THE STATE of NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Richard LeBlanc, *et al*.

v.

Monadnock Community Hospital, *et al*.

ORDER ON ATTORNEY-CONDUCTED *VOIR DIRE*

Docket No. 2003-C-0555

The parties to this action appeared for jury selection on January 10, 2005, with the case scheduled to commence trial on January 18, 2005. The action was dismissed by the trial judge, McGuire, J., at the conclusion of the plaintiffs' case. Defendants were prepared to unconditionally waive their right to attorney-conducted *voir dire* pursuant to RSA 500-A:12-a. Plaintiffs were prepared to conditionally waive this right if, and only if, the court asked all of the *voir dire* questions submitted by plaintiffs. Many of the questions were not of the type the court would ask as they sounded like the court was suggesting a result to the *venire*. Some of the questions went so far that they were questionable as to whether counsel should even be permitted to ask same as they bordered on asking the jurors what they would do under certain circumstances, that is, instead of seeking to find impartial jurors, the questions were designed to find jurors who might be pre-disposed to plaintiffs' positions. There are many articles that suggest that this is the real purpose of attorney-conducted *voir dire*. See generally, The Real Purpose of Voir Dire, Marni Becker-Avin, internet article at http://www.becker-

poliakoff.com/publications/article_archive/voir_dire.htm, and VOIR DIRE: Preparation, Communication, and Presentation Selection, Theory, and Strategy, Edwin E. Wright, III, internet article at http://www.edwright.com/Voir_Dire_dilemma.html. This notion that *voir dire* should be an extension of counsel's opening statement and should be used to find jurors that may be pre-disposed to one position or another is troubling in the face of the over-riding concern that jurors should be neutral and impartial. The court notes that many states which allow attorney-conducted *voir dire* have done so by court rule and have included effective provisions to address this concern which our statute does not. For instance see, *e.g.*, Nevada Rules of Civil Procedure, 47, as supplemented by local rules of court which provide (consistent with case law decisions):

> The following areas of inquiry are not properly within the scope of *voir dire* examination by counsel:
> (a) Questions already asked and answered.
> (b) Questions touching on anticipated instructions on the law.
> (c) Questions touching on the verdict a juror would return when based upon hypothetical facts.
> (d) Questions that are in substance arguments of the case.

See also California Rules of Court, Rule 4.200 which allows the judge to require that all proposed attorney-conducted *voir dire* be submitted in writing to the court and opposing counsel prior to trial. Without these protections incorporated into our statute, we invite not those jurors "as impartial as the lot of humanity will allow," (see *State v. Andre Rheaume*, 80 NH 319 (1922), but rather jurors pre-disposed to counsel's point of view.

When RSA 500-A:12-a became effective January 1, 2005, it tacked its provisions for jury selection and *voir dire* in civil cases onto those found in RSA 500-A:12. RSA 500-A:12-a requires that, when conducting civil *voir dire*, the court shall instruct the potential jurors on the nature of jury selection, the case that they will be presented, the relevant law, the specific issues to be resolved, and the controversial aspects of the case

likely to invoke bias. After the court's instructions, counsel for each side must then present their case to the potential jurors and then they and the court must examine the jurors to root out possible bias. All provisions of the law are mandatory except that examination by counsel may be waived by the agreement of all parties. The Court finds that this law, which dictates the procedure for an essential judicial process, violates the separation of powers doctrine and is, therefore, unconstitutional.

"In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except upon inescapable grounds. In other words, we will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution. One branch of government, however, is not constitutionally permitted to usurp the essential power of another." Petition of Judicial Conduct Comm., 151 N.H. 123, 125 (2004) (quotations and citations omitted); see also New Hampshire Constitution Part I, Art. 37. "Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people. Thus, each branch is prohibited by the Separation of Powers Clause from encroaching on the powers and functions of another branch." In Re Mone, 143 N.H. 128, 134 (1998). "When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are not constitutionally acceptable." Judicial Conduct Comm., 151 N.H. at 125.

The New Hampshire Constitution is the supreme law of this State. See Merrill v. Sherburne, 1 N.H. 199, 217 (1818). Under Part II, Art. 73-a of the New Hampshire Constitution, the chief justice of the supreme court, with the assent of a majority of the other justices of the supreme court, is vested with the authority to make rules governing the administration of all courts and the practice and procedure within the courts. While the legislature retains control over defining substantive rights, Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 570 (1997), the procedures set out in

RSA 500-A:12-a directly conflicts with Part II, Art. 73-a of the Constitution and is therefore unconstitutional.

> Our judicial power has always included the power to prescribe procedural rules for the conduct of litigation in this State's courts. In addition, this court's inherent power to promulgate procedural rules has been endorsed with constitutional authority. *See* N.H. CONST. pt. II, art. 73-a. The rule-making process is an inherent judicial power existing independently of legislative authority. In addition, part II, article 73-a of the New Hampshire Constitution, which granted to the supreme court the power to make rules regulating the administration of all courts of the State, makes clear that the judiciary has the authority to promulgate and administer rules concerning practice and procedure in the courtroom.

Id. (quoting State v. LaFrance, 124 N.H. 171, 180 (1983)). This legislation undoubtedly concerns practice and procedure in the courtroom because it focuses on the methods by which a substantive right, namely the right to a fair trial by an unbiased jury, is enforced. It does not define any new rights nor does it clarify, enhance or otherwise explain any existing substantive rights as permitted to the legislature by the constitution. See id. at 572. RSA 500-A:12-a is a procedural statute and, as such, usurps the power reserved to the judiciary by Part II, Art. 73-a to determine appropriate procedures for the courtroom. See id.

The Court recognizes that there is no clearly defined wall of separation between substantive and procedural rights. In fact, "[t]he legislature also may affect procedure, even when there is no tie to matters of substance, when it acts with its expressly delegated constitutional powers to create and allocate jurisdiction within, and among, the courts." Id. at 573. However, this statute does not fall within the legislature's authority to define the jurisdiction of the courts. RSA 500-A:12-a is clear on its face and addresses

only the procedure by which *voir dire* is conducted. Without doubt, such a responsibility does not fall within the constitutional purview of the legislature.

Moreover, RSA 500-A:12, effective in its current form since 1988 and to which RSA 500-A:12-a adheres, defined the manner and circumstances under which a potentially biased juror could be removed. The substantive right to a fair trial by an unbiased jury was thus already protected by statute. RSA 500-A:12-a serves only to ossify the procedure by which possible juror bias is determined. Providing such rigidity decreases the control the judiciary has over the events taking place in their courtrooms. Statutory protection of a substantive right was given by the legislature when it passed RSA 500-A:12. The creation and application of procedural protections for that substantive right remain the province of the courts.

Since RSA 500-A:12-a impermissibly intrudes into the procedural rulemaking arena reserved to the courts by Part II, Art. 73-a of the New Hampshire Constitution, it is unconstitutional. Accordingly, the procedures outlined in RSA 500-A:12-a will not be enforced.

Even if the Court were to find that RSA 500-A:12-a is an appropriate exercise of legislative authority that does not impede the ability of the courts to determine their own procedures, there are other grounds to invalidate the statute. By its terms, RSA 500-A:12-a applies only to civil cases. Providing a clear and detailed explanation for the proper method of jury examination and selection in all civil cases and not in criminal cases, may be a violation of equal protection guaranteed by Part I, Art. 2 of the New Hampshire Constitution. However, since that issue is not before the court in the context of this case and controversy, the court does not further address that concern.

Inasmuch as this order creates an appealable issue for any party in a civil case, the court urges the Supreme Court to consider this matter on an expedited basis regardless of any appeal in this action. The effect of this order is stayed as to other parties entitled to attorney-conducted *voir dire* to the extent that the court will allow such reasonable *voir*

dire truly designed to discover bias and not designed to argue or advance a party's case with the objective of finding pre-disposed jurors.

So Ordered.
Dated: January 29, 2005

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Edward J. Fitzgerald, III
Presiding Justice