

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

No. 33525

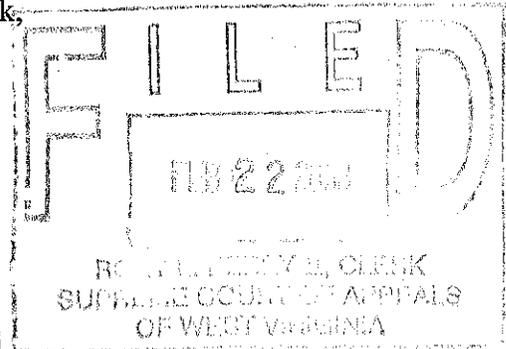
ROBERT MACEK and LAWRENCE
MACEK, Individually and as Co-Executors
of the Estate of Phyllis Macek,

Appellants and Plaintiffs
Below,

v.

CARL R. JONES, D.O. and
WEIRTON MEDICAL CENTER, INC.
a West Virginia corporation,

Appellees and Defendants
Below.



APPELLANTS' INITIAL BRIEF

FROM THE CIRCUIT COURT OF BROOKE COUNTY
CIVIL ACTION NO. 01-C-238

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I.

**KIND OF PROCEEDING AND NATURE
OF THE RULING IN THE LOWER COURT**

The question presented by this appeal is whether two jurors who expressed clear, definite and fixed opinions concerning an alleged medical malpractice “crisis” could sit as jurors in a medical malpractice case?

In this case, the trial court erred by refusing to strike two jurors for cause who, in their responses to a juror questionnaire and *voir dire* questioning, expressed clear, disqualifying biases. Under O’Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002), these jurors were disqualified “as a matter of law” and could not be rehabilitated through further questioning, retractions or promises to be fair. The trial court’s error was especially significant with respect to one of the jurors because he provided false and misleading *voir dire* responses with respect to his exposure to media coverage regarding the alleged “medical malpractice crisis.” The Appellants respectfully submit that a trial court should excuse for cause any prospective juror who fails to give accurate responses to legitimate and material *voir dire* inquiry. See Syl. Pt. 3, West Virginia Human Rights Commission v. Tenpin Lounge, Inc., 158 W. Va. 349, 211 S.E.2d 349 (1975); Phares v. Brooks, 214 W. Va. 442, 446-47, 590 S.E.2d 370, 374-75 (2003). The Appellants’ motion for new trial raised these same issues. It is from the denial of their new trial motion that the Appellants now appeal.

II.

STATEMENT OF FACTS

This case arises, in part, out of the substandard medical care rendered to Phyllis Macek by Carl Jones, D.O. on February 22, 2000 at Weirton Medical Center. On that day, Dr. Jones perforated Phyllis Macek’s colon during the course of what he believed to be an

emergency colonoscopy. Not only did Dr. Jones perform the colonoscopy prematurely before Mrs. Macek received sufficient blood, he also “blew out” Mrs. Macek’s colon by insufflating too much air during the procedure. Mrs. Macek died of septic shock several hours later because Dr. Jones failed to provide appropriate care after he inflicted the perforation.

The Appellants, as Mrs. Macek’s executors, sued both Dr. Jones and Weirton Medical Center in Brooke County, West Virginia. The case proceeded to trial in June, 2006 before the Honorable Martin J. Gaughan. On the first day of trial, Judge Gaughan administered the oath to the panel of prospective jurors and directed each of them to fill out a “special juror questionnaire.” Due to the complexity of the issues, it was believed that a questionnaire would streamline the *voir dire* process. The answers given by juror David George on the questionnaire and in follow up questioning leave no doubt that he should have been stricken for cause.

Question No. 4 of the questionnaire asked: “Can you state that if, after you have heard all of the evidence in this case, you find that the defendant, Dr. Jones, was negligent, you will return a verdict against Dr. Jones?” Mr. George’s answer indicated grave reluctance on his part:

If I believe that if his guilt is proven beyond a reasonable doubt,
I would probably have no choice. (emphasis added)

Additional information concerning this response was developed through the Appellants’ *voir dire* questioning. First, Mr. George’s older brother is Edward “Ned” George, a Wheeling area attorney with an employment law emphasis who represents employers in civil litigation. TR. 151. It comes as no surprise, then, that Mr. George would tend to sympathize more readily with the physician in a medical malpractice case. In fact, Mr. George expressed an almost instinctive sympathy toward a physician who was being sued,

stating: "I know that the defendant, you know, he's facing something very serious." TR., 152.

Question No. 6 related generally to publicity over an alleged malpractice "crisis." It asked: "Have you read, heard or discussed anything about medical negligence actions, lawsuits or a liability crisis? If so, state what you have read, heard or discussed." In response, Mr. George wrote:

I heard of a doctor in Wheeling who lost a million dollar negligence suit for refusing to listen to the daughter of a patient who was ordered to go home and died there that night.

Mr. George provided further details concerning his knowledge of this malpractice case when he was *voir dire*d individually. Importantly, he testified that he personally knew the physician who was involved. As a result, he confessed having "sympathy for him" being subjected to a substantial verdict. TR., 158. At various points, Mr. George confirmed the lasting effects of this verdict on his own, personal views. "It kind of stays with me," he admitted at the outset. TR., 157. Later, he acknowledged that while he tried to be fair, nevertheless, this incident "had some kind of effect on me simply because I knew [the physician]." TR., 158. Furthermore, he admitted that he "couldn't just wipe it clean from [his] memory." TR., 159.

The next three questions may be considered together. These questions all dealt with whether Mr. George had formed any opinions concerning medical malpractice cases generally or any alleged malpractice "crisis." Question No. 7 asked: "Have you formed an opinion concerning anything you may have read, heard or discussed about medical negligence actions, lawsuits or a liability crisis? If so, please explain." In response, Mr. George wrote as follows:

I sometimes can't help but think that some lawyers take advantage of what become frivolous cases and the premiums

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doctors have to pay skyrocket and it drives some of them out of the state. On the other hand, I try to be objective about them as well.

Question No. 8 asked: "Have you formed any opinion concerning claims or suits for medical malpractice or about the amount of recovery for damages? If so, please explain."

Mr. George responded as follows:

I will admit that I suspect there can be greed involved with the plaintiffs. However, some do have legitimate cases that stick.

Question No. 9 asked: "Do you believe that negligence lawsuits have interrupted the quality of medical care to the public or have increased the costs of medical care or medical insurance?" Mr. George wrote:

I think it has because of a doctor in Weirton who had to refer me to an interim [doctor] because she was trying to reassess what she was going to do because of the malpractice [situation].

Follow-up questioning confirmed that Mr. George did, indeed, have fixed opinions concerning medical malpractice cases. For one thing, he expressed a belief that there is a malpractice "crisis." TR., 164-65. In the same vein, he voiced a concern that "there could be lots of doctors who leave the state because they have to pay so much for their premiums." TR., 163. In fact, Mr. George testified that he knew a physician who lived near his parents who "ended up moving to Ohio because he felt like his premiums were going sky high." TR., 165.

More than that, Mr. George's own physician in Weirton was giving serious consideration to leaving the state. As he noted in response to Question No. 9, he was actually referred to an "interim" because of his physician's uncertain future. Mr. George testified that his physician was also "a real good friend" of longstanding. Accordingly, he was "sympathetic with her because...it's been kind of difficult for her." TR., 163. He also

conceded that because of the personal friendship he was “emotionally involved” with this issue. TR., 164.

The plaintiffs moved to strike Mr. George for cause, indicating that his personal opinions on the subject of medical malpractice were “overwhelming” and, under O’Dell, “it doesn’t matter if [he] say[s] [he] can be fair.” TR., 170. Judge Gaughan conceded that some of the views he expressed were “disturbing.” TR., 171. However, he concluded that “overall I’m satisfied that he has not indicated that he would carry any bias into the jury box with him.” TR., 173.

At the time of jury selection, Glen Stolburg was a district sales manager for Ogden Publishing. It goes without saying that Ogden’s publishing concerns have been extraordinarily vocal and biased in their coverage of the malpractice “crisis.” This Court is well aware of the organized effort by physicians and major media outlets in the Northern Panhandle to saturate potential jurors with news stories, fliers, billboards, etc., documenting a so-called “crisis.” It was also brought directly to Judge Gaughan’s attention. The plaintiffs produced a letter opinion written by another Northern Panhandle judge acknowledging the media campaign and its profound effects:

I agree with plaintiff’s counsel that *a campaign of advertising, media stories and public relations efforts in Ohio County over a period of several years* have convinced a large majority of Ohio County residents that verdicts in favor of plaintiffs in medical malpractice cases have caused and will continue to cause doctors to leave Ohio County, thereby undermining the healthcare available to them, and that this campaign has tainted the jury pool to such an extent that it has become more difficult to seat a fair and impartial jury in a medical malpractice case in Ohio County.¹

¹ See Letter Opinion in Rose v. Kettler (Ohio County, December 6, 2005) at p.2 (attached as Ex. 1 to “Plaintiffs’ Memorandum in Support of Plaintiffs’ Post-Trial Motion.”)

Despite the fact that Mr. Stolburg's employer was at the forefront of this coordinated effort, and despite the fact that he identified himself as a district sales manager, he claimed in his juror questionnaire that he had never once "read, heard or discussed anything about medical negligence actions, lawsuits or a liability crisis." See Stolburg Special Juror Questionnaire at Question 6. This response was directly contradicted by his *voir dire* testimony immediately thereafter.

When questioned individually, Mr. Stolburg admitted having knowledge of Ogden's coverage of medical malpractice issues: "I know it carried some coverage...well, I know it was on the front page a few times." Mr. Stolburg was also knowledgeable concerning the "strike" by Wheeling area physicians, indicating that their insurance rates were running "super high" and that they were seeking a "cap" on damages. TR., 198. When asked his views concerning the "strike," he noted first and foremost that "we need doctors" and that "we don't want [them] to be on strike." TR., 199. Contrary, then, to his written responses, Mr. Stolburg had been exposed to a considerable amount of adverse publicity and had a definite, fixed opinion that physicians should be placated to keep them from striking or leaving the state.

Significantly, Mr. Stolburg also testified that people filing suits to try to collect damages were responsible for causing insurance rates to increase, both the rates of doctors and his own insurance rates. TR., 200. He also appeared to favor lowering verdicts in medical malpractice cases. Asked what was responsible for high insurance rates, Mr. Stolburg testified that general litigation costs run high and that, in a malpractice setting, we should "try[] to keep that down to a minimal [sic]." TR., 205.

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The plaintiffs moved to strike, noting that Mr. Stolburg worked for the "culprit" behind much of the malpractice media campaign and that his response to the questionnaire was clearly an effort at concealment. Judge Gaughan acknowledged that Mr. Stolburg's written response "certainly raises some question" concerning his impartiality. TR., 204. Nevertheless, he concluded that "on the totality I think he'll be a fair and impartial juror." TR., 205.

There was clearly an abundance of jurors in the jury pool, and Judge Gaughan never suggested that his refusal to strike jurors George or Stolburg was necessary because of a shortage of jurors. (See the juror questionnaire and jury list included with the record. Docket Nos. 377, 379.) Judge Gaughan's failure to strike these jurors for cause resulted in substantial prejudice. The plaintiffs were given two peremptory strikes. The plaintiffs were effectively deprived of their peremptories because they were forced to use them in lieu of their strikes for cause. As a result, the plaintiffs had no peremptories left to strike juror Carole DiNardo, a phlebotomist at an area hospital who worked with the defendant, Dr. Jones. Mrs. DiNardo eventually was selected as the jury foreperson.

There can also be no doubt about the effect this prejudice had on the ultimate outcome of the trial. As demonstrated by the record, and so set forth more fully in the statement of facts that accompanied the Petition of this matter, the jury returned a verdict in the defendant's favor despite overwhelming evidence of his malpractice and despite the fact that Dr. Jones recanted his sworn deposition testimony with respect to nearly every single critical fact in the case.

Unfortunately, due to Judge Gaughan's refusal to strike Mr. George and Mr. Stolburg, this was not an objective jury. After a five day trial, the jury, with Mrs. DiNardo as its

foreperson, returned a verdict in favor of the defendants, Dr. Jones and Weirton Medical Center.

The plaintiffs timely moved for a new trial pursuant to Rule 59, again citing Judge Gaughan's failure to strike Mssrs. George and Stolburg. On October 23, 2006, Judge Gaughan denied the plaintiffs' new trial motion and this appeal followed.

III.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY REFUSING TO STRIKE JURORS GEORGE AND STOLBURG FOR CAUSE WHEN THEIR RESPONSES TO A WRITTEN QUESTIONNAIRE AND *VOIR DIRE* QUESTIONING INDICATED THE PRESENCE OF A DISQUALIFYING BIAS

IV.

STANDARD OF REVIEW

"In reviewing the qualifications of a jury to serve in a criminal [or civil] case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court." Doe v. Wal-Mart Stores, Inc., 210 W. Va. 664, 670, 558 S.E.2d 663, 669 (2001) quoting State v. Miller, 197 W. Va. 588, 600-01, 476 S.E.2d 535, 547-48 (1996) (brackets in original); Mikesinovich v. Reynolds Memorial Hospital, 220 W. Va. 210, 211, 640 S.E.2d 560, 561 (2006).

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V.

ARGUMENT

THE TRIAL COURT ERRED BY REFUSING TO STRIKE JURORS GEORGE AND STOLBURG FOR CAUSE WHEN THEIR RESPONSES TO A WRITTEN QUESTIONNAIRE AND *VOIR DIRE* QUESTIONING INDICATED THE PRESENCE OF A DISQUALIFYING BIAS

The general test for determining whether a juror is qualified to serve was set forth in Davis v. Wang, 184 W. Va. 222, 234, 400 S.E.2d 230 (1990): “In West Virginia, the test of a qualified juror is whether a juror can render a verdict based on the evidence, without bias or prejudice, according to the instructions of the court.”²

Thus, it is well established in West Virginia that “[w]hen individual *voir dire* reveals that a prospective juror feels prejudice against [a party] which the juror admits would make it difficult for him to be fair, and when the juror also expresses reluctance to serve on the jury, the [party’s] motion to strike the juror from the panel for cause should ordinarily be granted.” Syl. Pt. 1, State v. Bennett, 181 W. Va. 269, 382 S.E.2d 322 (1989). Additionally, once a juror has made a clear statement reflecting such bias, “the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.” Syl. Pt. 5, O’Dell v. Miller, 211 W. Va. 285, 565 S.E.2d 407 (2002). This fundamental principle has been cited and reaffirmed by the West Virginia Supreme Court of Appeals time and again. See, e.g., Syl. Pt. 2, Thomas v. Makani, 218 W. Va. 235, 624 S.E.2d 582 (2005). As the Supreme Court of Appeals of West Virginia has held, “The relevant test for determining whether a juror is biased is whether the juror has such a fixed opinion that he or she could not judge impartially.... Even though a juror swears that he or

² Davis was overruled on other grounds (the propriety of a “mistake of judgment” jury instruction in a malpractice case) by Syl. Pt. 5, Pleasants v. Alliance Corp., 209 W. Va. 39, 543 S.E. 2d 320 (2000).

she could set aside an opinion and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts indicate to the contrary." Syl. Pt. 4, State v. Miller, 197 W. Va. 588, 476 S.E.2d 535 (1996); State v. Salmons, 203 W. Va. 561, 580, 509 S.E.2d 842, 861 (1998).

"Because preconceived notions about the case at issue threaten impartiality, each juror must be free of bias." Michael v. Sabado, 192 W. Va. 585, 592, 453 S.E.2d 419, 426 (1994). In other words, each party has a right to a verdict from unbiased jurors acting without prejudice. The minds of prospective jurors should be wholly free from bias or prejudice, which can be shown by either the juror's admission or by proof of specific facts. See Syl. Pt. 5, State v. Miller. See also, Rine v. Irisari, 187 W. Va. 550, 420 S.E.2d 541 (1992). In Rine, the Supreme Court of Appeals reaffirmed the holdings in State v. West, 157 W. Va. 209, 200 S.E.2d 859 (1973) and State v. Matney, 176 W. Va. 667, 671, 346 S.E.2d 818, 822 (1986) when it noted that "[a]ny doubt the Court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror" and that the purpose of *voir dire* is to seat jurors "who are not only free from prejudice, but who are also free from the suspicion of prejudice." Rine, 187 W. Va. at 556 & n. 13.

Of course, the right to an unbiased jury hinges on the parties' ability to discover, through the *voir dire* process, whether such bias exists in the first place. See Syl. Pt. 2, State v. Pendry, 159 W. Va. 738, 227 S.E.2d 210 (1976) (*voir dire* appropriately explores all "matters which are reasonably calculated to permit litigants and their attorneys to exercise their preemptory challenges on an intelligent and meaningful basis."), *overruled in part on other grounds*, Jones v. Warden, West Virginia Penitentiary, 161 W. Va. 168, 241 S.E.2d 914 (1978). See also, Doe v. Wal-Mart Stores, Inc., 210 W. Va. 664, 671, 558 S.E.2d 663, 670

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(2001) (a party is “entitled to exercise her peremptory strikes from a jury panel consisting of qualified, impartial and unbiased jurors.”).

In other words, “*voir dire* must be probing enough to reveal jurors’ prejudices regarding issues that may arise at trial so that counsel may exercise their challenges in an informed manner.” Miller, 197 W. Va. at 603, 476 S.E.2d at 550. As this Court held in one medical malpractice case:

Voir dire examination is designed to allow litigants to be informed of **all relevant and material matters that might bear** on disqualification of a juror and is essential to a fair and intelligent exercise of the right to challenge either for cause or peremptorily. Such examination must be meaningful so that the parties may be enabled to select a jury competent to judge and determine the facts in issue without bias, prejudice or partiality.

Syl. Pt. 1, Thornton v. CAMC, 172 W. Va. 360, 305 S.E.2d 316 (1983) (emphasis supplied).

See also, Syl. Pt. 3 Torrence v. Kusminsky, 185 W. Va. 734, 408 S.E. 2d 684 (1991).

It is for this reason that a trial court should excuse for cause any juror who fails to give accurate responses to legitimate and material *voir dire* inquiry. This Court has already recognized that a party may be entitled to a new trial when it is discovered through a later hearing that a juror has falsely answered a material question on *voir dire*. There is no reason to apply a different standard when, as is the case here, a prospective juror admits to providing false answers to material questions while the *voir dire* process is still ongoing. See Syl. Pt. 3, West Virginia Human Rights Commission v. Tenpin Lounge, Inc., 158 W. Va. 349, 211 S.E.2d 349 (1975). On these points, Phares v. Brooks, 214 W. Va. 442, 590 S.E.2d 370 (2003) and Rine v. Irisari, *supra*, are on point and compelling.

Phares involved a motor vehicle wreck. During *voir dire*, the plaintiff asked the panel if anyone was familiar with the stretch of road where the accident took place. See Phares v.

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Brooks, 211 W. Va. 346, 348, 566 S.E.2d 233, 235 (2002) (“Phares I”). As the Court described *voir dire* in that case, “One member of the panel, Ms. Judith Dolechek, did not answer in the affirmative. During the further questioning of the panel, Ms. Dolechek indicated that she worked for an insurance company. She, however, also indicated that her job would, in no way, influence her verdict.” Id.

The jury ultimately returned a verdict that resulted in no recovery for the plaintiff. Following the verdict, counsel for the plaintiff contacted Ms. Dolechek. When asked, Ms. Dolechek admitted that she was familiar with the scene of the accident and “believed that the curve where the accident occurred was so dangerous that no one could be at fault for any accident which occurred there. Ms. Dolechek also expressed the opinion that everyone sued and that lawsuits caused insurance rates to rise.” Id.

The plaintiff asked for an inquiry into Ms. Dolechek’s conduct and the trial court denied that request. The plaintiff appealed and this Court reversed, finding that:

the question posed by the appellant’s attorney to the jury as to their knowledge of the scene of the accident was material in that it went to the question of whether the jurors could rule in the case solely on the evidence presented, rather than on personal knowledge. Additionally, the fact that Ms. Dolechek worked for an insurance company was material in that it raised the possibility of bias resulting from employment.

Id., 211 W. Va. at 349.³

On remand, the trial court conducted a hearing into Ms. Dolechek’s conduct but ultimately concluded that no new trial was warranted. Again, this Court reversed finding that Ms. Dolechek’s silence about her knowledge of the scene of the accident did amount to a materially false *voir dire* response. Accordingly, this Court reversed the trial court and

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³ Here, of course, no later hearing was necessary. As set forth above, Mr. Stolburg’s answers were revealed to be false during his later *voir dire* inquiry.

remanded the matter for a new trial. Phares v. Brooks, 214 W. Va. 442, 446-47, 590 S.E.2d 370, 374-75 (2003). (“Phares II”).

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

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

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

After the jury returned a verdict for Dr. Irisari, the Rines appealed. This Court reversed and remanded the case for a new trial, finding, among other things, that the trial court erred in failing to strike Ms. Okel and Mr. Brown for cause.

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

[T]he discretion granted the trial Court in striking jurors for cause must be balanced against a determination, after the fact,

of whether the potential jurors were sufficiently biased so as to prevent a fair trial. This Court has concluded that ‘the mere statement of a prospective juror that he or she is not biased with respect to a particular cause may not be sufficient for the trial Court to conclude that no such bias exists.’

Rine, 187 W. Va. at 555-56, quoting Davis v. Wang, 184 W. Va. 222, 225, 400 S.E. 2d 230, 233 (1990). Rine reaffirmed the holdings in State v. West, 157 W. Va. 209 (1973) and State v. Matney, 176 W. Va. 667 (1986) when it held that “[a]ny doubt the Court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror” and that the purpose of *voir dire* is to seat jurors “who are not only free from prejudice, but who are also free from the suspicion of prejudice.” Rine, 187 W. Va. at 556 & n. 13. Importantly, these same principles were reaffirmed again only fourteen months ago in Mikesinovich v. Reynolds Memorial Hospital, 220 W. Va. 210, 211 n.3, 640, S.E.2d, 560, 561 n.3 (2006) (“the discretion of the trial judge in deciding juror disqualification issues must resolve any uncertainty and doubts as to a juror’s qualification in favor of excluding the juror”).

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

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

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Okel and Mr. Brown from the jury. Accordingly, we find that the trial court abused its discretion.

187 W. Va. at 556 (emphasis supplied).

As was the case in Rine, jurors George and Stolburg each exhibited a disqualifying bias and, thus, should have been stricken from the jury. Each of them expressed bias in clear terms preventing them from sitting as impartial jurors. Under settled law, any doubts concerning their impartiality should have been resolved in the Appellants' favor. More importantly, once a clear statement of bias was expressed it was impossible for the court to rehabilitate these jurors.

With respect to Mr. George, Judge Gaughan's conclusion after reviewing the *voir dire* transcript was that there were "no less than seven instances where [he] makes it clear that he can be fair and impartial." 10/23/06 ORDER, AT 4. This, however, turns the analysis on its head. O'Dell, in particular, makes it clear that once a juror has made a statement indicating bias, he cannot be rehabilitated thereafter --even by solemn promises to be fair.

Mr. George's responses to the questionnaire and individual *voir dire* convincingly demonstrate bias. Judge Gaughan dismisses Mr. George's answer to Question No. 4, indicating that he was simply confused over the applicable burden of proof.⁴ But his answer is more telling than that. Regardless of what the burden of proof is, Mr. George's answer makes it clear that he would only return a plaintiff's verdict with great reluctance. In his own words, if the plaintiffs prevailed he "would probably would have no choice" but to find for them. Far from indicating a fair and impartial juror, this response clearly portrays a juror who would return a defense verdict unless compelled to do otherwise. Mr. George's defense

⁴Specifically, the court notes in this regard: "Mr. George's incorrect assumption of the standard of proof in a civil, medical malpractice case, as opposed to a criminal case, is very common among prospective jurors and does not readily indicate a bias." 10/23/06 ORDER, AT 4.

leanings were also confirmed by his repeated expressions of sympathy for the plight of physicians.

What is truly curious about Judge Gaughan's analysis is that the fact that he never addresses the key issue: Mr. George's views concerning the medical malpractice "crisis." Mr. George's answers portray a man whose life experiences have led to definite, fixed opinions concerning malpractice litigation. Mr. George personally knows two physicians from the Northern Panhandle who left the state--they say--due to skyrocketing insurance rates. But the "crisis" hits even closer to home. According to Mr. George, his own physician and close friend was considering leaving the state for the same reason! This was more than idle talk: Mr. George was actually referred to an interim physician while his friend decided whether to go or stay. By his own admission, the fact that his good friend was so profoundly affected by all of this meant that he, too, was "emotionally involved."

We are left, then, with a man who believes that frivolous malpractice cases and skyrocketing insurance rates have resulted in a "crisis" which is driving out West Virginia's physicians. These are not abstract beliefs. They involve close friends in the health care field who have been personally affected by the "crisis." Mr. George himself felt the sting of the "crisis," losing his own, personal physician. Obviously, with this kind of personal involvement, Mr. George cannot simply set aside these beliefs and magically become an impartial juror. His promise to do so, no matter how sincere, is meaningless under the law. Under an unbroken line of cases culminating in Mikesinovich, Judge Gaughan's own doubts concerning this juror's impartiality should have dictated the outcome: he should have been stricken for cause upon the plaintiffs' motion.

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The same is true for Mr. Stolburg. In fact, there are two grounds for disqualification present. First, Mr. Stolburg gave an answer on the juror questionnaire that was plainly false. In his written answer, he denied having any knowledge of the media coverage surrounding the so-called malpractice "crisis"--despite being employed in a management position by Ogden Publishing. When subjected to examination by the plaintiffs, Mr. Stolburg admitted having followed the news coverage. Furthermore, his answers betrayed a rather comprehensive understanding of the parties involved, their respective positions, etc.

Voir dire, of course, literally means "to speak the truth." Black's Law Dictionary, 1412 (5th ed. 1979). It goes without saying that giving false answers to *voir dire* questions undermines the whole jury selection process. It seems obvious that Mr. Stolburg falsified his answer with an ulterior motive--perhaps to conceal the truth in an effort to sabotage the jury in this medical malpractice case, as the plaintiffs themselves suggested. TR., 204. In the end, however, his motive is irrelevant. His false answer to a material question should have been sufficient grounds, in and of itself, to grant the plaintiffs' motion to strike. See, e.g., *Phares I; Phares II; West Virginia Human Rights Comm'n v. Tenpin Lounge, Inc.*, 158 W.Va. 349, 211 S.E.2d 349 (1975).

Second, Mr. Stolburg's substantive responses to *voir dire* show that he, like Mr. George, has a disqualifying bias. Clearly, he believes that steps should be taken to prevent physicians from leaving the state or engaging in another "strike." In fact, he believes there is a direct linkage between people bringing malpractice cases and the insurance rate increases that have forced physicians to take these kinds of desperate measures. One way to keep rates down, he acknowledged, is to keep malpractice verdicts down.

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Here, again, we have a juror whose opinions belie an underlying bias. When coupled with his demonstrably false answer on the questionnaire, Judge Gaughan should have stricken this juror for cause. Judge Gaughan himself acknowledged that his impartiality was brought into question. Under our case law, this doubt should have been resolved in the plaintiffs' favor. Accordingly, the failure to grant the plaintiffs' motion to strike was clear error.

VI.

CONCLUSION

The answers given by jurors George and Stolburg as part of the *voir dire* process demonstrated clear bias. Contrary to settled law, Judge Gaughan credited promises made by both jurors that they could be fair. The law, however, is clear. Having expressed disqualifying biases in their *voir dire* responses, both jurors were disqualified "as a matter of law." Accordingly, the plaintiffs pray that Judge Gaughan's ruling on the new trial motion be REVERSED, and that the case be REMANDED for a NEW TRIAL.

Respectfully submitted,

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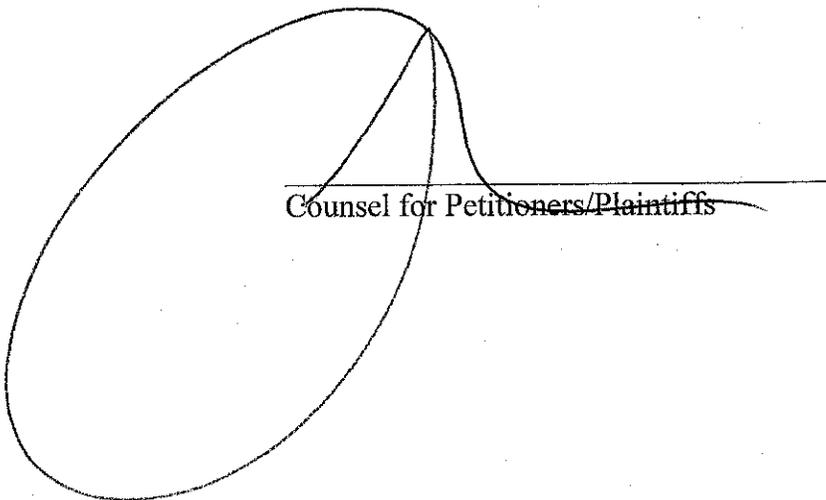
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CERTIFICATE OF SERVICE

Service of the foregoing APPELLANTS' INITIAL BRIEF was had upon counsel of record herein by mailing a true copy thereof on this 21st day of February, 2008, to:

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