IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

No. 33218

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

SALLY BLACK,
EXECUTRIX OF ESTATE OF CHARLES A. BLACK, ET AL.,
Plaintiff Below, Appellant,

V.

CSX TRANSPORTATION, INC.,
Defendant Below, Appellee.

Appeal from the Circuit Court of Kanawha County
Honorable Arthur M. Recht, Judge
Civil Action No. 02-C-9500

REVERSED AND REMANDED

Submitted: May 22, 2007
Filed: June 6, 2007

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE BENJAMIN dissents and reserves the right to file a dissenting opinion.

JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "The object of the law is, in all cases in which juries are impaneled to try the issue, to secure men for that responsible duty whose minds are wholly free from bias or prejudice . . . for or against either party in civil cases." Syllabus point 1, in part, *State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900).

2. "The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary." Syllabus point 4, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

3. "Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or 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." Syllabus point 5, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002).

4. "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." Syllabus point 3, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002).

Per Curiam:

The appellant herein and plaintiff below, Sally Black, as Executrix of the Estate of Charles A. Black [hereinafter "Mrs. Black"], appeals from an order entered April 7, 2006, by the Circuit Court of Kanawha County.[1] In that order, the circuit court denied Mrs. Black's motion for a new trial and entered judgment for the appellee herein and defendant below, CSX Transportation, Inc. [hereinafter "CSX"], following the return of a jury verdict in favor of CSX. On appeal to this Court, Mrs. Black argues that the circuit court erred by refusing to excuse a potential juror for cause. Upon a review of the parties' arguments, the record designated for consideration on appeal, and the pertinent authorities, we reverse the circuit court's ruling and remand this case for a new trial.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts underlying the instant appeal are not disputed by the parties. Mrs. Black's husband, Charles A. Black [hereinafter "Mr. Black"], was a longtime employee of CSX. During his employment, he was exposed to asbestos, and later developed colon cancer, from which he died. Following Mr. Black's death, Mrs. Black filed a cause of action against CSX in accordance with the Federal Employer's Liability Act (hereinafter

[1]This matter originated in the Circuit Court of Marshall County and subsequently was transferred to the Circuit Court of Kanawha County, where it was heard by the Honorable Arthur M. Recht, as a member of the West Virginia Mass Litigation Panel for F.E.L.A. Asbestos Cases.

"F.E.L.A."), 45 U.S.C. § 51, *et seq.*, alleging that Mr. Black's colon cancer was caused by his exposure to asbestos during his employment with CSX.

A jury trial in this matter began on November 7, 2005. Prior to the trial, each prospective juror was asked to complete a court-approved questionnaire entitled "SUPPLEMENTAL JUROR QUESTIONNAIRE FOR F.E.L.A. ASBESTOS CASES." The final question on this form asked prospective jurors, "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?" Prospective juror Edward Polack, M.D. [hereinafter "Dr. Polack"], responded on his form by checking the "Yes" answer and providing the following explanation: "A personal bias against personal injury lawyers and awarding of damages predicated on 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."

During the voir dire portion of the trial, the prospective jurors were questioned by counsel. Counsel for Mrs. Black examined Dr. Polack, which examination was conducted in the trial judge's chambers out of the presence of the other potential jurors, and Dr. Polack answered questions based upon his aforementioned questionnaire response, stating as follows:

Mr. Daley: 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' 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 number 46 [in the questionnaire]?

Dr. Polack: That's correct.

Thereafter, the trial court asked Dr. Polack,

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.

Dr. Polack: Yes.

Following this line of questioning by counsel and the trial court, counsel for Mrs. Black moved to strike prospective juror Dr. Polack for cause.[2] While the trial court acknowledged that Dr. Polack's answers in his juror questionnaire "came perilously close" to disqualifying him, the court ultimately denied Mrs. Black's motion to strike.

Later in the voir dire process, Mrs. Black renewed her motion to strike Dr. Polack for cause. The trial court again acknowledged that Dr. Polack's expressed bias against personal injury lawyers was "a strong statement, extremely strong statement," and re-called Dr. Polack for further questioning:

> 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, 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 be [sic] take?
>
> Dr. Polack: Credibility on the part of the source, in other words, the trial lawyer.

[2]W. Va. Code § 56-6-12 (1923) (Repl. Vol. 2005) discusses juror qualifications and challenges. For the text of this statute, see Section III, *infra*.

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 you by the Court?

Dr. Polack: That's correct.

After this exchange, the trial court determined that potential juror Dr. Polack should not be excused for cause. Accordingly, Mrs. Black removed Dr. Polack from the jury panel by using one of her peremptory challenges.

Upon the conclusion of the trial in this case, the jury determined that while CSX had been negligent, its actions had not caused or contributed to Mr. Black's colon cancer or his death therefrom, thus returning a verdict for CSX. Mrs. Black then filed a post-trial motion for a new trial, which motion was denied by the trial court's order of April 7, 2006. From this adverse ruling, Mrs. Black now appeals to this Court.

II.

STANDARD OF REVIEW

At issue in this proceeding is Mrs. Black's assignment of error alleging that the trial court erred by refusing to excuse potential juror Dr. Polack for cause. We have decided many cases presenting this identical issue and have determined that trial judges

are accorded great discretion in deciding whether a potential juror should be excused for cause. *See, e.g.*, Syl. pt. 3, *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927) ("The question presented as to the qualification of jurors is one of mixed law and fact, and the finding of the trial court upon that issue will not be set aside unless the error is plainly manifest."). We defer to a trial judge's rulings regarding the qualifications of jurors because the trial judge is able to personally observe the juror's demeanor, assess his/her credibility, and inquire further to determine the juror's bias and/or prejudice. Trial courts are authorized to question potential jurors to ascertain whether they will be unbiased and impartial. *See, e.g.*, W. Va. Code § 56-6-12 (1923) (Repl. Vol. 2005) (requiring trial court to conduct examine potential jurors upon party's motion); Syl. pt. 3, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002) ("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." (emphasis added)). Thus,

> [w]here the questions propounded by the trial court are sufficient to test a juror's ability to completely disregard anything he may have heard and read about the case, and to give the defendant a fair and impartial trial, and his answers are so unequivocal and satisfactory as to convince the trial judge of the juror's fairness and impartiality, it is the settled practice not to interfere with the court's finding, unless clearly against the evidence.

Syl. pt. 1, *State v. Toney*, 98 W. Va. 236, 127 S.E. 35 (1925). In other words, "[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." Syl. pt. 12, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998). *Accord* Syl. pt. 6, in part, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996) ("An appellate court should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law."). Mindful of this standard, we proceed to consider the parties' arguments.

III.

DISCUSSION

On appeal to this Court, Mrs. Black assigns error to the trial court's denials of her motions to strike prospective juror Dr. Polack for cause. During the voir dire portion of the underlying trial, Mrs. Black twice moved to strike Dr. Polack for cause. Although the trial court expressed concerns about Dr. Polack's impartiality, it nevertheless determined that Dr. Polack was not biased and should not be excused for cause.

Before this Court, Mrs. Black contends that the answers provided by Dr. Polack clearly demonstrate bias or prejudice such that the trial court should have stricken

him from the jury panel for cause. Mrs. Black argues further that Dr. Polack's bias was explicit in his answers and that the trial court did not cure this prejudice through its additional questioning. CSX responds that the trial court properly refused to strike prospective juror Dr. Polack for cause because he did not present any bias or prejudice to warrant being stricken for cause. Instead, Dr. Polack testified that he would render his decision based upon objective, scientific evidence and the trial judge's instructions, rather than based upon emotion. CSX additionally contends that because Dr. Polack testified that he would follow the law and base his decision about the facts upon credible evidence, he was not biased, and the trial court properly refused to strike him for cause.

A charge that a juror is not impartial is not a matter to be taken lightly. "The object of the law is, in all cases in which juries are impaneled to try the issue, to secure men for that responsible duty whose minds are wholly free from bias or prejudice . . . for or against either party in civil cases." Syl. pt. 1, in part, *State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900). To achieve this goal of a panel of impartial jurors, parties are permitted to question prospective jurors and to challenge those who express bias or prejudice:

> Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall

> appear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause. And in every case, unless it be otherwise specially provided by law, the plaintiff and defendant may each challenge four jurors peremptorily.

W. Va. Code § 56-6-12 (1923) (Repl. Vol. 2005).

When assessing whether a prospective juror is impartial, "[t]he true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syl. pt. 1, *State v. Wilson*, 157 W. Va. 1036, 207 S.E.2d 174 (1974). *Accord* Syl. pt. 1, *Wheeler v. Murphy*, 192 W. Va. 325, 452 S.E.2d 416 (1994) ("'"The true test to be applied with regard to qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the court's instructions and disregard any prior opinions he may have had." *State v. Charlot*, 157 W. Va. 994, 1000, 206 S.E.2d 908, 912 (1974).' Syl. pt. 1, *State v. Harshbarger*, 170 W. Va. 401, 294 S.E.2d 254 (1982)."). Even if a juror professes to be impartial, however, a trial court must still tread cautiously and ascertain whether, in fact, it believes the juror is capable of fairly rendering a verdict based upon the evidence presented at trial.

> The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be

credited if the other facts in the record indicate to the contrary.

Syl. pt. 4, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). Therefore, "[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." Syl pt. 4, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002). *See also* Syl. pt. 3, *State v. Pratt*, 161 W. Va. 530, 244 S.E.2d 227 (1978) ("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.").

Where a juror's bias is evident, he/she should be excused for cause. "Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or 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. *Accord* Syl. pt. 1, in part, *State v. Bennett*, 181 W. Va. 269, 382 S.E.2d 322 (1989) ("When 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, . . . the [party's] motion to strike the juror from the panel for cause should ordinarily be granted."). Furthermore, if any doubts remain as to the juror's neutrality, the trial court should err on the side of caution

and excuse the prospective juror for cause.

> 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*.

Syl. pt. 3, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (emphasis added).

In the case *sub judice*, Dr. Polack clearly expressed a bias against Mrs. Black. Despite his statements that he would render a decision based upon the scientific evidence presented and the trial court's instructions of law, Dr. Polack continued to convey a bias against parties claiming to have been injured by exposure to asbestos and against personal injury attorneys. For example, Dr. Polack stated in his written questionnaire that he would find it difficult to be a juror and to award money damages because he has "*[a] personal bias against personal injury lawyers* and awarding of damages predicated on 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." (Emphasis added).

He further responded to counsel's questions by saying that his "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." In response to these comments, Mrs.

Black timely and repeatedly moved to strike juror Polack for cause. *See* Syl. pt. 5, *McGlone v. Superior Trucking, Inc.*, 178 W. Va. 659, 363 S.E.2d 736 (1987) ("Where a new trial is requested on account of alleged disqualification or misconduct of a juror, it must appear that the party requesting the new trial called the attention of the court to the disqualification or misconduct as soon as it was first discovered or as soon thereafter as the course of the proceedings would permit; and if the party fails to do so, he or she will be held to have waived all objections to such juror disqualification or misconduct, unless it is a matter which could not have been remedied by calling attention to it at the time it was first discovered. *Flesher v. Hale,* 22 W. Va. 44 (1883)[, *overruled on other grounds by Proudfoot v. Dan's Marine Service, Inc.*, 210 W. Va. 498, 558 S.E.2d 298 (2001)].").

Although the trial court also expressed its doubts as to Dr. Polack's impartiality, it nevertheless attempted to rehabilitate Dr. Polack by questioning him further:

> 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.
>
> Dr. Polack: Yes.

After Mrs. Black renewed her motion to strike Dr. Polack for cause, the trial court again

inquired of him, as follows:

> 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 you by the Court?
>
> Dr. Polack: That's correct.

We previously have cautioned against the use of such "magic questions," though, when it is clear that a potential juror is partial.

> Trial judges must resist the temptation to "rehabilitate" prospective jurors simply by asking the "magic question"[3] to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could be reasonably questioned. "A trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors because, in reality, the judge is the only person in the courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury." *Walls v. Kim*, 250 Ga. App. 259, 260, 549 S.E.2d 797, 799 (2001)[, *aff'd*, 275 Ga. 177, 563 S.E.2d 847 (2002)].

O'Dell, 211 W. Va. at 290, 565 S.E.2d at 412.

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[3] "After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law? Not so remarkable, jurors confronted with this question from the bench almost inevitably say, 'yes.'" *Walls v. Kim*, 250 Ga. App. 259, 259, 549 S.E.2d 797, 799 (2001)[, *aff'd*, 275 Ga. 177, 563 S.E.2d 847 (2002)].

In view of the totality of the circumstances surrounding Dr. Polack's voir dire, it is apparent that he was not an impartial juror and that the trial court should have excused him for cause. Syl. pt. 3, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407. Because the trial court denied Mrs. Black's repeated motions to so strike Dr. Polack and, instead, required her to use one of her peremptory strikes to remove him from the jury panel, we find that the trial court abused its discretion. We further find that Mrs. Black was prejudiced by this erroneous ruling insofar as the jury who ultimately heard and decided her case returned an adverse verdict. *See Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 670, 558 S.E.2d 663, 669 (2001) ("A trial court's determination as to whether to strike a juror for cause will be 'reverse[d] only where actual prejudice is demonstrated.'" (quoting *State v. Miller*, 197 W. Va. at 605, 476 S.E.2d at 552 (additional citation omitted)). Accordingly, we reverse the trial court's ruling denying Mrs. Black's motion for a new trial and remand this matter for a new trial.

IV.

CONCLUSION

For the foregoing reasons, the April 7, 2006, order of the Circuit Court of Kanawha County is hereby reversed, and this case is remanded for a new trial.

Reversed and Remanded.