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IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

Civil Action No.: 01-C-238

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

Defendants.

ORDER

On June 30, 2006 this Court received Plaintiff's Post-Trial Motion pursuant to Rules 50 and 59 of the *West Virginia Rules of Civil Procedure* asking this Court to grant Plaintiffs a new trial. The Court finds that the motion is timely filed. Plaintiffs are represented by Scott S. Blass, Esquire of the law firm Bordas & Bordas, P.L.L.C.; Defendant Carl R. Jones, D.O. is represented by Stephen R. Brooks, Esquire and Robert C. James, Esquire of the law firm Flaherty, Sensabaugh & Bonasso, P.L.L.C.; and Defendant Weirton Medical Center, Inc. is represented by Brent Copenhaver, Esquire of the law firm Colombo & Stuhr, P.L.L.C.

The Court has studied Plaintiffs' Post-Trial Motion, Defendants' responses thereto, and the memoranda of law and exhibits submitted by the parties; considered all papers of record and reviewed pertinent legal authorities. As a result of these deliberations, for the reasons set forth below, the Court has concluded that Plaintiffs' Post-Trial Motion requesting a new trial is denied.

On June 2, 2006, this Court conducted a voir dire process for the jury in the above-styled case. At Plaintiffs' request, this Court distributed a Special Juror Questionnaire to each member

of the prospective juror pool. The parties were then given a copy of each prospective juror's completed questionnaire, and provided time to review those questionnaires. After the review was finished the parties were then allowed to commence with individual voir dire in an effort to glean more information where needed. The Court then struck some jurors from the jury pool based on their responses. Specifically in their Post-Trial Motion, Plaintiffs assert that this Court erred in denying Plaintiffs' motion to strike jurors David A. George and Glen Stolburg for cause.

West Virginia Rules of Civil Procedure Rule 59(a) states that "[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law; and (2) in an action tried without a jury, for any of the reasons for which re-hearings have heretofore been granted in suits in equity."

The power to grant a new trial should be used with care, and a circuit judge should rarely grant a new trial. *Gerver v. Benavides*, 207 W.Va. 228, 530 S.E.2d 701 (1999); *cert denied* 120 S.Ct. 2008, 529 U.S. 1131. A new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *State ex rel. Meadows v. Stephens*, 207 W.Va. 341, 532 S.E.2d 59 (2000); *see also Morrison v. Sharma*, 200 W.Va. 192, 488 S.E.2d 467 (1997). Generally, error at trial which has not been found to be prejudicial cannot form basis for granting new trial. *Witt v. Sleeth*, 198 W.Va. 398, 481 S.E.2d 189 (1996).

If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. *Gum v. Dudley*, 202 W.Va. 477, 505 S.E.2d 391 (1997). Although trial judge should rarely grant new trial, trial judge

nevertheless has broad discretion to determine whether or not new trial should be granted. *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994), *cert denied* 115 S.Ct. 2614, 515 U.S. 1160.

If 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. Syllabus Point 4, *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002); Syllabus Point 4, *Thomas v. Makani*, 218 W.Va. 235, 624 S.E.2d 582 (2005). When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror. *Id.* at Syllabus Point 5. The trial judge is in the best position to determine the sincerity of a juror's pledge to abide by the court's instructions, and therefore, his assessment is entitled to great deference. *Id.* "A trial judge is entitled to rely upon his/her self-evaluation of allegedly biased jurors when determining actual juror bias. The trial judge is in the best position to determine the sincerity of a juror's pledge to abide by the court's instructions. Therefore, his/her assessment is entitled to great deference." Syllabus Point 12, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998). If it be determined that juror falsely answered question on voir dire examination, whether or not new trial should be awarded is within sound discretion of trial court. *West Virginia Human Rights Commission v. Tenpin Lounge*, 158 W.Va. 349, 211 S.E.2d 349 (1975).

Concerning David A. George first, Plaintiffs insist that he should have been struck from the jury panel for cause. Plaintiffs note that Mr. George's answers to Questions 4, 6, 7, 8, and 9 from the Special Juror Questionnaire, taken together, indicate that Mr. George is a man whose

personal experiences have led him to the belief that “frivolous cases” and “greed” on the part of the plaintiffs and their attorneys have caused malpractice premiums to “skyrocket.”

Plaintiffs also argue that Mr. George is biased because he relayed stories known to him concerning a doctor in Wheeling who lost a million dollar suit, and also because his doctor had to refer him to another doctor while she reassessed whether she intended to continue practicing medicine in West Virginia.

After reviewing the transcript of Mr. George’s individual voir dire, as well as his completed Special Juror Questionnaire, this Court finds no less than seven instances where Mr. George makes it clear that he can be fair and impartial. *See Questionnaire Question 3, 11a, 14, and 15; Transcript Volume I, page 156, lines 13-22; page 158, lines 12-19; page 160, lines 4-11.* Mr. George did state in his Questionnaire in response to if he could return a verdict against Dr. Jones if he found him negligent: “If I believe that his guilt is proven beyond a reasonable doubt, I would probably have no choice.” 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. In fact, this Court notes that once it instructed Mr. George on the correct standard of proof, he clearly stated that he would follow the Court’s instructions. *See Transcript Volume I, pages 153-154.* When Mr. George’s answers, both on the Special Juror Questionnaire and in individual voir dire, are taken together, it is clear to this Court that Mr. George was taking the process of voir dire very seriously, and answering the numerous questions asked of him thoroughly, completely, and honestly. There is nothing in the record to indicate that Mr. George was rehabilitated to make statements that he will be fair and impartial.

Second, Plaintiffs assert that Glen Stolburg should have been stricken from the jury panel for cause because they argue that he was untruthful on his Special Juror Questionnaire. Specifically, in response to Question 6, Mr. Stolburg answers that he has not “read, heard or discussed anything about medical negligence actions, lawsuits or a liability crisis.” Plaintiffs contend that Mr. Stolburg was clearly lying in his answer because he is employed as a district sales manager for Ogden Publishing, which Plaintiffs claim has been very vocal and biased in its coverage of a “malpractice crisis.” In essence, Plaintiffs are arguing that “there is no way that a district sales manager for Ogden has never once in his entire life read or even heard anything about the ‘malpractice crisis.’” *See Plaintiffs’ Memorandum in Support of Plaintiffs’ Post-Trial Motion.*

This Court finds after a review of Mr. Stolburg’s answers on his Special Juror Questionnaire that almost all of his answers were either “yes” or “no” and that none of his answers included any explanation. In individual voir dire, after being questioned on this answer to Question 6, Mr. Stolburg gives no indication that his previous answers on the questionnaires were untruthful. In fact, Mr. Stolburg testifies that his position at Ogden Publishing consists of overseeing the delivery of the newspapers and that he is in no way involved in the sale of the paper or the editing. *See Transcript Volume I, pages 200-201.* Prior to working for Ogden Publishing, Mr. Stolburg worked for Nickles Bakery and lived in the Pittsburgh area. *See Transcript Volume I, pages 195, 196, 201.* In fact, Mr. Stolburg testified that he does not read the paper a great deal himself. *See Trial Transcript Volume I, page 200, lines 19-24.* The Court concluded at the end of Mr. Stolburg’s individual voir dire that Mr. Stolburg had not formed any opinions about medical malpractice actions and that Mr. Stolburg was merely answering accurately.

This Court finds that there is no evidence on the record that Mr. Stolburg was untruthful in his answers to the Special Juror Questionnaire. In reviewing the transcript of the voir dire, this Court finds that the conclusion that Mr. Stolburg was in some way untruthful in a veiled effort to get picked for the jury in a medical malpractice case just to sabotage that case is absurd. Mr. Stolburg made it clear that he has worked for Ogden Publishing since 1997 and is a manager of the paperboys. He has no influence on the content of the newspaper, and infrequently reads the newspaper himself. This Court will not find that just because Mr. Stolburg has no real interest in the supposed medical malpractice crisis of West Virginia he is lying. In addition, this Court will not begin assuming that just because a prospective juror lives within the boundary lines of West Virginia he or she is brainwashed on the subject of medical malpractice and automatically biased or prejudiced.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs' Post-Trial Motion for a new trial is DENIED.

The Clerk of the Circuit Court shall forward copies of this Order to all counsel of record.

ENTER this 23rd day of October, 2006.



MARTIN J. GAUGHAN, JUDGE
First Judicial Circuit

I hereby certify that the enclosed
is a true and correct
copy of the original. In testimony
whereof
Attest: Linda Barber
Clerk, Circuit Court
Brooks County, West Virginia
By Florence Long, Deputy