

COPY

Appeal No.: 32753

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

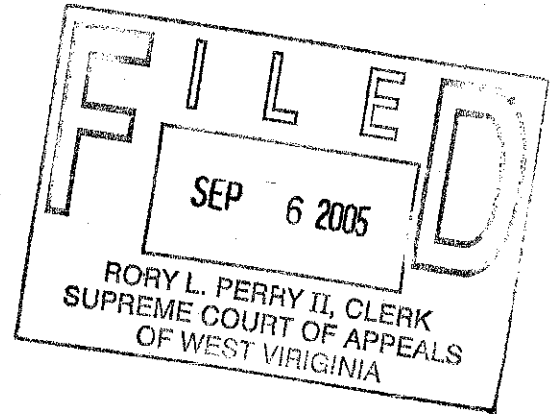
JENNIFER THOMAS,

Appellant and Plaintiff Below,

v.

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

Appellees and Defendants Below.



BRIEF OF APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF GRANT COUNTY, WEST VIRGINIA
CIVIL ACTION NO.: 02-C-12
THE HONORABLE PHILLIP B. JORDAN, Jr., JUDGE

Dino S. Colombo (WV Bar No. 5066)
Timothy R. Linkous (WV Bar No. 8572)
COLOMBO & STUHR, P.L.L.C.
1054 Maple Drive
Morgantown, WV 26505
(304) 599-4229

TABLE OF CONTENTS

Cover page 1

Table of Contents 2

Table of Authorities 3-4

Kind of Proceeding and Nature of Ruling in the Lower Court 5

Statement of Facts 5

Standard of Review 7

Discussion 8

I. After Detailed Individual *voir dire*, The Appellant Did Not Move To Strike Jurors Bruce And Porter, And, Therefore, The Lower Court Exercised Sound Discretion By Permitting Them To Remain As Jurors. Further, All Jurors Indicated That They Could Sit As Impartial Jurors, The Court Exercised Sound Discretion, And The Lower Court’s Decision Should Be Affirmed 8

II. Conclusion And Prayer For Relief 21

TABLE OF AUTHORITIES

CASES:

- Dupuy v. Allera, 193 W.Va. 557, 457 S.E.2d 494 (1995)
- Hewitt v. DHHR, 212 W.Va. 698, 575 S.E.2d 308 (2002)
- Livengood v. Kerr, 182 W.Va. 681, 391 S.E.2d 371 (1990)
- O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002)
- O'Neal v. Peake Operating Co., 185 W.Va. 28, 404 S.E.2d 420 (1991)
- Pleasants v. Alliance Corp., 209 W.Va. 39, 543 S.E.2d 320 (2000)
- State v. Derr, 451 S.E.2d 731, 192 W.Va. 165 (1994)
- State v. Gargiliana, 138 W.Va. 376, 76 S.E.2d 265 (1953)
- State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
- State v. Hutchinson, 215 W.Va. 313, 599 S.E.2d 736 (2004)
- State v. King, 183 W.Va. 440, 396 S.E.2d 402 (1990)
- State v. Miller, 476 S.E.2d 535, 197 W.Va. 588 (1996)
- State v. Richards, 182 W.Va. 664, 391 S.E.2d 354 (1990)
- State v. Wade, 490 S.E.2d 724, 200 W.Va. 637, cert. denied 118 S.Ct. 576, 522 U.S. 1003, 139 L.Ed.2d 415
- State v. Williams, 524 S.E.2d 655, 206 W.Va. 300 (1999)
- State v. Wilson, 157 W.Va. 1036, 207 S.E.2d 174 (1974)
- State Road Comm'n v. Ferguson, 148 W.Va. 742, 137 S.E.2d 206 (1964)
- Wade v. Chengappa, 207 W.Va. 319, 532 S.E.2d 37 (1999)
- Ward v. Ward's Heirs, 50 W.Va. 517, 40 S.E. 472, 473 (1901)
- Wheeler v. Murphy, 452 S.E.2d 416, 192 W.Va. 325 (1994)
- W.Va. Dept. of Highways v. Fisher, 170 W.Va. 7, 289 S.E.2d 213 (1982)

STATUTES:

W. Va. Code §56-6-12 (1931).

KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER COURT

The Appellant filed the underlying medical professional negligence civil action against the Appellees, a trial by jury was conducted, and the jury unanimously found that the Appellees met the applicable standard of care in every respect. Following that unanimous jury verdict in favor of the Appellees, the Circuit Court of Grant County, West Virginia denied the Appellant's Motion for New Trial. Specifically, the lower Court correctly concluded that it had exercised appropriate discretion when it issued rulings pertaining to *voir dire*.

This Honorable Court granted Appellant's Petition for Appeal on the sole issue of the lower Court's discretion during the *voir dire* process. During that process, each and every juror stated, unequivocally, that he or she could and would sit in judgment of Anil K. Makani, M.D. in a fair and unbiased manner. In fact, their sworn testimony during *voir dire* was more indicative of fairness and impartiality than that of testimony from jurors in other civil actions that this Court previously determined was sufficient to protect the integrity of the judicial process. Therefore, the lower Court correctly applied the standards announced by this Court, and it did not abuse its discretion. As more fully set forth below, this Court should affirm the lower Court's decisions because it correctly applied the applicable law and exercised its sound discretion.

STATEMENT OF FACTS

On May 11, 2000, Appellee Anil K. Makani, M.D. performed a laparoscopic cholecystectomy on Appellant Jennifer Thomas. Prior to surgery Dr. Makani advised Ms. Thomas that one of the potential recognized complications of this procedure was an

injury to her bile duct. In fact, Ms. Thomas signed a consent form verifying that she knew of this potential risk prior to undergoing surgery.

Unfortunately, during this laparoscopic cholecystectomy there was an injury to Ms. Thomas' common hepatic duct. Dr. Makani promptly recognized the complication during surgery and immediately transferred Ms. Thomas to the University of Virginia Medical Center for repair of the duct. The repair was successful and the Appellant made a complete recovery with no long-term consequences.

During *voir dire*, each prospective juror was questioned, in detail, about their potential biases and prejudices. At the conclusion of the *voir dire* process, the Court correctly concluded, based upon the totality of the jurors' responses and the standards announced by this Court, that the jury was qualified to sit in judgment of the case. Each juror indicated that he or she would be able to judge the case fairly and solely upon the evidence.

Appellant complains only about the responses of three jurors during *voir dire*: David Evans, Gretchen Bruce, and Linda Porter. However, the Appellant's counsel explicitly stated that he was not moving to strike Jurors Gretchen Bruce and Linda Porter for cause and he did not object to their participation as jurors. Therefore, the Plaintiff has waived any right to object to jurors Gretchen Bruce and Linda Porter participating as potential jurors. Moreover, the sworn testimony of Jurors Bruce and Porter indicate that they would be fair and impartial. With respect to Juror Evans, he unequivocally stated that he would judge the case fairly, impartially and based upon the evidence and the instructions of the lower Court. In short, the sworn testimony of the prospective jurors

during the *voir dire* process establishes that they would sit in judgment of the case fairly and impartially, and the lower Court correctly exercised its discretion.

Dr. Makani presented vast amounts of evidence that his care and treatment of the Appellant met the standard of care in all respects, and the jury concluded, based upon that evidence, that he was not negligent. Dr. Makani performed the laparoscopic cholecystectomy appropriately, and, unfortunately, a well-known and recognized complication occurred, namely an injury to a bile duct. This complication is known to occur under the best of circumstances, and it has been widely recognized as an inescapable problem that virtually every surgeon performing this difficult and technical surgery will encounter. Also, Ms. Thomas was thoroughly advised of this potential risk prior to surgery and signed the informed consent document acknowledging that she was aware of this risk.

The jury fully appreciated the difficulty of the procedure; the Appellant had great difficulty in identifying specific acts of Dr. Makani that fell below the standard of care; Dr. Makani presented expert testimony from a Johns Hopkins surgeon that the standard of care was met; Dr. Makani introduced medical literature to support his care; and the jury came to the correct conclusion that he met the standard of care in all respects. In short, the verdict in favor of Dr. Makani was supported by the clear weight of the evidence and substantial justice was accomplished.

STANDARD OF REVIEW

The lower Court's rulings during *voir dire* are reviewed with an abuse of discretion analysis. "[T]he determination of whether a juror may be biased or prejudiced is left to the discretion of the trial judge." W.Va. Dept. of Highways v. Fisher, 170

W.Va. 7, 11-12, 289 S.E.2d 213, 218 (1982), citing State v. Gargiliana, 138 W.Va. 376, 379, 76 S.E.2d 265, 267 (1953); see also Dupuy v. Allera, 193 W.Va. 557, 564, 457 S.E.2d 494, 501 (1995), *overruled on other grounds* by Pleasants v. Alliance Corp., 209 W.Va. 39, 543 S.E.2d 320 (2000); State v. King, 183 W.Va. 440, 451, 396 S.E.2d 402, 413 (1990). “The 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, W.Va. Dept. of Highways v. Fisher, 170 W.Va. 7, 289 S.E.2d 213 (1982), citing Syl. Pt. 1, State v. Wilson, 157 W.Va. 1036, 207 S.E.2d 174 (1974). “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. King, 183 W.Va. at 451, 396 S.E.2d at 413.

Accordingly, this Court should affirm the lower Court’s decision inasmuch as each juror indicated the ability to serve without bias or prejudice, each juror indicated that he or she would render a verdict solely on the evidence and under the instructions of the lower Court, and the lower Court correctly exercised its sound discretion.

DISCUSSION

- I. **After Detailed Individual *voir dire*, The Appellant Did Not Move To Strike Jurors Bruce And Porter, And, Therefore, The Lower Court Exercised Sound Discretion By Permitting Them To Remain As Jurors. Further, All Jurors Indicated That They Could Sit As Impartial Jurors, The Court Exercised Sound Discretion, And The Lower Court’s Decision Should Be Affirmed.**

The Appellant raises questions about the responses of only three jurors during *voir dire*: David Evans, Gretchen Bruce, and Linda Porter. However, Appellant waived her right to appeal issues pertaining to Jurors Gretchen Bruce and Linda Porter because she specifically stated that she was not moving to strike them for cause. (Trial R. pgs 75-

80); Hewitt v. DHHR, 212 W.Va. 698, 575 S.E.2d 308 (2002). After learning that Jurors Bruce and Porter had prior contact with Dr. Makani, the Appellant requested individual *voir dire* outside the presence of the jury. (Trial R. pgs. 72-73, 76). Appellant's counsel questioned Juror Bruce at length regarding her ability to sit as a fair and impartial juror, and, at the conclusion of his questioning, he elected not to move the Court to strike her for cause:

Mr. Curry: Would it cause you some concern, sitting on a jury in this case, if you had to sit in a jury box, find that [Dr. Makani] was at fault, and award money damages against him, and then have to go back to him and have him treat you?

Ms. Bruce: No, it wouldn't worry me, not one bit.

Mr. Curry: It wouldn't cause you any reluctance or ...

Ms. Bruce: No reluctance, not at all. No, sir.

Mr. Curry: So you can assure us, as we're sitting here on this panel, that if you believe that he violated the standard of care, you wouldn't have any hesitancy in returning a verdict against him?

Ms. Bruce: No sir, I would not.

Mr. Curry: Thank you.

Mr. Colombo: I have nothing.

The Court: Okay. Thank you.

(Ms. Bruce returned to the courtroom.)

Mr. Curry: No motion on that.

(Trial R. pgs. 75-76, emphasis supplied). The same holds true for Juror Porter; namely, Appellant's counsel questioned her at length only to conclude that he would not move to strike her for cause, and he explicitly stated such on the record. (Trial R. pgs. 76-80). Not only did the Appellant fail to move the lower Court to strike Jurors Bruce and Porter

for cause, she also did not utilize a preemptory strike against either one of them. (Trial R. pg. 121).

“Where a party by his acts or express agreement releases appealable error, he waives all right of appeal.” *Hewitt v. DHHR*, 212 W.Va. 698, 575 S.E.2d 308 (2002), *quoting Ward v. Ward’s Heirs*, 50 W.Va. 517, 40 S.E. 472, 473 (1901); *see also* Syl. Pt. 10, *State v. Hager*, 204 W.Va. 28, 511 S.E.2d 139 (1998) (“Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, *such objections will not be considered on appeal*” (emphasis supplied)), *citing* Syl. Pt. 1, *State Road Comm’n v. Ferguson*, 148 W.Va. 742, 137 S.E.2d 206 (1964), Syl. Pt. 3, *O’Neal v. Peake Operating Co.*, 185 W.Va. 28, 404 S.E.2d 420 (1991). Appellant requested individual *voir dire* of Jurors Porter and Bruce following which Appellant explicitly set forth her “express agreement” on the record that she did not have a motion to strike those jurors for cause based upon their sworn responses to inquiries. (Trial R. pgs. 75-80). Appellant’s counsel, like the lower Court, was obviously convinced by the totality of those jurors’ responses to individual *voir dire* that they were fair and unbiased. Therefore, the Appellant waived her right to an appeal any issue relating to those jurors sitting on the jury panel, and the decision of the lower Court should be affirmed. *Id.*

Moreover, the Appellant bore the burden of persuading the lower Court that prospective jurors were partial and bias before they could be excused for cause:

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 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.

Syl. Pt. 6, State v. Miller, 476 S.E.2d 535, 197 W.Va. 588 (1996); Syl. Pt. 15, State v. Wade, 490 S.E.2d 724, 200 W.Va. 637 (1997), cert. denied 118 S.Ct. 576, 522 U.S. 1003, 139 L.Ed.2d 415; see also State v. Williams, 524 S.E.2d 655, 658, 206 W.Va. 300, 303 (1999). In this case, the Appellant did not make an attempt to persuade the trial Court that Jurors Bruce and Porter were partial or subject to being excused for cause, and her counsel stated on the record that she was not moving for their removal. Hence, the Appellant did not meet her burden of persuasion or even make an attempt to do such, and the lower Court's decision should be affirmed.

The primary thrust behind the Appellant's concern over these three jurors was their past relationship with Dr. Makani, and that alone is insufficient to warrant striking them for cause under these circumstances. Syl. Pts. 1 and 2, W.Va. Dept. of Highways v. Fisher, 170 W.Va. 7, 289 S.E.2d 213 (1982); Syl. Pt. 3, Dupuy v. Allera, 193 W.Va. 557, 457 S.E.2d 494 (1995); Syl. Pt. 3, Livengood v. Kerr, 182 W.Va. 681, 391 S.E.2d 371 (1990). This Court has acknowledged that in small communities, such as Petersburg, West Virginia, it may be impossible to seat a medical malpractice jury that is comprised of persons who never had contact with the defendant physician:

It is a fact of life that in many rural jurisdictions in this State, a limited number of physicians may practice within any given community. These doctors, as a rule, treat patients throughout the community. When one of these doctors is a party or a witness in a medical malpractice action, it is unlikely the court can seat a panel of jurors with absolutely no contacts with the doctor.

Dupuy v. Allera, 193 W.Va. 557, 562, 457 S.E.2d 494, 499 (1995) (emphasis supplied).

This Court should affirm the lower Court's decision inasmuch as Dr. Makani's past

contact with jurors alone is insufficient to justify reversing the sound discretion of the lower Court.

The relevant inquiry to determine a juror's qualifications is not necessarily looking to determine whether the juror had contact in the past with the defendant physician; rather, lower courts must look to determine whether the juror is biased and whether the juror can render a fair verdict based upon the evidence and instructions of the court. Syl. Pt. 1, W.Va. Dept. of Highways v. Fisher, 170 W.Va. 7, 289 S.E.2d 213 (1982); see also Wheeler v. Murphy, 452 S.E.2d 416, 192 W.Va. 325 (1994); State v. Derr, 451 S.E.2d 731, 192 W.Va. 165 (1994). The lower Court instructed the *venire* that one of the primary purposes of *voir dire* was to examine the relationships between the jurors and the parties to determine whether it would be difficult for them to sit impartially. (Trial R. p. 6). After introducing the parties and explaining the nature of the case, the lower Court asked the entire *venire* if there were any reasons they could not be impartial, and no one indicated that this was a problem. (Trial R. p. 9). **Further, none of the *venire* members considered themselves current patients of Dr. Makani.** (Trial R. p. 11). Upon questioning from Appellant's counsel, **every member of the *venire* indicated they would not be hesitant to find against Dr. Makani if the evidence supported such a verdict.** (Trial R. pgs. 11-12). Therefore, there was every indication that the *venire* members, including Jurors Bruce, Porter and Evans, were impartial and qualified to sit in judgment of this case.

Moreover, during individual *voir dire*, Jurors Bruce, Porter and Evans all indicated that they could judge this case impartially. Specifically, Juror Bruce unequivocally stated, on at least three occasions, that she would not be reluctant in the

slightest to return a verdict against Dr. Makani. (Trial R. pgs. 75-76). Appellant's counsel spent considerable time questioning Juror Porter, and he was unable to elicit any testimony that indicated she was biased in favor of Dr. Makani. (Trial R. pgs. 76-78). In fact, Appellant's counsel discovered that although Dr. Makani had diagnosed a lump in Juror Porter's breast in 1999, she elected to have another surgeon from out of town perform her surgery. (Trial R. pgs. 77-79). If anything, this raised an inference that Juror Porter preferred other surgeons over Dr. Makani. Finally, with respect to Juror Evans, he responded to the individual *voir dire* precisely the way a fair and impartial juror should:

Mr. Colombo: ... Are you telling us that you cannot be fair to both sides and listen to the evidence, or are you...

Mr. Evans: I'm not saying that I can't be, no.

Mr. Colombo: Okay. That's what we're looking for. I mean, I recognize fourteen years ago you were in an automobile accident and Dr. Makani took care of you. But, you haven't had any first hand dealings with him since 1990?

Mr. Evans: No, not since then.

Mr. Colombo: And, so, the issue that the Judge is and the lawyers deal with here is, would you be someone who could be fair to Ms. Thomas and listen to the evidence and decide the case based on the evidence, setting aside your experience with Makani fourteen years ago?

Mr. Evans: *I would try to, to the best of my ability.*

Mr. Colombo: Alright. Could you be fair to Dr. Makani? The flip side of that; set aside your personal experience with him; listen to the evidence; decide the case the best you can?

Mr. Evans: I think so.

Mr. Colombo: Alright.

Mr. Evans: I'd try to.

Mr. Colombo: That's all we ask.

The Court: Mr. Evans, if Dr. Makani testifies to one medical opinion and let's say we have a doctor on the other side that testifies to something different, based upon your dealings with Dr. Makani when he, in 1990, would you be more likely to believe what he said than what the other doctor said?

Mr. Evans: I don't know. I shouldn't. I don't think I would, but *it would depend on how everything was explained and the processes and things going through. I mean, like if one would sit down and explain it so that I understand it better, then I might, I'd lean that way more probably. But as far as picking him over another doctor, I mean, I wouldn't.*

(Trial R. pgs. 67-69, emphasis supplied). **Juror Evans, in his very own words, stated that he would be swayed by the evidence itself and the manner in which it is presented rather than basing his opinions upon past dealings with Dr. Makani.** This is precisely what this Court has stated constitutes a fair and impartial juror. Syl. Pt. 1, W.Va. Dept. of Highways v. Fisher, supra; see also Wheeler v. Murphy, supra; State v. Derr, supra.

The lower Court concluded that based upon the totality of the responses received from Jurors Bruce, Porter and Evans, they were qualified to sit and judge this case fairly and impartially. (See Order Denying Appellant's Motion for New Trial). By carefully considering the responses of the prospective jurors, their demeanor, and the totality of the circumstances, the lower Court complied fully with W.Va. Code §56-6-12 (1931). As such, the lower Court's decision should be affirmed.

The facts and analysis of Dupuy v. Allara are extremely similar to the one *sub judice*, and it demonstrates that the lower Court correctly and appropriately qualified the jury panel. 193 W.Va. 557, 457 S.E.2d 494 (1995). Mr. Dupuy filed a medical malpractice lawsuit against his family physician, Dr. Allara, in Jefferson County, West

Virginia, and a jury returned a defense verdict. Mr. Dupuy appealed and contended that the trial court should have stricken three (3) jurors for cause because they had significant contacts with Dr. Allara and his witnesses. In rejecting the plaintiff's arguments and concluding that the trial court took "special care" during *voir dire*, this Court set forth the following analysis:

Courts have consistently recognized these circumstances by holding that, when empaneling a jury, the primary question is whether a prospective juror is free from bias or prejudice. Relevant, but of lesser importance, are the questions of whether the prospective juror knows the doctor or whether the juror or a member of his family has been a patient of the doctor. If the court, through proper voir dire, can make a determination the prospective juror is free from bias or prejudice, then the juror is not disqualified, and a strike for cause is not in order.

Id., 193 W.Va. at 562, 457 S.E.2d at 499 (emphasis supplied). The lower Court took similar "special care" when conducting *voir dire* in this case, it correctly concluded that the jurors were free from bias and prejudice, and its decision should be affirmed.

What is most striking about the Dupuy case is the colloquy that transpired between the prospective jurors and the lower court which is virtually identical to the discussions that took place in this case. For instance, the following transpired in the Dupuy case during *voir dire*:

First, the appellants contend that Angela Barry should have been disqualified for cause because she was once a patient of the appellee, Dr. Allara, and "... the likelihood of bias or prejudice is inherent due to the nature of the juror's ongoing relationship with [Dr. Allara]...." During in-chambers *voir dire* of Angela Barry, the judge asked her about Dr. Allara: "Is he--do you consider him to be your family doctor?" She responded, "No." **When asked whether she believed she had a bias in Dr. Allara's favor because of her prior experience with him, Ms. Barry said, "I don't know. It depends on what the situation is."** The judge then explained the need to pick jurors who "will make a decision based upon the evidence and the law, and not on any extraneous factors ... **would your previous contact with him affect your ability to render a fair and impartial verdict based on the evidence?"** Ms. Barry answered, "No,

not really. ...

Counsel subsequently asked Ms. Barry to clarify what she meant when, in response to questions about whether anything associated with her treatment by Dr. Allara might bias her in this case, she said, "**It depends....**" Ms. Barry replied, "**I said depends--I said depends when you said bias because I didn't know exactly what he was talking about.**" Ms. Barry was then asked if she was biased against Dr. Allara, and she said, "**No, I don't have anything against him.**"

The trial judge refused to strike Ms. Barry, finding that "[s]he said basically that she can render a fair verdict based upon the law and the evidence ... You know, her willingness to go back to him [Dr. Allara] is based upon her apparently not having any prejudice against him. Not so much on her endorsement."

Id., 193 W.Va. at 562-63, 457 S.E.2d at 499-500 (emphasis supplied).

In Dupuy, this Court concluded that the trial judge made the correct decision when he permitted Ms. Barry to sit in judgment of that case because **the in-chambers voir dire "did not elicit sufficient doubt about [her] ability to be impartial as to warrant striking [her] for cause."** Id., 193 W.Va. at 564, 457 S.E.2d at 501 (emphasis supplied). In this case, the jurors of whom the Appellant complains had similar responses to individual *voir dire* questions, and they were all able to conclude that they could sit fairly and in an unbiased fashion in this case. Moreover, the exchange between Juror Evans and counsel during individual *voir dire* in the instant case is almost identical to the discussion with Ms. Barry in the Dupuy case. Id., (Trial R. pgs. 67-69). Hence, an identical result is warranted, and this Court should affirm the decision of the lower Court.

Another juror in the Dupuy case had similar responses to that of Jurors Bruce and Porter in this case. Specifically, in Dupuy, Lewis Lloyd was a juror whose wife had an on-going physician-patient relationship with one of Dr. Allara's expert witnesses, namely

Dr. Miller, for treatment of her bronchitis. The following transpired during the *voir dire* with respect to Mr. Lloyd:

It is true Mr. Lloyd said he was satisfied with the care Dr. Miller had given his wife, but when he was then asked "if Dr. Miller expresses an opinion in this case, would that in itself--the relationship you and your wife have with him, give you more of a feeling that you know to give more credence to what he says?", Mr. Lloyd stated unequivocally, "Absolutely not."

After an in-chambers individual *voir dire* of Mr. Lloyd, counsel argued he should be struck because "... it is quite obvious now that the whole panel here is going to be Dr. Allara's patients or Dr. Miller's patients. And I think there is a point when it gets to the cumulative effect that we've got a biased jury."

The trial court rejected the appellants' cumulative effect argument, correctly pointing out that "we have to look at these things from the standpoint of each individual juror and how they respond to *voir dire*." The trial court refused to strike Mr. Lloyd for cause, concluding that "if this gentleman is true to his word, he sounds like he is going to be a dynamite juror for both sides." However, the appellants exercised a preemptory strike and removed Mr. Lloyd from the jury.

Id., 193 W.Va. at 563, 457 S.E.2d at 500. Again, this Court found that the *voir dire* did not elicit sufficient doubt as to Mr. Lloyd's ability to be impartial so as to warrant striking him as a juror. Id., 193 W.Va. at 564, 457 S.E.2d at 501. Therefore, Mr. Dupuy's argument was rejected.

Similarly, Gretchen Bruce was unequivocal with her response that she could sit as an unbiased and fair juror in this case regardless of her past contacts with Dr. Makani. (Trial R. pgs. 75-76). Simply because the Appellant contends that Ms. Bruce and Ms. Porter had past contacts with Dr. Makani does not foreclose them as potential jurors. Syl. Pt. 2, W.Va. Dept. of Highways v. Fisher, 170 W.Va. 7, 289 S.E.2d 213 (1982); Syl. Pt. 3, Dupuy v. Allera, 193 W.Va. 557, 457 S.E.2d 494 (1995); Syl. Pt. 3, Livengood v. Kerr, 182 W.Va. 681, 391 S.E.2d 371 (1990). Therefore, the lower Court correctly and

appropriately exercised its discretion when empanelling the jurors, and its decision should be affirmed.

Finally, Mr. Dupuy also contended that the trial court erred when it did not strike juror Paul Tan. Mr. Tan experienced a nosebleed during trial, and Dr. Allara's expert witness, Dr. Miller, attended to the juror. The trial court asked Mr. Tan whether **his medical treatment during the trial by Dr. Allara's expert witness** would affect his judgment, and he indicated it would not. This Court concluded that there was insufficient doubt that Mr. Tan would be biased from these events to justify striking him for cause. Id., 193 W.Va. at 564, 457 S.E.2d at 501. In other words, lower courts are instructed to focus more upon the responses to questions during *voir dire* than upon the appearance of a bias based upon contact with the defendant physician. Inasmuch as the jurors in this case all indicated that they could serve as impartial and unbiased jurors, the lower Court correctly and appropriately exercised its discretion when empanelling the jury, and this Court should affirm the lower Court's decision. (Trial R. pgs. 9, 11-12).

In State v. Richards, a prospective juror gave responses during *voir dire* that were, again, very similar to the responses of Juror Evans in the instant case. 182 W.Va. 664, 391 S.E.2d 354 (1990). Mr. Richards was convicted of second-degree murder and appealed because the lower court refused to strike a juror despite her husband's friendship with the murder victim. Id. The discussion with the prospective juror was as follows:

Q. Okay, do you think by your husband being that close to him that it could possibly have some effect on your ability to impartially judge the case?

A. I think so....

Q. As a result of that, are you fixed in your opinion about this case? Have you made up your mind to the guilt or innocence of Mr.

Richards?

A. No.

Q. Still open in your mind?

A. A little bit, yea, I would say.

Judge: Well, I want to put in a question here. From your husband's friendship with him and what he has told you about the case, do you think this would very seriously affect your attitude during the trial? Do you think that these would be factors that would affect your decision?

A: No, I don't think so. I would just listen to it and make up my own mind.

State v. Richards, 182 W.Va. at 666, 391 S.E.2d at 356 (emphasis supplied). These responses to *voir dire* questions are, again, almost identical to the responses given by Juror Evans. Moreover, just like Juror Evans, the State v. Richards juror concluded that she would make up her own mind based upon the evidence. This Court denied Mr. Richard's Appeal, and, similarly, this Court should affirm the lower Court's decision in the matter *sub judice* and deny her appeal.

Yet another example where this Court affirmed a trial court's refusal to strike a juror when he gave *voir dire* responses similar to Juror Evans is found in Wade v. Chengappa, 207 W.Va. 319, 532 S.E.2d 37 (1999), a medical malpractice case. In Wade, the patient appealed a jury verdict based, in part, upon the lower court's refusal to strike a juror for cause. Specifically, the juror's family sought care and treatment from the defendant's wife, who was also a physician. 207 W.Va. at 321, 532 S.E.2d at 39. The juror indicated that if he had to find against the defendant, he would hesitate to take his family back to the defendant's wife for treatment. Id. When asked whether the relationship would influence his decision making abilities, he equivocally stated, "I don't think so, no." Id. In the end, the juror concluded that he could sit as a fair and impartial juror, and the court refused to strike him for cause. Id. This Court affirmed the lower

court's decision in that case, and, similarly, this Court should affirm the lower Court's decision in this case.

In State v. Hutchinson, a defendant was convicted of first-degree murder and appealed, in part, because the lower court refused to strike a prospective juror for cause. 215 W.Va. 313, 599 S.E.2d 736 (2004). The juror indicated that he was uncomfortable in making any decisions with respect to another man's life. 215 W.Va. at 318, 599 S.E.2d at 741. In other words, this juror did not want to judge another man's life in a *murder* trial. Nevertheless, the lower court permitted him to remain on the jury panel, and this Court upheld that decision. 215 W.Va. at 319, 599 S.E.2d at 743. Similarly, this Court should affirm the decision of the lower Court.

All of the above-cited cases have common themes: there should be an unequivocal expression or indication of bias or prejudice to strike a juror for cause, and the trial court is invested with sound discretion to examine the totality of the circumstances and determine whether a juror will be fair and impartial. Syl. Pts. 3, 4, and 5, O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002). In fact, this Court stated, "The test of a juror's disqualification is the probability of bias or prejudice **as determined by the court.**" O'Dell, 211 W.Va. at 289, 565 S.E.2d at 411. As is indicated by the lower court's Order denying the Appellant's Motion for New Trial, it was convinced from the jurors' responses, their demeanor, and the totality of the circumstances that Jurors Bruce, Porter and Evans were qualified, free from bias, and impartial. Further, the lower court was convinced that those jurors would judge this case based upon the evidence and instructions from the Court. Therefore, the lower Court

correctly applied the law of this State, carefully conducted *voir dire*, and appropriately utilized its sound discretion.

In summary, the Appellant's only motion to strike during *voir dire* pertained to Juror Evans, and the lower Court correctly permitted him to remain as a juror. Juror Evans indicated that he would be impartial and his responses were virtually identical to the responses of jurors in the Dupuy, State v. Richards, Wade v. Chengappa, and State v. Hutchinson cases, all of whom this Court determined were qualified to sit as jurors. Dupuy, 193 W.Va. at 564, 457 S.E.2d at 501, (Trial R. 67-69). The Appellant specifically indicated that she was not moving to strike Jurors Bruce and Porter for cause after hearing their responses to individual *voir dire*, thereby waiving all right to appeal. Hewitt v. DHHR, 212 W.Va. 698, 575 S.E.2d 308 (2002). Jurors Bruce, Porter and Evans all indicated that they would be impartial thereby satisfying the standards announced by this Court, the lower Court correctly exercised its sound discretion, and the lower Court's decision should be affirmed. Syl. Pt. 1, W.Va. Dept. of Highways v. Fisher, *supra*; see also Wheeler v. Murphy, *supra*; State v. Derr, *supra*.

II. Conclusion And Prayer For Relief.

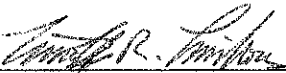
This Court should affirm the lower Court's decision because it exercised sound discretion when empanelling a jury and rendering evidentiary rulings during the trial of this matter.

Finally, this Court should not be persuaded or influenced to decide these issues based upon Appellant's irrelevant, immaterial and extraneous arguments pertaining to an alleged conspiracy among insurance companies in this State and the general appearance of medical malpractice cases across the state. (See page 15 of Brief of Appellant). Such

arguments have no place in this case or this Court's determination of the relevant issues, and they should be entirely disregarded. The Appellees view such arguments as an attempt to improperly inflame the passions of the Court against the Appellees on irrelevant grounds.

Respectfully submitted this 2nd day of September 2005.

**APPELLEES ANIL K. MAKANI, M.D. AND
SOUTH BRANCH SURGICAL ASSOCIATES, INC.,**
By Counsel,



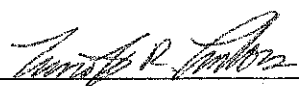
Dino S. Colombo (WV Bar No. 5066)
Timothy R. Linkous (WV Bar No. 8572)
COLOMBO & STUHR, P.L.L.C.
1054 Maple Drive
Morgantown, WV 26505
(304) 599-4229

Certificate of Service

I hereby certify that on the 2nd day of September 2005, I served the foregoing **APPELLEE BRIEF** upon all counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Guy R. Bucci, Esq.
Carrie L. Webster, Esq.
Peter G. Markham, Esq.
Bucci, Bailey & Jabins, L.C.
213 Hale Street
Charleston, West Virginia 25301

A. John Curry, II, Esq.
Curry & Tolliver
PO Box 11866
Charleston, West Virginia 25338-1866



Timothy R. Linkous (W.Va. Bar No. 8572)
COLOMBO & STUHR, PLLC
1054 Maple Drive
Morgantown, WV 26505
(304) 599-4229