itself, and the potential jurors’ statements were not clearly disqualifying as contemplated by *O’Dell*. *Id.* Similarly, in this case, Dr. Polack’s statements were not clearly disqualifying and deference should be given to the trial court. The trial court was in the best position to judge the demeanor and responses of Dr. Polack, and it found him to be an impartial juror.

Lastly, in the most recent opinion of this Court involving potential jurors who made questionable statements during *voir dire*, the Court again refused to find that the trial court abused its discretion in refusing to strike two potential jurors. In *Quinones v. Rubenstein*, discussed above at page 15, a criminal defendant was convicted of second-degree murder related to a cocaine dispute. 624 S.E.2d at 825. The Defendant filed a petition for a writ of *habeas*

*corpus* and asserted, among other issues, that the trial court committed reversible error under *O'Dell v. Miller* when it refused to strike two venire members for cause, making them use two peremptory challenges to strike the venire members. *Id.* at 833. One of the venire members was a client of the county prosecutor and the assistant prosecutor assigned to the defendant's murder case. *Id.* The other venire member expressed "serious concerns" about people who use alcohol and drugs, because both of his children had died tragically, one at the hands of a drunk driver. *Id.* In refusing to strike these venire members for cause, the court held "the matters the two juror candidates originally raised did not represent prejudice beyond question so as to indicate that they had a present and fixed view of the case." *Id.*

As in *Quinones*, the trial court made a proper decision in this case. Dr. Polack did not express a fixed view of this case. Rather, just like the juror in *Quinones* who candidly discussed his personal background, Dr. Polack volunteered that, as a doctor, he had misgivings about trial lawyers. He did not hold a bias against either party or their counsel and he did not have a personal relationship with any critical witnesses. Dr. Polack unequivocally assured the trial court that his personal experiences would not impinge upon his duty as a juror or his ability to decide the case based upon the facts presented and the law as given to him by the court.

There is a consistent theme in all of these cases where a potential juror made questionable statements during *voir dire*. In all of these cases, the trial courts were given the discretion to question the venire members further about their possible bias. This Court has held consistently that a proposed juror must be stricken when they express a genuine bias against a particular party or a reluctance to follow the trial court's instructions and the law as applied to the case.

This honorable Court is faced with a far less challenging issue than those presented in the cases discussed above. Like the prospective jurors in the majority of those cases, Dr. Polack did

not manifest bias or prejudice toward any of the parties to this case. Instead, he simply expressed his candid view of trial lawyers in light of his experiences as a doctor in West Virginia. His response on the juror questionnaire suggested that follow-up questioning was appropriate. However, even in his responses to this questionnaire, Dr. Polack unambiguously stated that he would decide the case on the evidence presented. Thus, Dr. Polack's affirmation in jury *voir dire* that he would follow the instructions of the Court and decide the case on the evidence presented leaves no doubt that the trial court was well within its considerable discretion in denying the motion to strike Dr. Polack for cause.

Because Dr. Polack expressed no clear bias or prejudice and because the trial court painstakingly considered the totality of the circumstances – as well as the mandates of *O'Dell* – this Court should affirm the trial court's ruling and the jury's verdict below.

#### VII. CONCLUSION

**WHEREFORE**, Appellee, CSX Transportation, Inc., respectfully requests the Court to affirm the jury's verdict.

**CSX TRANSPORTATION, INC.**

By

  
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