

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 32753

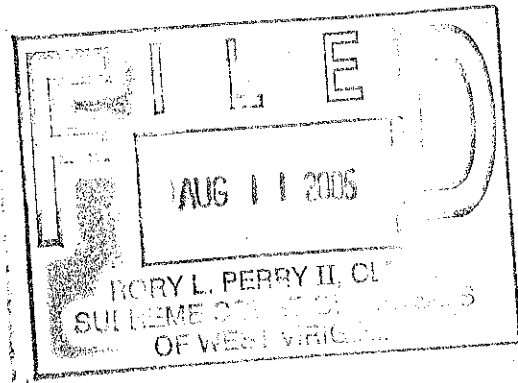
JENNIFER THOMAS,

Appellant – Plaintiff Below,

v.

ANIL K. MAKANI, M.D. and
SOUTH BRANCH SURGICAL ASSOCIATES, INC.,
a West Virginia corporation,

Appellees – Defendants Below.



BRIEF OF APPELLANT

On appeal from the Circuit Court of Grant County, West Virginia
Civil Action No. 02-C-12
The Honorable Phillip B. Jordan, Jr., Circuit Judge

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KIND OF PROCEEDING & NATURE OF THE RULING
IN THE LOWER TRIBUNAL

This appeal stems from a jury trial in a civil action for medical malpractice. Jennifer Thomas, the Appellant herein, appeals from an Order of the Circuit Court of Grant County, West Virginia, entered on October 29, 2004 (the "Order"). The Order refuses to set aside an adverse jury verdict returned on August 4, 2004. The six-person jury determined that Dr. Anil Makani, the Appellee herein, was not negligent in performing gallbladder surgery on Ms. Thomas.

The jury verdict was contaminated with bias in favor of Dr. Makani, and the circuit court should have set it aside pursuant to the post-trial motion of Ms. Thomas. Specifically, during *voir dire* the court abused its discretion in failing to strike for cause three potential jurors who were former or current patients of Dr. Makani and who testified that they had "good feelings" toward Dr. Makani. The three potential jurors affirmed that they had all received successful medical treatment from Dr. Makani and, accordingly, viewed him in a positive light. The *voir dire* testimony of the jurors, which is discussed in great detail below, unquestionably exhibits an open and obvious bias in favor of Dr. Makani. Because West Virginia law requires that all jurors be free of bias and prejudice in finding the facts, the circuit court was obligated to strike for cause the three potential jurors who displayed favoritism toward Dr. Makani. The court abused its discretion by impaneling these three jurors, and it further erred by refusing to set aside the tainted jury verdict. Thus, Ms. Thomas is entitled to a new trial.

STATEMENT OF THE FACTS OF THE CASE

On May 11, 2000, Dr. Anil Makani performed a laparoscopic cholecystectomy on Ms. Thomas. During the course of the gallbladder surgery, Dr. Makani cut Ms. Thomas's hepatic bile duct. Once he realized that he had severed her bile duct and placed her health in serious danger, Dr. Makani transferred Ms. Thomas to the University of Virginia Medical Center for a separate bile duct repair surgery. Ms. Thomas, a single mother of three children, was forced to undergo two separate surgeries at the University of Virginia over a two month period. These combined surgeries required considerable recovery and subjected Ms. Thomas to significant pain, suffering and other damages.

On February 28, 2002, Ms. Thomas filed a lawsuit in the Circuit Court of Grant County, West Virginia, designated as Civil Action No. 02-C-12. The Complaint named Dr. Makani and South Branch Surgical Associates, Inc. as defendants, alleging that Dr. Makani violated the applicable standard of care in performing the laparoscopic cholecystectomy.¹ Ms. Thomas contended that Dr. Makani negligently cut her bile duct, necessitating the separate repair surgeries at the University of Virginia and other extensive medical follow-up. The Civil Action proceeded to trial on August 2, 2004.

The *voir dire* testimony of three prospective jurors (who were later impaneled on the jury by the circuit court) is relevant in this Appeal and demonstrates that Ms. Thomas did not receive a fair trial.

Specifically, during individual *voir dire*, prospective juror David Evans stated that he was a former patient of the defendant, Dr. Makani. Dr. Makani performed surgery on Evans

¹ Other parties initially named in the Action were voluntarily dismissed by Ms. Thomas.

following a motor vehicle accident in 1990. (Trial R. p. 64). Evans testified that he was “[v]ery satisfied” with the results of the surgery, and he characterized his treatment by Dr. Makani as a “[g]ood experience.” (Trial R. p. 65). Evans confirmed that his positive feelings toward Dr. Makani could cloud his objectivity – particularly because of his [Evans’s] unfamiliarity with medicine. (Trial R. p. 66). In fact, Evans agreed that he could possibly “lean towards” Dr. Makani in assessing his liability because “he [Dr. Makani] does good work.” (Trial R. pp. 66-67).

Based on Evans’s candid responses to *voir dire*, counsel for Ms. Thomas immediately moved to strike Evans for cause, expressing, “I don’t know how someone can have a fair trial with a juror on there that expressed that his experiences were so good with the doctor that it may cause him to lean that way.” (Trial R. p. 70). The court countered by stating, “I think that if we strike him [Evans] we would almost have to just strike anybody that Dr. Makani has ever treated.” (Trial R. p. 71). Consequently, noting counsel’s objection, the circuit court denied the motion to strike Evans, and permitted him to serve on the jury. (Trial R. p. 72).

Prospective juror Gretchen Bruce testified next. Bruce stated that she had last been a patient of Dr. Makani in July, 2004, only one month before the trial commenced. (Trial R. p. 73). Dr. Makani had removed a cyst from Bruce’s head. *Id.* Even more significantly, Dr. Makani had removed Bruce’s gallbladder only two years prior – the same type of surgery that was at issue in the underlying case. Bruce believed (but was not certain) that Dr. Makani had also performed surgery on her niece’s gallbladder. (Trial R. p. 74). Finally, Bruce expressed that if she had other medical problems, she would seek treatment from Dr. Makani because she had “good feelings” about him. (Trial R. p. 74-75). Despite the close relationship between Bruce and Dr. Makani, the court permitted Bruce to serve on the jury.

The court then considered the *voir dire* testimony of prospective juror Linda Porter, another former patient of Dr. Makani's. Porter acknowledged that Dr. Makani had diagnosed a lump in her breast. (Trial R. pp. 77, 79). Porter also enjoyed a "good experience" as a patient of Dr. Makani, though she ultimately sought treatment for the lump in Winchester, Virginia, from a surgeon with whom she was more familiar. Porter, however, expressed unwavering confidence in Dr. Makani and indicated that she was very appreciative of Dr. Makani for finding the lump. (Trial R. p. 79). Again, despite the confidence in Dr. Makani expressed by Porter, the court permitted Porter to serve on the jury.

The trial proceeded with Jurors Evans, Bruce and Porter, comprising half of the jury who would determine whether Dr. Makani was negligent in performing the gallbladder surgery on Ms. Thomas. In light of the jury's composition, it is not surprising that the jury found in favor of Dr. Makani at the close of the evidence. Thereafter, Ms. Thomas submitted a timely Motion for New Trial, contending, *inter alia*, that the circuit court abused its discretion by impaneling the biased jury. The court denied the Motion in its Order, and Ms. Thomas brings this appeal.

ASSIGNMENT OF ERROR

The circuit court abused its discretion by refusing to strike for cause three potential jurors from the medical malpractice jury who firmly established, through extensive *voir dire* testimony, that they received successful medical treatment from the defendant, Dr. Anil Makani, and were biased in his favor, preventing Ms. Thomas from receiving a fair trial.

STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia reviews a final order disposing of an action under an abuse of discretion standard. See Syl. Pt. 2, Walker v. West Virginia Ethics Commission, 201 W.Va. 108, 492 S.E.2d 167 (1997). Pursuant to this standard, the factual findings of the circuit court are reviewed for clear error, and its rulings on questions of law are reviewed *de novo*. Id. Furthermore, the determination of whether a prospective juror should be excused to avoid bias or prejudice in the jury panel is a matter within the sound discretion of the circuit court. See O'Dell v. Miller, 211 W. Va. 285, 288, 565 S.E.2d 407, 410 (2002). Thus, the West Virginia Supreme Court reviews such a determination for abuse of discretion. Id.

DISCUSSION

The circuit court abused its discretion by refusing to strike for cause Jurors David Evans, Gretchen Bruce and Linda Porter, who firmly established, through extensive *voir dire* testimony, that they received successful medical treatment from the defendant and were biased in his favor, preventing Ms. Thomas from receiving a fair trial.

Appellant Jennifer Thomas is entitled to a new trial because the circuit court abused its discretion by impaneling David Evans, Gretchen Bruce, and Linda Porter on the jury, all of whom exhibited substantial bias in favor of the defendant. West Virginia law recognizes that the parties to a lawsuit are entitled to impartial jurors. See W. Va. Code § 56-6-12 (requiring the circuit court to strike jurors who are not qualified or do not “stand indifferent” in a cause). Therefore, *voir dire* functions “to secure jurors who are not only free from improper prejudice and bias, but who are also free from the suspicion of improper prejudice or bias.” See O'Dell v. Miller, 211 W. Va. 285, 288, 565 S.E.2d 407, 410 (2002); see also § 56-6-12 (permitting parties to examine under oath a potential

juror 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”). Furthermore, this Court has observed that “[a]ctual bias can be shown either by a juror’s own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed.” O’Dell, 565 S.E.2d at Syllabus Point 1. Significantly, “[o]nce 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.” Id. at Syllabus Point 5. This Court has also recognized that there is another purpose of *voir dire*: to identify those jurors who are not only free from prejudice, “but who are also free from the suspicion of prejudice.” Rine By and Through Rine v. Irisari, 187 W.Va. 550, 420 S.E.2d 541, 547, n. 13 (1992) (quoting State v. Matney, 176 W.Va. 667, 671, 346 S.E.2d 818, 822 (1986) (internal quotations omitted)).

In the instant case, David Evans, Gretchen Bruce and Linda Porter, during their respective *voir dire* testimony, either directly exhibited bias or created a credible suspicion of bias which is not acceptable under West Virginia law. Therefore, the circuit court should have struck the potential jurors for cause.

In Rine, this court determined that the circuit court of Marshall County abused its discretion in a medical malpractice case by not striking two potential jurors for cause. Id. at 547. The jurors should have been struck because they made certain statements during *voir dire* that “brought their impartiality into doubt.” Id. The first juror, Alice Okel, was a nurse at Reynolds Memorial Hospital, which was one of the defendants in the case. Id. at 546. Ms. Okel generally “knew of” the defendant doctor, Oscar S. Irisari, M.D., and had observed two surgeries performed

by Dr. Irisari during her training as a nurse. Id. It was also revealed during *voir dire* that Ms. Okel and another prospective juror, Teri Dobbs, had conversed about Dr. Irisari's performance as a physician. Specifically, Ms. Dobbs had told Ms. Okel that Dr. Irisari was "a good doctor" and that she was "pleased with him." Id. When asked about the conversation with Ms. Dobbs and about what she knew of the defendant, Ms. Okel told the court that Dr. Irisari "seems alright to me." Id. The court excused Ms. Dobbs for cause, but it did not excuse Ms. Okel.

The second juror, William Brown, operated a grocery store across the street from Dr. Irisari's office. Mr. Brown testified that Dr. Irisari and his wife were "good neighbors and customers." Id. Mr. Brown testified that "[i]t might be hard to look [Dr. Irisari's wife] in the eye" if he awarded a verdict against her husband. Id. However, the circuit court did not excuse Mr. Brown for cause, prompting the appeal of its decision.

In assessing on appeal whether Ms. Okel and Mr. Brown should have been struck for cause, the Rine Court relied on its earlier decision in Davis v. Wang, 184 W.Va. 222, 225, 400 S.E.2d 230, 233 (1990). The Davis decision recognizes that the "true test" of whether a juror is qualified to serve on a panel is "whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Id. at 233. Davis observes, moreover, that "the mere statement of a prospective juror that he or she is not biased with respect to a particular cause may or may not be sufficient for the trial court to conclude that no such bias exists." Id. Therefore, according to Davis, "[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." Id.

Examining the *voir dire* testimony at issue in Rine, the court explained that, "although Ms. Okel and Mr. Brown both represented to the circuit 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.” Rine, 420 S.E.2d at 547. The court determined that, “[t]he mere statements by both of these jurors to the effect that they would not be biased were not sufficient for the circuit court to conclude that no bias existed, given their other statements about Dr. Irisari and his wife.” Id. The court further observed that Davis and its progeny required that “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.” Id. According to the court, “cause existed to strike Ms. Okel and Mr. Brown from the jury,” and the circuit court “abused its discretion by not striking the jurors.” Id.

The instant case is analogous to Rine. Here, prospective jurors Evans, Bruce and Porter should have been struck for cause because they each made certain statements during *voir dire* that “brought their impartiality into doubt.” Rine, 420 S.E.2d at 547. To reiterate the facts, Evans disclosed that he had been a patient of Dr. Makani following a motor vehicle accident. In fact, Dr. Makani performed surgery on Evans. Evans was “very satisfied” with the results of the surgery, and he characterized his treatment by Dr. Makani as a “good experience.” (Trial R. pp. 65-66). Evans even confirmed that his positive feelings toward Dr. Makani could cloud his objectivity in light of Evans’s unfamiliarity with medicine. Indeed, Evans stated that he could possibly “lean towards” Dr. Makani in finding the facts. (Trial R. pp. 66-67). More specifically, Evans testified as follows:

Plaintiff’s Counsel: . . . I know this was a long time ago. I’m assuming you were satisfied with the way Dr. Makani treated you?

Mr. Evans: Very satisfied.

Plaintiff’s Counsel: And, satisfied with how the result came out?

Mr. Evans: Yeah.

Plaintiff's Counsel: So, based on your feelings towards Dr. Makani, would those feelings affect your decision in this case at all, if you had to decide whether or not he was negligent in treating another patient?

Mr. Evans: They're liable to cause he, I mean, he went through and explained everything to us as he was doing it.

Plaintiff's Counsel: So, you believe your experience with him might cloud your feelings as to whether or not a verdict could be returned by you against Dr. Makani?

Mr. Evans: It's liable to, especially since I don't know nothing about the medical practice.

Plaintiff's Counsel: When you said it's liable to, are you saying that because you had such a good experience in the way your were treated, it may make you lean towards Dr. Makani some?

Mr. Evans: Possibly, especially since I don't know nothing about medicine or nothing. I mean, I don't have a clue what surgery he wanted to do on her [Ms. Thomas]. I don't know nothing about it. So, from my experience, I think he does good work.

Plaintiff's Counsel: So, that even though you'd want to try to be fair in this case, your experiences might . . .

Mr. Evans: They might, yeah.

Plaintiff's Counsel: . . . not intentionally, but might . . .

Mr. Evans: Not intentionally.

Plaintiff's Counsel: . . . might cause you to lean towards him?

Mr. Evans: Uh huh.

(Trial R. p. 65-67).

Based on Evans's testimony, trial counsel for Ms. Thomas objected and moved to strike Evans for cause, stating: "I don't know how someone can have a fair trial with a juror on there that expressed that his experiences were so good with the doctor that it may cause him to lean that way." (Trial R. p. 70). The court countered by stating, "I think that if we strike him [Mr. Evans] we would almost have to just strike anybody that Dr. Makani has ever treated." (Trial R. p. 71). Ms. Thomas' counsel further argued:

I don't mind if someone has been treated by him [Dr. Makani]. I don't mind someone who likes him. And, I don't mind someone who trusts him. I'm not going to take the position in this case that he's a bad doctor. I'm taking the position that he made a mistake on this particular day. But, when you have a jury that, in any degree at all, other than I liked him, he did a nice job on me. When you ask the question would that cause you to lean towards, in favor of the doctor, or might affect that, and they say yes, that's "for cause."

(Trial R. pp. 71-72). As the facts already indicate, the circuit court denied counsel's motion to strike Evans and permitted Evans to serve on the jury. (Trial R. p. 72).

Regardless of any additional comments or statements that Appellee may raise as examples of why, in his view, Evans can sit as an impartial juror, it is clear from the record that Evans's statements call his impartiality into doubt at the very least. Under such a scenario, the Davis Court has clearly 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." *Accord Davis v. Wang*, 400 S.E.2d at 233. Thus, consistent with this Court's previous ruling, the Court should determine that the circuit court abused its discretion in failing to strike Evans for cause and prevented Ms. Thomas from receiving a fair trial.

The *voir dire* testimony of Gretchen Bruce and Linda Porter likewise exhibited bias favorable to Dr. Makani, or at a minimum demonstrated that they were not free from the suspicion

of bias. *Accord Rine*, 420 S.E.2d at 547, n. 13. For instance, Bruce – who had undergone a surgical operation by Dr. Makani only one month prior to trial and who had her gallbladder removed by Dr. Makani only two years prior to trial – confirmed that she had “good feelings” about Dr. Makani. (Trial R. p. 73-75). In fact, Bruce explained that she would not hesitate to seek treatment from Dr. Makani in the future if she had other medical problems. *Id.* Similarly, Porter revealed her good feelings toward Dr. Makani in discussing how appreciative she was of Dr. Makani for discovering the lump in her breast. Significantly, Ms. Porter characterized her treatment from Dr. Makani as a “good experience.” (Trial R. p. 79). These two jurors’ positive view of their doctor brought their impartiality in doubt, and out of an abundance of caution, the circuit court should have removed them from the jury pool.

In sum, the circuit court should have struck Evans, Bruce, and Porter for cause in light of their “good feelings” toward Dr. Makani and inherent bias created by these feelings. Certainly, Evans, Bruce, and Porter would have been struck for cause if they had expressed that they had suffered a bad medical experience from Dr. Makani or expressed “bad feelings” toward him. It should work both ways. Further and most significantly, David Evans was unqualified to serve given his admission that he would “lean towards” Dr. Makani – an admission that certainly reflected the presence of a disqualifying bias that a later retraction could not cure. *Accord O’Dell*, at Syllabus Point 1. Thus, even if this Court is not sufficiently persuaded that Jurors Bruce and Porter should have been struck by the circuit court, it should be convinced that the court abused its discretion by failing to strike Evans, whose bias and partiality is evident from the record and effectively denied the Appellant, Jennifer Thomas, her constitutionally and statutorily protected right to a fair and impartial jury.

PRAYER FOR RELIEF

In recent years, the medical profession and the insurance industry have engaged in a concerted effort to change the laws governing the manner in which our courts handle medical malpractice litigation in West Virginia. This effort has created the unfortunate impression in the minds of many West Virginians that all medical malpractice cases are inherently frivolous. It has, therefore, become increasingly difficult for West Virginia medical malpractice plaintiffs to pick an impartial jury and receive a fair trial. Thus, at this critical time, this Court and all inferior courts in West Virginia have a heightened obligation to fiercely protect this basic constitutional tenet of fundamental fairness and ensure that the right to a fair trial for all plaintiffs engaged in medical malpractice litigation is safeguarded.

This appeal exhibits a situation where a medical malpractice plaintiff lacked any chance of prevailing as a result of the erroneous rulings of the circuit court. Here, the jury verdict was contaminated with bias in favor of Dr. Makani, and the court should have set it aside pursuant to the post-trial motion of Ms. Thomas. Specifically, the circuit court should never have permitted jurors Evans, Bruce or Porter to assess the negligence of Dr. Makani given the partiality demonstrated by their voir dire testimony. When three out of six potential jurors in a medical malpractice trial express "good feelings" toward a defendant and otherwise exhibit bias in his favor in light of their positive past or present relationship with the defendant, significant doubt is created as to the jurors' objectivity.

Pursuant to the foregoing, Jennifer Thomas respectfully requests that this Honorable Court set aside the tainted jury verdict returned on August 4, 2004, and grant her a new trial.

Respectfully Submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2005, I served the foregoing **Brief of Appellant** upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelop addressed as follows:

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