

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

No. 33525

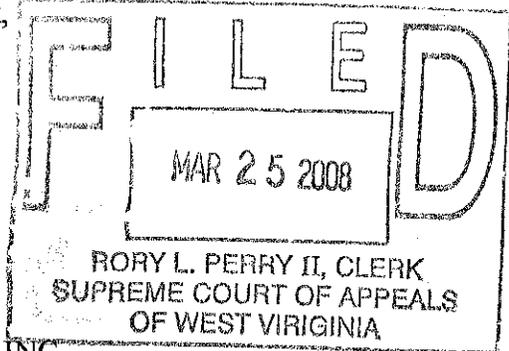
ROBERT MACEK AND LAWRENCE
MACEK, Individually and as Co-Executors
of the Estate of Phyllis Macek,

Petitioners and Plaintiffs
Below,

v.

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

Respondents and Defendants
Below.



BRIEF OF APPELLEE, CARL R. JONES, D.O.

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

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
I. COUNTER-STATEMENT OF PROCEEDING AND NATURE OF RULING IN LOWER COURT	1
II. COUNTER-STATEMENT OF FACTS	1
III. COUNTER TO ASSIGNMENT OF ERROR	7
THE TRIAL COURT DID NOT ERR BY REFUSING TO STRIKE PROSPECTIVE JURORS GEORGE AND STOLBURG FOR CAUSE WHEN THEIR RESPONSES TO THE WRITTEN QUESTIONNAIRE AND FORMAL <i>VOIR DIRE</i> QUESTIONING INDICATED THAT THEY WERE ABLE TO BE FAIR AND IMPARTIAL WITNESSES THAT LACKED ANY DISQUALIFYING BIAS.	
IV. STANDARD OF REVIEW	7
V. ARGUMENT	8
VI. CONCLUSION	14
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Mikesinovich v. Reynolds Memorial Hospital</u> , 220 W.Va. 210, 640 S.E.2d 560 (2006)	9
<u>O'Dell v. Miller</u> , 211 W.Va. 285, 565 S.E.2d 407 (2002)	8
<u>Rine v. Irisari</u> , 187 W.Va. 550, 420 S.E.2d 541 (1992)	9
<u>State v. Bennett</u> , 181 W.Va. 269 (1989)	8
<u>State v. Miller</u> , 197 W.Va. 588 (1996)	7, 9
<u>State v. Phillips</u> , 194 W.Va. 569, 461 S.E.2d 75 (1994)	7, 9
<u>State v. Pratt</u> , 161 W.Va. 530, 244 S.E.2d 227 (1978)	8
<u>State v. Pietranton</u> , 140 W.Va. 444, 84 S.E.2d 774, 783 (1984)	8
<u>Thomas v. Makani</u> , 218 W.Va. 235, 624, S.E.2d 582 (2005)	9, 12

I.

COUNTER-STATEMENT OF PROCEEDING AND
NATURE OF RULING IN LOWER COURT

The question presented in the appeal was whether two jurors, who expressed that they would be fair and impartial, should have been stricken at Plaintiffs' request simply because they made statements that were disliked or disbelieved by Plaintiffs' counsel.

During jury selection, the trial court often used its discretion and struck a number of prospective jurors. However, two of the Plaintiffs' requests to strike were denied as the jurors expressed a clear conviction, after detailed questioning by the attorneys and the court, that they would be fair and impartial and that they had no disqualifying bias, such as a financial stake in the case, inside information or knowledge about the case, and/or a relationship or connection with a party.

After a six (6) day trial in which the jury returned a verdict in favor of the Defendant, Dr. Jones, Plaintiffs filed a motion for post-trial relief arguing it was an error not to strike the two additional jurors for cause. The trial court confirmed its original assessment of the jurors and denied the post-trial motion as the Judge had the unique opportunity of seeing the jurors when they testified during *voir dire* to assess their credibility. It is from the denial by the trial court of the Plaintiffs' Post-Trial Motion that the Appellants now appeal.

II.

COUNTER-STATEMENT OF FACTS

The herein matter is a medical professional liability claim brought against Dr. Jones and Weirton Medical Center for alleged failure to properly care for Phyllis Macek, the decedent Plaintiff.

On February 21, 2000, the decedent, a 75 year old woman at the time, presented at the emergency room of Weirton Medical Center suffering from bloody stool. Her treating doctor, Gary A. Hanson, M.D., admitted her and ordered a consult from a gastroenterologist. Carl R. Jones, D.O., a gastroenterologist, subsequently examined Phyllis Macek and scheduled her for a colonoscopy the next morning. As blood tests from the early morning of February 22, 2000, revealed that Phyllis Macek had lost blood over night, Dr. Jones ordered two pints of blood to be transfused and promptly proceeded with the colonoscopy. After confronting many challenges in attempting the colonoscopy, Dr. Jones had to stop the procedure. He transferred his patient to the critical care unit, ordered an abdominal x-ray, and, subsequently, based on the x-ray findings, had her taken for an exploratory laparotomy, where she developed disseminated intravascular coagulopathy (DIC). She then passed away.

In June of 2006, the case proceeded to trial before the Honorable Martin J. Gaughan. On the first day of trial, Judge Gaughan administered to the panel of prospective jurors the oath, and, at the request of Plaintiffs' counsel, directed them to fill out a "Special Jury Questionnaire" drafted by Plaintiffs' counsel. After the panel of prospective jurors had completed the "Special Jury Questionnaire," the written document was collected from them and traditional *voir dire* of oral questioning and answering by the panelists was conducted in open court.

In addition to the "Special Jury Questionnaire" prolonging the *voir dire* process, it generated some problems in that many prospective jurors provided written responses that were not necessarily internally consistent and were unclear and ambiguous. As such, further questioning of most of the prospective jurors occurred in the privacy of the Judge's chambers.

During the completion of questioning of each individual in chambers, Judge Gaughan entertained motions to disqualify the prospective juror. Judge Gaughan did, in fact, strike a number of prospective jurors through these motions. (See Transcript 145-146, 149, 186-187, 192-194, 263, 273) In spite of granting all but two of Plaintiffs' motions to strike for cause, Plaintiffs are dissatisfied. They take issue with these two rulings, asserting that the trial court erred in failing to strike David Andrew George, because Plaintiffs perceived that he had a pro-physician leaning, and erred in failing to strike Glen Stolburg based on the unsubstantiated challenge they make to his veracity.

Mr. George demonstrated he was a person determined to be fair and objective. In responses to Special Jury Questionnaire No. 3, which asked whether he had preconceived notions or ideas about the duty doctors owe patients, Mr. George wrote, **"I make it a policy to be as objective as I can with everyone regardless of any medical standards."** When asked in Question No. 11a whether he had an experience at Weirton Medical Center that would keep him from being fair and impartial, he stated, **"I don't see any difficulties in reaching an impartial and unbiased verdict,** since I have never been really victimized through this matter." (Emphasis added). When asked in Question No. 14 if he had any feelings or personal philosophies that would prevent him from bringing a negligence law suit, he wrote, **"No because I do what I can to keep an open mind."** (Emphasis added). Again, when asked in Question No. 15 whether he was morally indebted to the medical profession, he stated, **"No. I wouldn't say that I feel that way so I think I can be fair and impartial."** (Emphasis added). (See Special Jury Questionnaire of David Andrew George).

When Mr. George was questioned in chambers, he reinforced his written statement that he would be fair and impartial. When asked to explain an unclear answer to Special Jury Questionnaire No. 4, he stated, "Well I - - maybe part of my philosophy is **I try to be as objective as I can possibly be**, because I know that the defendant, you know, he's facing something very serious." (Emphasis added). (Transcript at 152). Mr. George goes on to state, "I tend to be the kind of sympathetic with people at the same time and - - but there could be a good chance I'd say he's guilty [referring to the defendant], too." (Transcript at 152-153). Later, during questioning, Mr. George stated, "As I say, I just try - - **I just try to be as objective as I can.**" (Transcript at 156). When pointedly asked whether he would listen to the evidence and listen to the law and still have the judgment to be fair to both sides of the case, Mr. George responded, "Yes, I do believe I can, yes." (Transcript at 166). Based on the totality of his responses, Judge Gaughan was correct to deny the motion to strike him.

As to Glen Stolburg, there is and was no articulated bias. Glen Stolburg filled out the Special Jury Questionnaire with simple "yes" and "no" answers to all the questions. When asked if he could return a verdict against Dr. Jones if the evidence supported it, he responded, "Yes." When asked if he could return a verdict in favor of Dr. Jones, he also responded, "Yes." (See Special Jury Questionnaire of Glen Stolburg Question No. 5). His "yes" and "no" answers were consistent with someone who had no bias, but was merely succinct in his answers.

Since the record was void of a bias, Plaintiffs' counsel has resorted to attacking Mr. Stolburg's integrity. Judge Gaughan, the only objective person in a position to do so, evaluated Mr. Stolburg's demeanor, looked in his eyes, watched his body language, observed his mannerisms, which are not captured as part of a recorded transcript, and concluded that Mr. Stolburg was being honest.

Thus, he apparently concluded Mr. Stolburg should not be stricken for cause.

Glen Stolburg held the job of overseeing delivery of papers to customers for a local newspaper. Plaintiffs' counsel seems to challenge his veracity because of the letter opinion written by Judge Wilson that major media outlets have saturated potential jurors in Ohio County as of 2005 with information documenting a "crisis" of physicians. The opinion letter states a "large majority of Ohio County residents [are convinced] 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 health care available to them." Plaintiffs conveniently ignored that the case was not even in Ohio County. Moreover, anyone familiar with this area and the Weirton area recognizes that citizens of the Weirton area frequently seek medical treatment either in Steubenville, Ohio, or in Pittsburgh. While a "crisis," if indeed one existed, may be of a concern to residents in Ohio County and for Wheeling health care providers, the crisis of physicians in Weirton is not nearly the concern that exists elsewhere, as a ten minute drive east or west of Weirton provides one with access to a plethora of physicians whose rates are not affected by any "crisis" in West Virginia, thus, further undermining the application of Judge Wilson's findings for Ohio County.

Plaintiffs try to impute the actions of Mr. Stolburg's employer and views onto him. Mr. Stolburg is an overseer of the paper boys. His job is to distribute the paper to the individual carriers. It should not be a foreign concept for anyone that works to have diverging political views from owners. It is not as if Mr. Stolburg is a reporter, writer, or editor of the paper!

Contrary to Plaintiffs' assertions, there is nothing in the record to suggest Mr. Stolburg worked for the "culprit" behind the perceived medical malpractice media campaign, nor is there any evidence of a calculated effort of conspiracy by Mr. Stolburg.

Finally, Plaintiffs' challenge to Mr. Stolburg's veracity is not based on outside information impeaching Mr. Stolburg. They base this claim on Mr. Stolburg's testimony. How can they possibly claim he tried to hide information from them based on his disclosure of the information?

Ultimately, the case was tried before an impartial jury. The Plaintiffs have had their fair day in court on this matter.

III.

COUNTER TO ASSIGNMENT OF ERROR

THE TRIAL COURT DID NOT ERR BY REFUSING TO STRIKE PROSPECTIVE JURORS GEORGE AND STOLBURG FOR CAUSE WHEN THEIR RESPONSES TO THE WRITTEN QUESTIONNAIRE AND FORMAL *VOIR DIRE* QUESTIONING INDICATED THAT THEY WERE ABLE TO BE FAIR AND IMPARTIAL WITNESSES THAT LACKED ANY DISQUALIFYING BIAS.

IV.

STANDARD OF REVIEW

The standard of review to be utilized by the court in matters involving appeals from challenging jurors for cause was articulated in syllabus point 6 of State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996), as follows:

... the challenging party bears the burden of persuading the *trial court* that the juror is partial and subject to being excused for cause. ... an appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias when it is left with a clear and definite impression that a prospective juror would have been unable faithfully and impartially to apply the law.

This Court further held, "[T]he trial court is in the best position to judge the sincerity of a juror's pledge to abide by the court's instructions; therefore, its assessment is entitled to great weight." State v. Miller, 197 W.Va. 606, 476 S.E.2d 553 (citing State v. Phillips, 194 W.Va. 569,

590, 461 S.E.2d 75, 96). With regard to “whether a juror should be excused to avoid bias or prejudice in a jury panel,” this Court has stated that the matter is “within the sound discretion of the trial judge.” O’Dell v. Miller, 211 W.Va. 285, 288, 565 S.E.2d 407, 410 (2002).

V.

ARGUMENT

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY REFUSING TO STRIKE JURORS GEORGE AND STOLBURG FOR CAUSE AS THEIR RESPONSES TO WRITTEN QUESTIONNAIRES AND *VOIR DIRE* QUESTIONING INDICATED THEY LACKED A DISQUALIFYING BIAS AND HAD THE ABILITY AND DESIRE TO BE FAIR AND IMPARTIAL.

The decision as to whether to grant a party’s motion to strike jurors for cause rests within the sound discretion of the trial court. State v. Bennett, 181, W.Va. 269, 382 S.E.2d 322 (1989), citing State v. Pietranton, 140 W.Va. 444, 84 S.E.2d 774, 783 (1984).

[I]f a prospective juror makes an inconclusive or vague statement during *voir dire* reflecting or indicating the possibility of a disqualifying bias or prejudice, further probing into the facts and background related to such bias or prejudice is required. O’Dell v. Miller, 221 W.Va. 285, 656, S.E.2d 407 (2002) Syllabus point 4.

Jurors 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 either party, requiring their excuse. Syllabus point 3, State v. Pratt, 161 W.Va. 530, 244 S.E.2d 227 (1978).

“Once a juror has made a clear statement reflecting a disqualifying bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retraction or promise to be fair.” O’Dell v. Miller, 221 W.Va. 285, 290, 565 S.E.2d 407, 412 (2002). (Emphasis added).

In making a final decision, the trial court is to consider the totality of the circumstances and conduct a full inquiry before determining if there is a basis to disqualify a juror. Thomas v. Makani, 218 W.Va. 235, 624 S.E.2d 582, 586 (2005).

When an issue of candor of a prospective juror is raised, “The trial court is in the best position to determine the sincerity of the juror’s pledge to abide by the court’s instructions; therefore, its assessment is entitled to great weight.” *Id.* State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) citing State v. Phillips, 194 W.Va. 569, 461 S.E.2d 751 (1998).

II.

THE COURT DID NOT ERR IN DENYING PLAINTIFFS’ MOTION TO STRIKE JUROR GEORGE.

The Plaintiffs assert that David Andrew George should have been stricken for cause because he had a disqualifying bias. However, review of the record makes it clear that the assertion is misplaced.

In Mikesinovich v. Reynolds Memorial Hospital, 220 W.Va. 210, 640 S.E. 2d 560 (2006), this Court gave an example of a disqualifying bias. In Mikesinovich a prospective juror had a spouse employed by the defendant hospital. The court found that having a household income linked with a party constituted a disqualifying bias. The court held that the juror should have been dismissed for cause. In the herein matter, no such pecuniary relationship even remotely existed, nor is one even alleged. There is simply no record or basis to believe that Mr. George has any family member of his employed by anyone even remotely connected with the case.

In Rine v. Irisari, 187 W.Va. 550, 420 S.E. 2d 541 (1992), this Court gave another example of a disqualifying bias. A juror knew the defendant, saw him daily, and thought it would be difficult

to render a verdict against him when he would have to subsequently look him in the eye. Hence, this Court found that a close relationship with a party existed so as to constitute a disqualifying bias. In the matter at bar, there is no relationship between Mr. George and anyone connected with the case, including parties and key witnesses.

In addition to lacking a disqualifying bias, Mr. George made it clear that he was impartial. When asked if there was any reason he could not return a verdict against the doctor, he essentially states that if the case is proven, he would have “no choice.” (See Special Jury Questionnaire of David Andrew George Question No. 4). Conversely, when asked if he could return a verdict in favor of the defendant doctor, he stated that he could “if it is obvious to me that he is innocent.” (See Special Jury Questionnaire of David Andrew George Question No. 5). When asked whether he had preconceived notions or ideas about the duty between physicians and patients, he responded, “**I make it a policy to be as objective as I can with everyone** regardless of any medical standard.” (Emphasis added). (See Special Jury Questionnaire of David Andrew George Question No. 3). When asked whether he had any experience at Weirton Medical Center that would keep him from being fair or impartial, he stated, “**I don’t see any difficulties in reaching an impartial and unbiased verdict** since I have never been really victimized through this matter.” (Emphasis added). (See Special Jury Questionnaire of David Andrew George Question No. 11a). When asked if he had any feelings or personal philosophies that would prevent him from bringing a negligent lawsuit, he responded, “No because I do what I can to **keep an open mind.**” (Emphasis added). (See Special Jury Questionnaire of David Andrew George Question No. 14). Again, when asked whether he was morally indebted to the medical profession, he stated, “No I wouldn’t say that I feel that way so **I think I can be fair and impartial.**” (Emphasis added). (See Special Jury Questionnaire of David Andrew George Question

No. 15). Mr. George was very clear in expressing his intent to be fair and impartial. He displayed the very attitude this Court directs trial courts to look for in jurors.

Plaintiffs object to Mr. George's answer to Question No. 4, wherein he stated, "If I believe that his guilt is proven beyond a reasonable doubt, I would probably have no choice." (See Special Jury Questionnaire of David Andrew George Question No. 4). A further interpretation of Mr. George's statement is that he intended to follow the law and simply did not know the legal standards to be applied in civil cases. In fact, when questioned directly and explained by Judge Gaughan that the standard of civil cases was not beyond a reasonable doubt, Mr. George, appearing somewhat shy and embarrassed by his lack of knowledge, corrected himself and indicated that he would have no problem following the law. (Transcript at 153 - 155).

Plaintiffs' brief emphasizes the phrase, "I would probably have no choice" and suggests this reveals Mr. George's deeper political views. Plaintiffs conveniently ignore Mr. George's other remark. Specifically, in response to Question No. 5, he writes: "**If it is obvious to me** that he is innocent ... I would have to think in favor of him." (See Special Jury Questionnaire of David Andrew George).

Moreover, even if Plaintiffs are accurately perceiving a reason why they do not want Mr. George to serve as a juror, it is not material. Our judicial system provides an opportunity for a peremptory strike, so that the parties have the opportunity to strike people their "gut" questions. It is not an error for the court to fail to strike someone for cause based on something that amounts to no more than an instinct held by Plaintiffs' counsel, particularly when the juror, as in Mr. George's case, provided an otherwise overwhelming record of an intent to be objective.

As Mr. George demonstrated quite convincingly he is a person that would take his oath and his duty very seriously; the trial court's ruling regarding this juror should be affirmed.

III.

THE COURT DID NOT ERR IN DENYING PLAINTIFFS' MOTION TO STRIKE JUROR STOLBURG

Regarding Mr. Glen Stolburg, Plaintiffs' counsel argues that his answers were not truthful, stating that Mr. Stolburg gave "false answers" during *voir dire* questioning. However, this Court has indicated that the trial judge is in the best position to determine the sincerity of a juror's pledge to abide by the court's instruction. Therefore, his/her assessment is entitled to great deference. Thomas v. Makani, M.D., 218 W.Va. 235, 624 S.E. 2d 582, 586 (2005). As such, Plaintiffs' objection to Glen Stolburg does not even rise to an issue for appellate review.

Moreover, while concise at times, Mr. Stolburg's responses to the Special Jury Questionnaire were not lacking veracity. Mr. Stolburg explained that he is the district manager of Ogden Publishing, a locally owned newspaper that carried stories on the healthcare crisis, as well as all the general local news of the area. (Transcript at 201). In his answers to the Special Jury Questionnaire, he indicated that he was not aware of the publicity regarding the healthcare crisis. During formal *voir dire*, Mr. Stolburg explained that his job at the newspaper was to oversee the delivery of the papers to customers. (Transcript at 201). He explained that he does not read a great deal of the paper. (Transcript at 200). He explained he was not involved in sales of the paper. (Transcript at 201). He was not involved in editing the paper. (Transcript at 201). His background was simply in distribution. In fact, he only worked for the paper for four years. Prior to working for the paper, he worked for Nickels Bakery in the Pittsburgh area. (Transcript at 195-196, 201). He even explained

that he had lived in Pittsburgh and actually sat on two juries there. (Transcript at 195)

Therefore, it should come as no surprise that a man who does not particularly read the paper and historically identifies himself with the Pittsburgh community (until 10 years ago lived in Pittsburgh and until four years ago worked in Pittsburgh) would not necessarily follow news of a healthcare crisis in West Virginia. Yet this court is asked to believe that such a notion is so far astray that the only viable explanation for Mr. Stolburg's initial denial of knowledge about a health care crisis is dishonesty.

Character attacks on an individual who is simply honoring his civic duties should not be humored by this Honorable Court. As such, the court should deny Plaintiffs' appeal.

VI.

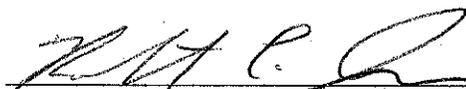
CONCLUSION

The answers given by jurors George and Stolburg as part of their *voir dire* process showed they were fair and impartial. No disqualifying biases were expressed during the *voir dire* responses. Thus, Mr. George and Mr. Stolburg were fully qualified "as a matter of law." Accordingly, the Respondent/Defendant prays that the Petition for Appeal be denied and that Judge Gaughan's ruling denying a new trial be upheld.

Respectfully submitted,

CARL R. JONES, D.O., Respondent/Defendant

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CERTIFICATE OF SERVICE

Service of the foregoing *Brief of Appellee, Carl R. Jones, D.O.* was had upon counsel of record as listed below by United States mail, postage prepaid, this 24th day of March, 2008:

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